

Croatia in the European single aviation market: Liberalisation, common rules and workable competition

Croatian Transport Law Association
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Dr Steven Truxal
Reader in Aviation Law
Associate Dean (International)

EU law → national law



Treaty (TFEU)

Regulations

Directives

direct effect

indirect effect



Law-making and law-enforcement in EU

■ Law-making

- European Commission
- European Parliament
- European Council

} Political

THE LAW

■ Law-enforcement

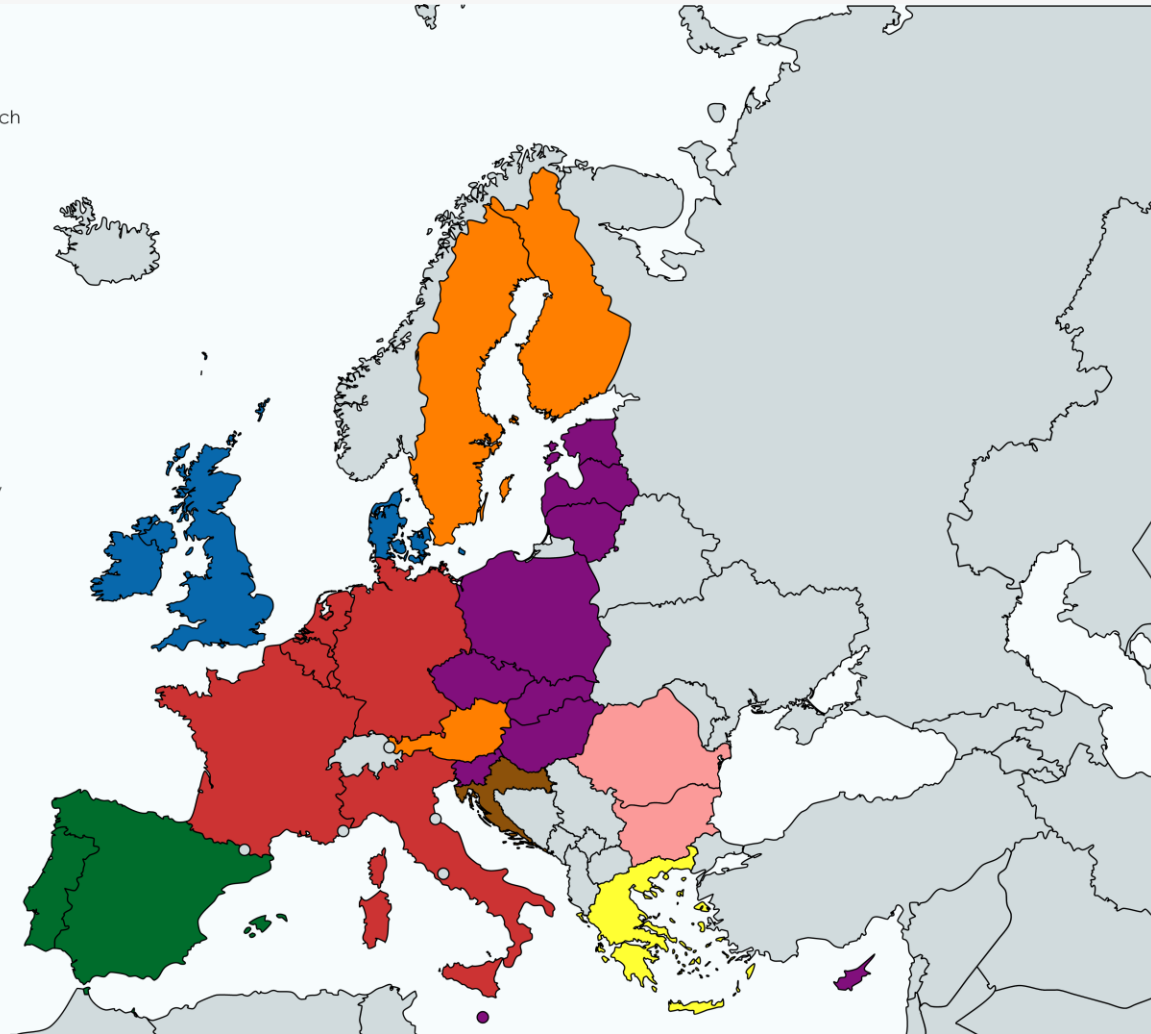
- European Commission (Admin)
- CJEU (Judicially)

} X Political

European Union (EU)

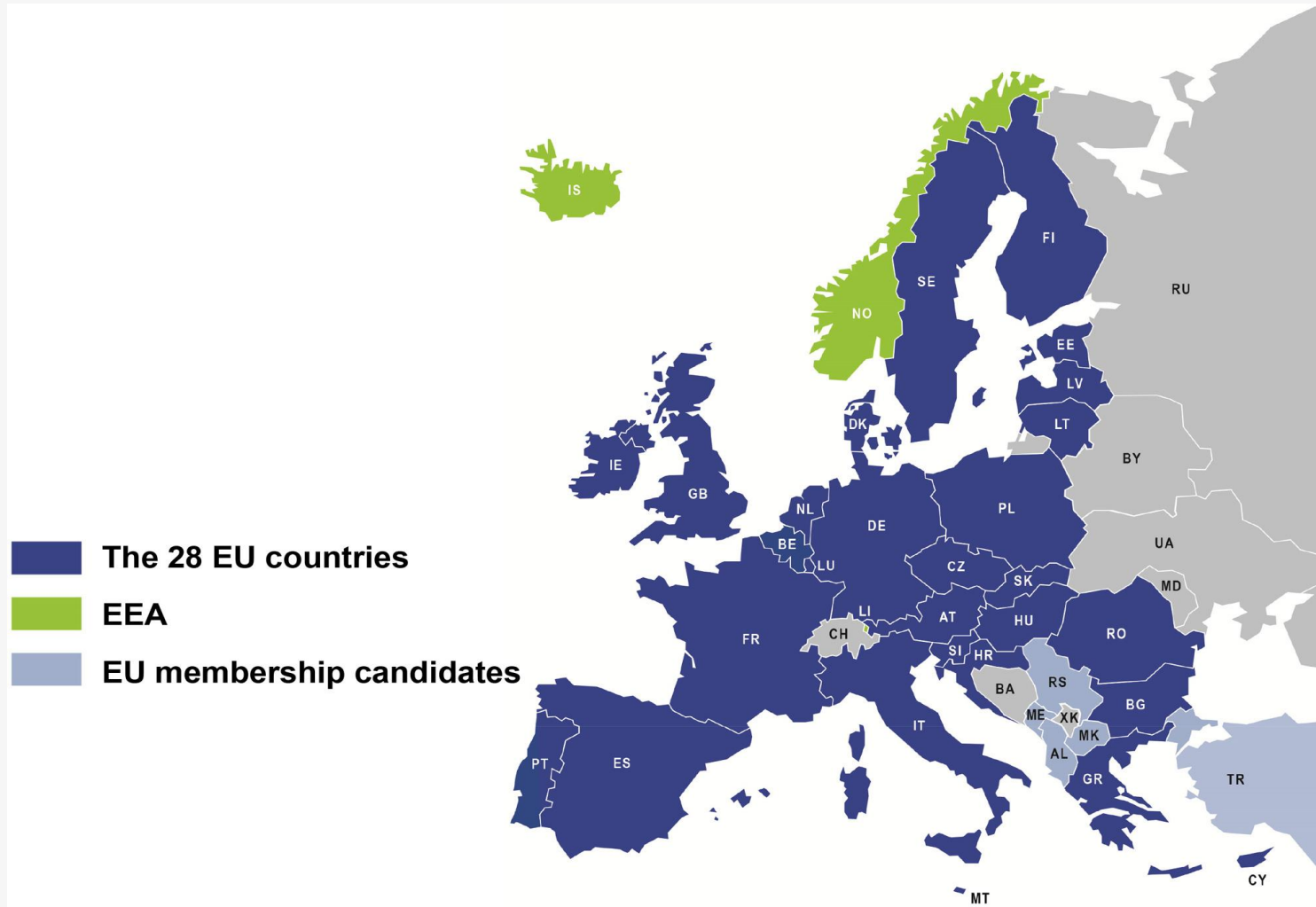
EU Member States By Date of Accession

- Founding Members (25th March 1957)
- First Enlargement (1st January 1973)
- Second Enlargement (1st January 1981)
- Third Enlargement (1st January 1986)
- Fourth Enlargement (1st January 1995)
- Fifth Enlargement (1st May 2004)
- Sixth Enlargement (1st January 2007)
- Seventh Enlargement (1st July 2013)



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European Economic Area (EEA)

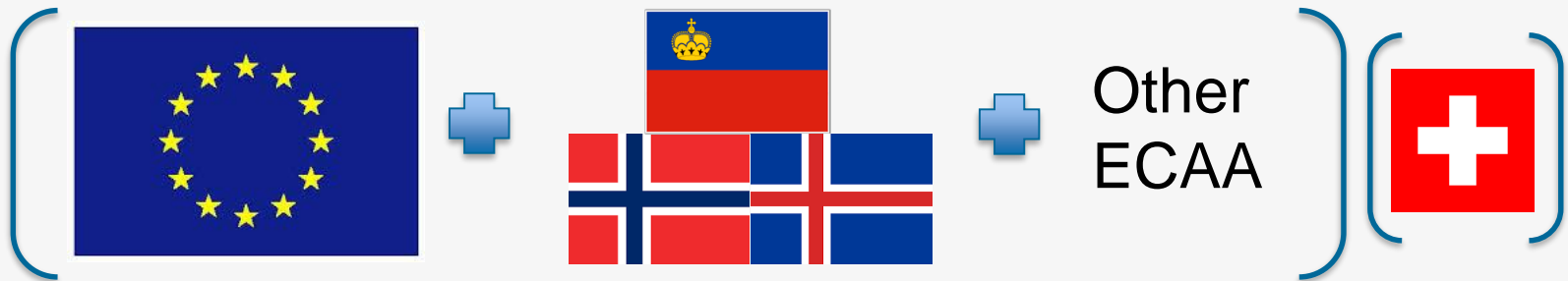


European Civil Aviation Conference (ECAC)



The single market

Creating the single (internal) market → Aviation



Three liberalisation packages, incremental:

1987

1990

1992

Some relevant legislation:

- 1) Economic
- 2) Social
- 3) Environmental
- 4) External relations

***Acquis
communautaire***

1) Creating the single market:

Economic legislation

- **Reg 1008/2008** – common rules for operation of air services in the Community
- **Dir 96/67** – access to groundhandling market at Community airports ('gradual opening and harmonisation of access to the groundhandling market')
- **Reg 95/93** – common rules for allocation of slots at Community airports
- **Reg 785/2004** – insurance requirements for air carriers and aircraft operators
- Protection against subsidisation and unfair pricing practices of foreign carriers causing injury to Community carriers ~~Reg 868/2004~~ → **Reg 2019/712**

2) Creating the single market:

Social legislation

- **Reg 216/2008** – common rules in field of civil aviation (aerodromes, ATM and ATS) and creating European Aviation Safety Agency (EASA) +
- **Reg 300/2008** – common rules in field of security in civil aviation +
- **Reg 90/314, Reg 261/2004** – air passenger rights
- **Reg 1107/2006** – rights of disabled persons and those with reduced mobility
- **Dir 2000/79** – workers' rights (working time)
- **Dir 2009/12** – common principles for levying airport charges at Community airports

3) Creating the single market:

Environmental legislation

- Reg 2003/87, Reg 2008/101 – ETS
- Dir 2002/30 – rules and procedures with regard to noise related operating restrictions at large airports
 - Due to be replaced by Reg
- Note: Better Airports Package (2001): New legislative measures on groundhandling, noise and airport slots
 - Proposed recasts (2013) → held up

4) Creating the single market:

External relations law

- *'Open skies' judgments [2002]* – Commission launches proceedings against MSs, argues EU competition rules apply to both internal and external air transport markets; ECJ confirms EU extensive jurisdiction and air transport as area of exclusive external competence
- **Reg 411/2004** – Existing bilateral ASAs between MSs or EU and third countries should be considered where Arts 101+102 TFEU applied in proceedings on basis of Reg 1/2003
- **Reg 847/2004** – Offending provisions in ASAs (discriminatory/anticompetitive) should be amended or replaced by new agreements compatible with EU law

Market rules: European competition law

- Principally, **Arts 101–103** of the Treaty on the Functioning of the European Union (TFEU) +
- **Reg 1/2003** of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 TEC (now Arts 101-102 TFEU) +
- The EC Merger Regulation (on the control of concentrations between undertakings), **Reg 193/2004** of 20 January 2004 on the control of concentrations between undertakings +

- **For aviation**, **Reg 487/2009** of 25 May 2009 on the application of Art 101(3) TFEU (formerly Art 81(3) TEC) to certain categories of agreements and concerted practices in the air transport sector (Codified version)

Art 101 TFEU

- Art 101(1) TFEU prohibits
 - ‘... all **agreements** between **undertakings**, decisions by associations of undertaking and concerted practices which may affect trade between Member States and which have as their objective or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
 - directly or indirectly fix purchase or selling prices or any other trading conditions;
 - limit or control production, markets, technical development, or investment;
 - share markets or sources of supply;
 - apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- Art 101(2) states that these agreements are **void**.

Art 101(3) TFEU

- Art 101(3) provides that the provisions of Art 101(1) **may be declared 'inapplicable'** if the agreement, decision or concerted practice
 - '... contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - impose on the undertakings concerted restrictions which are not indispensable to the attainment of these objectives;
 - afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

→ 'block exemption' (BE)

Regulation (EC) 487/2009

- The Commission may ... adopt such Regs in respect of agreements, decisions or concerted practices which have as their object any of the following:
 - (a) joint planning and coordination of airline schedules;
 - (b) consultations on tariffs for the carriage of passengers and baggage and of freight on scheduled air services;
 - (c) joint operations on new less busy scheduled air services;
 - (d) slot allocation at airports and airport scheduling;
 - (e) common purchase, development and operation of computer reservation systems relating to timetabling, reservations and ticketing by air transport undertakings
- Art 3: Specified period
- Art 6: Published draft – open for comments

Block exemption on tariff consultations


Long history of block exemptions in airline industry...

- **Reg 2671/88** – First BE permitting tariff consultations, so long as tariffs subject to approval by MS
- Cargo tariff consultations added to BE (**Reg 1617/93**) and removed from scope as from June 1997 (**Reg 1523/96**) – BE for passenger services continued until 2007
- Comm gives preliminary view that IATA consultations (cargo tariffs) restrict competition; IATA agrees to stop setting intra-EEA tariffs using its mechanism from 2002 onwards (IP/01/694)

Enforcement process

- European Commission
 - creates competition policy
 - investigates possible breaches
 - adjudicates – determines whether there has been infringement
 - sets fine
- Judicial review in General Court
- **Art 263 TFEU** – infringement of procedural requirements or ‘of the Treaties or of any rule relating to their application, or misuse of powers’
- **Art 261 TFEU** and **Art 31, Reg 1/2003**: ‘unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment’
- Appeal from GC, on point of law only, to Court of Justice

Investigating 'co-operations'

- Commission: possible infringements
 - Examples of formal proceedings:
 - *LH/SK* [1996]
 - *OS/LH* [2002]
 - *BA/IB/AA* [2010] (VS)
 - *CO/UA/LH/AC* [2013]
 - *AF/KL/AZ/DL* [2015]
 - Art 9, Reg 1/2003 commitments (offer) to remedy comp concerns
 - Binding on undertakings
- 

Review: typically after 10 years

Airfreight cartel

- Case AT.39258
- EUR 799 million (Comm Dec 2010)
- 11 carriers
- Period of infringement: 1999—2006*
- The anticompetitive behaviour: ‘single and continuous infringement’
 1. agreeing a flat-rate fuel surcharge per kilo of cargo (**price-fixing**), which air cargo carriers claim to have done to hedge against the rise in fuel costs (where fuel is cited as their biggest expense);
 2. inventing and applying ‘in full without exception’ a security charge (**a separate instance of price-fixing**); and
 3. refusing to pay commission on surcharges to clients (freight forwarders).
The Commission stated that, ‘by refusing to pay a commission, the airlines **ensured that surcharges did not become subject to competition** through the granting of discounts to customers.’

European Commission 2006 Guidelines

on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003

- Commission determines a 'basic amount' - a percentage of 'the value of the undertaking's sales of goods or services' affected by infringement
- The percentage will generally be up to 30% of that value - determined by the gravity of the infringement and other factors
- Basic amount multiplied by number of years
- An 'entry' deterrent of between 15% and 25% of the value of sales as defined above is then added to the basic amount irrespective of duration.
- Then application of aggravating or mitigating circumstances

Regulation 1/2003, Art 23(3)

- The Commission may impose fines on undertakings... where, **either intentionally or negligently**... they infringe Art 101 or 102
- For each undertaking the fine **shall not exceed 10% of its total turnover in the preceding business year**..... In fixing the amount of the fine, regard shall be had both to the **gravity** and to the **duration** of the infringement’.
- ‘Powers’
 - Leniency: LH + LX
 - Recidivism: SK – 50% uplift
- Discretion exercised
 - Sales where harm fell outside EEA: 50% reduction (all carriers)
 - ‘on account of the general regulatory environment in the sector which can be seen as encouraging price co-ordination’: 15% reduction (all carriers)

Ten highest cartel fines per case

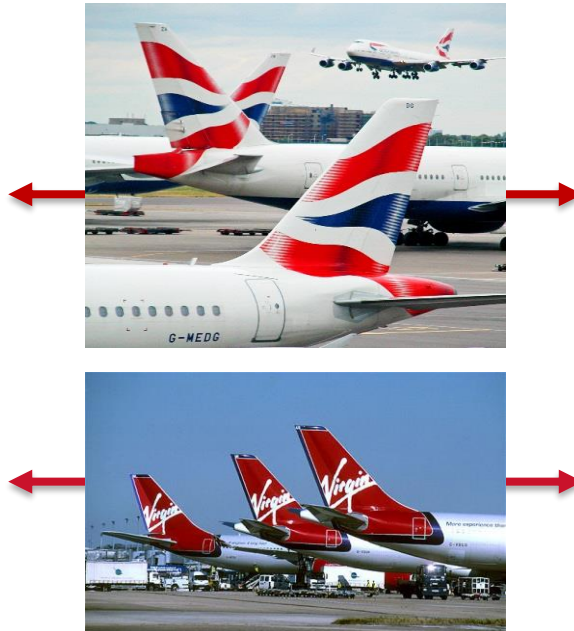
| Year | Case name | Amount in € |
|------------------|--|--------------------|
| 2016/2017 | Trucks | 3 807 022 000 |
| 2012 | TV and computer monitor tubes | 1 409 588 000 |
| 2013/2016 | Euro interest rates derivatives (EIRD) | 1 310 039 000 |
| 2008 | Carglass | 1 185 500 000 |
| 2014 | Automotive bearings | 953 306 000 |
| 2007 | Elevators and escalators | 832 422 250 |
| 2001 | Vitamins | 790 515 000 |
| 2010/2017 | Airfreight (*re-adopted) | 785 345 000 |
| 2013/2015 | Yen interest rate derivatives (YIRD) | 669 719 000 |
| 2007/2010 | Gas insulated switchgear (re-adopted) | 675 445 000 |

Art 102 TFEU

- Art 102 TFEU provides:

- ‘Any **abuse** by one or more undertakings in a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.’

- includes no provision for exemptions



Virgin Atlantic v British Airways

- 2001: US CA **BA**
- 1999: European Commission → 2003: ECJ **VS**

The City Law School
City, University of London
Northampton Square
London EC1V 0HB
United Kingdom

T: +44 (0)20 7040 3417
E: steven.truxal.1@city.ac.uk

