

A tale of two codes: free-flow code-sharing in the EU competition law assessment

A critical view on the investigation into the Brussels Airlines – TAP code-sharing agreement

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Abstract

Starting from an analysis of the competition law relevance of code-sharing within the framework of inter-carrier cooperation, this paper takes a critical view on the opening of investigations by the European Commission on a free-flow code-sharing arrangement between TAP Portugal and Brussel Airlines. The conclusion is that the competition concerns raised by the Commission on free-flow code-sharing appear misplaced and could lead to questioning even looser degrees of airline cooperation, such as interlining.

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List of abbreviations

EU	European Union.
TFEU	Treaty on the Functioning of the European Union.
ECJ	European Court of Justice.
ECA	European Competition Authorities.

1 Introduction

Following the opening of investigations by the European Commission¹ into a parallel free-flow code-sharing agreement on the Brussels – Lisbon route, a long “winter of despair”² has befallen lower levels of inter-carrier cooperation.

An overview of the drive for cooperative agreements between airlines sets the grounds for evaluating whether the free-flow type of code-sharing between TAP and Brussels Airlines investigated by the Commission could pose competitive restraints. By developing several arguments in favour of a different appraisal of free-flow code-sharing arrangements, I will take a critical view on the merits of the investigation. After identifying common traits between free-flow code-sharing and interlining, I conclude by highlighting the negative consequences that the outcome of this investigation could have on the current competition understanding of the pervasive interlining cooperation between airlines.

2 The need for cooperation and competition between airlines

The airline industry is built on networks.³ Most precisely, it is one of the few examples of a supply-based network economy, where the network strategy is not only a driver for lowering production costs but also a means towards increasing revenue.⁴ To this end, different levels of horizontal cooperation between carriers are required. An airline enters into a cooperative arrangement because it improves competitiveness in the market and, consequentially, it allows achieving a better economic performance.⁵ As empirical studies show, high levels of cooperation are linked to high levels of firm productivity.⁶ Another factor that underpins the decision to cooperate is the desire to skirt around nationality rules and route restrictions.⁷ Through different forms of cooperation, airlines aim at circumventing the regulatory barriers that would otherwise prevent their expansion.⁸ These restrictions stem directly from the current international civil aviation policy which relies on air services agreements and nationality

¹ Hereinafter the “Commission”.

² C. Dickens, *A Tale of Two Cities* 1 (1859).

³ D. Mes, *Market Definition and Antitrust Rules*, in L. Hortiz Blanco & B. Van Houtte (eds.), *EU Regulation and Competition Law in the Transport Sector* (2nd ed) 355 (2017).

⁴ A. Cento, *The Airline Industry: Challenges in the 21st Century*, 29 (2009).

⁵ T. Oum et al, *The effect of horizontal alliances on firm productivity and profitability: evidence from the global airline industry*, 57 *Journal of Business Research* 846 (2004).

⁶ *Id.* 846.

⁷ See P. Dempsey, *Public International Air Law* 546 (2008).

⁸ Cf. P. Mendes de Leon, *Introduction to Air Law* 84 (2017).

clauses.⁹ It follows that on an international level airlines have sought to overcome foreign ownership and routes restrictions by entering into different levels of cooperative agreements.¹⁰ As economics and the current international aviation regulatory regimes stimulate cooperation between airlines,¹¹ the forms into which this cooperation translates could fall under the scrutiny of competition authorities.¹² Such investigations take place in jurisdictions that do not exempt aviation transport from competition laws.¹³ Being the EU one of these jurisdictions,¹⁴ cooperative agreements between airlines have been subject to different level of examination under Articles 101 and 102 TFEU. In particular, cooperative efforts between airlines fall under the notion of horizontal agreements, which are agreements between undertakings that are active at the same level within a certain sector.¹⁵

3 Code-sharing as an intermediate form of airline cooperation

Code-sharing is one of the most frequent and basic forms of horizontal cooperation between airlines.¹⁶ In its essence, it is a marketing arrangement that allows two airlines to place their designator code on a service, although only one airline practically operates it.¹⁷ Code-sharing is, therefore, first and foremost a marketing tool.¹⁸

The decision by two carriers to code-share is often accompanied by various joint activities and integrated operations.¹⁹ Airlines could, therefore, decide to coordinate schedule planning, share ticketing and gate facilities, organise baggage handling, align frequent flyers

⁹ J.K. Brueckner, *International Airfares in the Age of Alliances: the Effects of Codesharing and Antitrust Immunity*, 85 *The Review of Economics and Statistics* 105 (2003). See also, M. Giamulla et al, *From Regulation to Deregulation* in E. M. Giamulla & L. Weber (eds.), *International and EU Aviation Law* 187 (2011).

¹⁰ See Dempsey, *supra* note 7, 605.

¹¹ Cf. Cento, *supra* note 4, 38.

¹² See J. Goh, *European Air Transport Law and Competition* 80 (1997).

¹³ See Mendes de Leon, *supra* note 8, 104.

¹⁴ J. Balfour, *EC Competition law and airline alliances*, in 10 *Journal of Air Transport Management* 82 (2004).

¹⁵ N. Kredel, *Agreements between Undertakings*, in S. Hobe, N. Ruckteschell and D. Heffernan, *Cologne Compendium on Air Law in Europe* 1148 (2013).

¹⁶ A. Cheng-Jui Lu, *International Airline Alliances* 63 (2003).

¹⁷ ICAO, *Implications of Airline Codesharing* 1 (1997). See also, S. Neumann, 'Code Sharing', in S. Hobe et al. (eds.), *Cologne Compendium on Air Law in Europe*, 126 (2013).

¹⁸ Giamulla et al, *supra* note 9, 188. See also Mes, *supra* note 2, 353; H. S. Harris & E. Kirban, *Antitrust Implications of International Code-sharing Alliances* in XXIII ASL 166 (1998).

¹⁹ Harris & Kirban, *supra* note 18, 166.

programs and other promotional activities.²⁰ The benefits of this loose form of cooperation are the increased virtual connectivity and subsequent network expansion,²¹ without the need to invest in fleet enlargement or frequency increase.²² These advantages could ultimately lead to traffic synergies,²³ cost efficiencies in network cooperation and better utilisation of aircraft,²⁴ which return economies of scope in network building.²⁵ From a demand perspective, cooperation translates into better service for the passengers,²⁶ higher access to travelling opportunities and lower fares as a result of the internalisation by airlines of the double-marginalisation externality.²⁷

Within a code-sharing agreement, access to capacity could be granted according to free-flow arrangements or block-space arrangements. Under the former, the marketing airline sells as many seats as its passengers require.²⁸ It follows that the marketing carrier has full access to the operating carrier's inventory.²⁹ This access comes in the form of a shared mapping facility for the booking classes between the two carriers.³⁰ Conversely, the operating carrier receives all the ticket revenue,³¹ bears the risk of the unsold inventory and can, therefore, determine seat availability.³²

Under a blocked space agreement, the marketing carrier defines beforehand the number of seats to offer on the flight operated by the partner.³³ The prior agreement between the carriers also covers the price.³⁴ If the marketing carrier fails to sell the predetermined number of seats, it

²⁰ *Id.*, 166. See also ECA, *Code-Sharing Agreements in Scheduled Passenger Air Transport – The European Competition Authorities' Perspective* 5 (2006). Cf. also Kredel, *supra* note 11, 1166.

²¹ J. Milligan, *European Union Competition Law in the Airline Industry* 77 (2017).

²² See A. Mosner, *Codesharing and Airline Alliances*, in D. Heffernan & B. Connor (eds.), *Aviation regulation in the United States* 170 (2014).

²³ ICAO, *supra* note 17, 12. See also Y. Du & B. Starr McMullen, *Is the Decision to Code-share a Route Different for Virtual versus Traditional Code-share Arrangements*, 54 *JTRF* 43 (2015).

²⁴ ECA, *supra* note 20, 19.

²⁵ See Cheng-Jui Lu, *supra* note 16, 224.

²⁶ ICAO, *Implications of Airline Codesharing* 24 (1997). See also, ECA, *supra* note 20, 19.

²⁷ Cf. Brueckner, *supra* note 9, 107. *But contra* D. Gilo, & F. Simonelli, *The price-increasing effects of domestic code-sharing agreements for non-stop airline routes*, 11 *Journal of Competition Law and Economics* 68 (2015).

²⁸ Harris & Kirban, *supra* note 18, 167.

²⁹ See Milligan, *supra* note 21, 77. See Steer Davies Gleave & Clyde&Co, *Report on the Competition Impact of Airline Code-Share Agreements* 8 (2007).

³⁰ Steer Davies Gleave *supra* note 29, 29.

³¹ Cf. H. Ito & D. Lee, *Domestic Code Sharing, Alliances, and Airfares in the U.S. Airline Industry*, 50 *The Journal of Law and Economics* 359 (2007).

³² See ECA, *supra* note 20, 6.

³³ Steer Davies Gleave, *supra* note 29, 11

³⁴ Milligan, *supra* note 21, 78.

bears the loss resulting from the excess of inventory.³⁵ A slight variation of block-space agreements allows for the return of unsold seats to the operating carrier up to a certain time before the scheduled departure.³⁶ All types of block space agreements, however, are characterised by the fact that the cooperating airlines do not necessarily need to set up a means of communicating between them as to inventory availability.³⁷

4 Anticompetitive concerns revolving around code-sharing

For competition purposes, code-sharing occupies a median position on the spectrum that measures the intensity of inter-carrier cooperation.³⁸ Accordingly, code-sharing has been subject to a relatively low level of scrutiny when compared to the other forms of cooperative agreements between airlines.³⁹ Reason for this lies in the fact that code-sharing *per se* raises little concerns in terms of competition law.⁴⁰ As opposed to full-fledged alliances, the simple marketing nature of pure code-sharing arrangements does not restrict competition between the participating airlines.⁴¹ Nonetheless, Article 15 Reg. 1008/2008 allows Community carriers to “combine air services and to enter into code-share arrangements, *without prejudice to the Community competition rules applicable to undertakings*”.⁴² The emphasis on the applicability of competition rules is justified because code-sharing falls within the category of reciprocal commercialisation agreements between competitors, by which undertakings agree to distribute their substitute products on a reciprocal basis.⁴³ This kind of agreements could lead to the partitioning of the market, price fixing by means of output limitation and exchange of strategic information.⁴⁴ Hence, code-sharing arrangements could fall under the scope of Article 101 (1) TFEU. The ensuing competition assessment under Article 101 TFEU consists of two stages. The Commission first evaluates whether the code-sharing agreement has an anti-competitive object or anti-competitive effects. If the agreement is found to be restrictive, in the second stage,

³⁵ See Harris & Kirban, *supra* note 18, 167.

³⁶ Cf. Milligan, *supra* note 21, 78.

³⁷ See Steer Davies Gleave, *supra* note 29, 11.

³⁸ Cf. ICAO, *supra* note 17, 23.

³⁹ P. Ruttley & S. Leandro, *Cooperative Agreements in the Aviation Sector and EU Competition Law*, in P. Mendes de Leon (ed.) *From Lowlands to High Skies: a Multilevel Jurisdictional Approach towards Air Law* 151 (2013).

⁴⁰ See Kredel, *supra* note 15, 1166.

⁴¹ ECA, *supra* note 20, at 25, note 54.

⁴² Emphasis added. See *amplius* Milligan, *supra* note 21, 77.

⁴³ European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, 1001/C 11/01, 225.

⁴⁴ *Id.*, 230 – 233.

the Commission assesses whether the code-sharing arrangement in question generates benefits to outweigh the restraining effects.⁴⁵

Under EU competition law, the main concerns attaching to code-sharing are the price increases that might result from such agreements,⁴⁶ market partitioning and the exchange of sensitive information that could take place within this cooperation framework.⁴⁷

5 The TAP – Brussels Airlines case

During the cold winter of 2011 the Commission started an investigation into the code-sharing agreement between two TAP Portugal and Brussels Airlines.⁴⁸ The investigation is still ongoing, and the Commission has recently sent a Statement of Objections to the interested airlines.⁴⁹

The concerns of the Commission are concentrated on the Lisbon – Brussels route, for which the two airlines entered into a standalone parallel code-sharing agreement on a free-flow basis. A parallel code-sharing entails that both airlines are operating the route,⁵⁰ and act as marketing carrier on the flight operated by the other.⁵¹ If both airlines run the service, they are flying direct overlap routes and can be considered competitors.⁵² By contrast, in unilateral or connecting code-sharing scenarios, airlines are not competing on the same route,⁵³ rather they virtually expand their network by sharing the codes on the other's complementary service.⁵⁴

When both airlines are deemed to be competitors, such as in parallel or overlapping code-sharing instances,⁵⁵ the decision to share capacity on a free-flow basis might have anticompetitive effects, as it could lead to a decrease of competition on the interested O&D itinerary.⁵⁶ In other words, because the commercial risk is equally apportioned between the two airlines, the level of competition between them is reduced. If this practice is coupled with fares

⁴⁵ See ECA, *supra* note 29, 9.

⁴⁶ Cf. Steer Davies Gleave, *supra* note 25, 45 and 65.

⁴⁷ ECA, *supra* note 20, 8.

⁴⁸ European Commission Press Release 11 February 2011 IP/11/147 (COMP/39860). See also I. Rabinovici, *The Application of EU Competition Rules in the Transport Sector*, 8 *Journal of European Competition Law & Practice* 275 (2007).

⁴⁹ European Commission Press Release 27 October 2016 IP/16/3563.

⁵⁰ See ECA, *supra* note 20, 7.

⁵¹ Cf. Steer Davies Gleave, *supra* note 29, 8.

⁵² See ECA, *supra* note 20, 10.

⁵³ Ruttle & Leandro, *supra* note 39, 147.

⁵⁴ See Du & Starr McMullen *supra* note 23, 43.

⁵⁵ ECA, *supra* note 20, 10, note 18. See Du & Starr McMullen, *supra* note 23, 43.

⁵⁶ *Id.*, 16.

alignment and capacity reduction, as it allegedly happened in the TAP – Brussels Airlines case, the Commission holds the view that this strategy has anticompetitive effects prohibited under Article 101 (1).⁵⁷ This position is not isolated: several studies have suggested – albeit not conclusively – that code-sharing on overlapping services could facilitate collusive behaviour, thus leading to higher fares and reduction of capacity.⁵⁸

Because the investigation is still ongoing, it is not yet clear whether the Commission will ultimately uphold the view that the agreement in question breached Article 101 (1) TFEU.⁵⁹ Nonetheless, what might be already of relevance is the fact that the Commission took into consideration the free-flow scheme as a possible anticompetitive covenant. This is not a novelty approach within the EU, as the Italian competition authority investigated a domestic free-flow code-share agreement between Alitalia and Volare in 2003.⁶⁰ In that investigation the Italian authority maintained, among other things, that the agreement could impede competition as the operating carrier had full decision power on the capacity and pricing, while the marketing carrier, which bore no risk, had little incentive to adopt an aggressive pricing policy on tickets marketed by it.⁶¹ The Lazio regional administrative court ultimately quashed the prohibition decision of the Italian authority on the grounds that a code-share agreement, as such, does not lead to anticompetitive outcomes.⁶²

5.1 A tentative critique of the investigation

The rationale behind the anticompetitive concerns around free-flow code-sharing, albeit understandable in principle, could be challenged by looking at how this type of cooperation is carried out in practical terms.

At a closer inspection, the primary outcome of a free-flow arrangement seems to be of little material concern to competition law. By sharing the distribution of the capacity available, the two airlines are not directly intervening in the number of seats available or in prices. On the contrary, they are reorganising between themselves the distribution and marketing efforts of their combined capacity on that route. In fact, the overriding issue of code-sharing, including the free-flow type, is not market capacity, rather market access.⁶³ As the Commission points out in its Guidelines, when an apparent price fixing is not involved, reciprocal commercialisation

⁵⁷ European Commission Press Release 11 February 2011 IP/11/147.

⁵⁸ See Steer Davies Gleave, *supra* note 29, 45. See also Brueckner, *supra* note 9, 106; Harris & Kirban, *supra* note 18, 171.

⁵⁹ A similar investigation that was initiated against Lufthansa and Turkish Airlines at the same time was dismissed by the Commission on 27 October 2016. Cf. European Commission Press Release 27 October 2016 IP/16/3563.

⁶⁰ AGCM, Press Release "Alitalia/Volare: the Competition Authority Prohibits an Agreement on Nine Domestic Routes" (2003).

⁶¹ AGCM Decision 12185 Alitalia/Volare, 184 (2003).

⁶² TAR Lazio, decision 25 October 2004, no. 11581. See also Ruttley & Leandro, *supra* note 35, 154.

⁶³ A. Mosner, *supra* note 22, 170.

agreements could lead to collusive outcomes where the agreement covers products which entail costly commercialisation.⁶⁴ If the agreement covers homogeneous products for which the highest cost factor is the production, like airline “seats”,⁶⁵ such conclusion does not apply.⁶⁶ As capacity remains unaffected, provided that there is no evidence of another collusive intention between the two airlines to reduce it, then also fare would be unaffected by the decision to code-share.

In theory, any free-flow arrangement could raise competition concerns when the operating carrier is entitled to end the contract in case of an aggressive pricing policy by the marketing carrier.⁶⁷ such provision, however, would be anticompetitive by itself as it constitutes an indirect price fixing.⁶⁸ A similar fate would expect minimum yield management provisions contained in the agreement if these point towards some form of tariff concertation.

The investigation by the Commission is open to criticism also for the methodology employed when dealing with this type of cooperative agreement. This problem was already apparent in the decision of the Italian competition authority regarding Alitalia and Volare.⁶⁹ The competition assessment of code-sharing agreement requires to consider that most code-sharing agreements come with a plethora of ancillary covenants and accompanying agreements.⁷⁰ The challenge is to distinguish between the anticompetitive effects of code-sharing and the possible anticompetitive impact of these ancillary agreements. Because this distinction is seldom made, the whole transaction is deemed to be anticompetitive and, therefore, all covenants fall under the scope of Article 101 (2) TFEU. Although it is not the purpose of this paper to challenge the complexity and technicalities required for competition assessments, the act of inferring the anticompetitive nature of a certain agreement by looking at other side arrangements could be questionable if the provisions of the concerned agreements are severable. In the case at hand, such ancillary agreements would be the prorate or sale covenants governing the financial apportioning of the code-share operations. Most of the anticompetitive effects do not appear to relate to the pure marketing arrangement regarding the sharing of codes; rather they depend on these underlying financial covenants. Provided that these provisions are severable from the core code-sharing agreement, what shall be deemed void, fined and struck down, are these ancillary agreements and not the primary decision to code-share.

The competition assessment of a free-flow code-share should also take into account that by contractual agreements, airlines are acting in the capacity of agents while selling tickets. This

⁶⁴ Commission, *supra* note 48, 243.

⁶⁵ As evidenced by the most common ratio used to measure the physical output of an airline, which is the “Cost per Available Seat-Mile”. See W. E. O'Connor, *An Introduction to Airline Economics* 74 (2001).

⁶⁶ *Id.*

⁶⁷ Cf. Milligan, *supra* note 21, 80.

⁶⁸ See Commission Guidelines, *supra* note 48, at 234.

⁶⁹ Cf. TAR Lazio, *supra* note 56.

⁷⁰ See e.g., Commission Decision 4 July 2004 COMP/38.284 *Air France – Alitalia*.

is the clear wording of Article 7.1 of the IATA Model Interlining Agreement.⁷¹ Although in other jurisdictions the notion that principal and agent cannot be considered competitors has been challenged,⁷² in the EU there are no signs that the position held in *DaimlerChrysler v Commission* has been reversed.⁷³ Therefore, agency agreements cannot be considered understandings between different undertakings falling within the scope of Article 101 (1) TFEU.⁷⁴ Like in a pure interlining sale scenario, in a free-flow code-share sale the marketing carrier is selling seats on the operating airline, gets a commission for such transaction and does not fully bear the risk of unsold seats.⁷⁵ Conversely, a blocked-space agreement allocates to the marketing carrier a certain amount of seats along with the corresponding commercial risk.⁷⁶ To put it in the words of the ECA, in free-flow sales the “marketing carrier functions almost as an agent”.⁷⁷ Both the contractual and factual elements for an agency relationship are therefore in place.

Finally, a last argument could be made from the perspective of Article 101 (3) TFEU.⁷⁸ Free-flow code-sharing could virtually extend the capacity to which a passenger has access, as he or she would be able to select more options and routes from the marketing channels of either carrier. The parallel nature of the code-shared services does not erase the network effects that the arrangement brings, as the two airlines’ networks could benefit from increased connectivity between the two hubs. In other terms, TAP could feed more passengers from its routes out of Lisbon and *vice versa*. Furthermore, several economic studies found that instances of unilateral non-connecting code-sharing, which are services where only one of the cooperating carriers is operating the flight, generally lead to lower prices.⁷⁹ This observation strictly relates to the fact that higher access to options for passengers brings better utilisation of the capacity on that

⁷¹ According to which “[o]n issuing or completing tickets or MCOs for transportation over the routes of the other parties thereto, the issuing airline shall be deemed to act only as an agent of the carrier airline”. See IATA Multilateral Interline Traffic Agreement – Passenger, *Multilateral Interline Traffic Agreements Manual* 7 (2012).

⁷² See the decision of the Australian High Court in the “Flight Centre” case, (2016) 339 ALR 242 (‘ACCC v Flight Centre’).

⁷³ Court of First Instance, 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, Case T-325/01 (2005).

⁷⁴ *Id.*, 88 – 89.

⁷⁵ Ito & Lee, *supra* note 31, 359.

⁷⁶ See ECA, *supra* note 20, 6.

⁷⁷ *Ibid.*

⁷⁸ According to which the prohibition on agreements which have restrictive, preventive or distortive effects on competition “may, however, be declared inapplicable in the case of (...) any agreement or category of agreements between undertakings, (...) which 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: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

⁷⁹ See Ito & Lee, *supra* note 31, 355.

given route.⁸⁰ As environmental sustainability concerns are gaining ever-increasing momentum both in the EU and on the International plane, higher occupancy of aircraft conveys apparent efficiencies also on the front of environmental sustainability. Efficiencies in the form of collective environmental benefits have been already appreciated by the Commission and shall be therefore further considered within the competition assessment.⁸¹

This brief review of tentative arguments challenging the position of the Commission on the potential anticompetitive effects of a free-flow code-sharing agreements shows that the investigation might be originating from misplaced assumptions on the nature of this type of arrangements.

5.2 The potential relevance for interlining

If the Commission concludes that the covenants regarding the right to sell seats on each other's flight on a given route have anticompetitive effects, this conclusion could then lead to extending the same concerns to the basic contractual facility underlying any code-share operation. A code-sharing arrangement is, in its most basic sense, an advanced interline arrangement.⁸² Even when it involves just a parallel operation, it requires the acknowledgement by one airline of the ticket issued by another airline.

Interlining is a commercial practice whereby airlines recognise tickets issued by other airlines to the effect that one ticket can be used for two or more services operated by different airlines, thus facilitating connections and seamless travel.⁸³ In its essence, it allows the sale of itineraries involving another carrier.⁸⁴ The framework for interlining is set out in the Multilateral Interline Traffic Agreement promoted by IATA. By following this framework, airlines can enter into specific bilateral interline agreements. Through this contractual template, airlines can "sell transportation over the routes of the others".⁸⁵ Although interlining has seldom been censored from a competition point of view,⁸⁶ and it is often regarded as a remedy,⁸⁷ the findings of the Commission in the investigation on free-flow code-sharing could yield a different conclusion.

The possible anticompetitive effect that the Commission identified in the TAP – Brussels Airlines arrangement could emerge in an interlining scenario too. From a competition point of view, the outcome of parallel free-flow code-share is not very different from that of an interlining

⁸⁰ See Kredel, *supra* note 15, 1167.

⁸¹ Cf. European Commission Decision Case IV.F.1/36.718. *CECED*, 48 and 55 (1998).

⁸² Cf. Mosner, *supra* note 22, 161.

⁸³ See Mendes de Leon, *supra* note 8, at 105, note 58.

⁸⁴ Steer Davies Gleave *supra* note 29, 13.

⁸⁵ IATA Multilateral Interline Traffic Agreement, *supra* note 71, 7. See also, Davies Gleave *supra* note 29, 13.

⁸⁶ Cf. R. Miller, *International Airline Alliances*, XXIII Air & Space Law 125 (1998).

⁸⁷ See European Commission Case IV/33.544 *British Midland v. Aer Lingus* (1992). See also Cheg-Jui Lu, *supra* note 12, 102.

agreement, whereby the carriers reciprocally acknowledge tickets issued on each other's lines. The only difference in the case at hand is that, whereas interlining usually involves two or more carriers, in a parallel code-share there is only one operating carrier. This circumstance, however, does not impinge on the free-flow arrangement, as an airline would have access to capacity in either scenario. Article 2.3 of the IATA Model Interlining Agreement reads that each cooperating airline "shall furnish to each other party the tariffs and other information necessary for the sale, as contemplated hereunder, of the transportation services currently being offered by it".⁸⁸ The way this structure operates does not differ from that of a free-sale system. In fact, the concern supporting the investigation into the code-share free-flow agreement is not related to the sharing of codes itself, nor to the nature of the arrangement, but to an element of common sales that is already in place for the interlining facilities. In other terms, if the Commission takes the view that a free-flow arrangement could have anticompetitive effects, the next logical step would be to question the very essence of the interlining framework that is currently in place between airlines.

6 Conclusion

The tension between airline cooperation and competition has not spared code-sharing agreements.⁸⁹ As ever lower levels of cooperation seem to be affected by the competition concerns of the Commission, the focus is now on parallel free-flow sales. In this paper, I presented a different legal standpoint on the assumption that a free-flow arrangement underlying a parallel code-sharing necessarily leads to anticompetitive effects. Although none of the arguments put forward can be considered conclusive as to excluding the competition concerns raised by the Commission, they nonetheless aim at giving a different perspective on the Commission's positions that, if taken to the extreme, could spread to even lesser forms of cooperation, such as interlining. Even so, as the investigation into the Brussels – Lisbon code-share has not yet concluded, it is still possible to adjust its course and allow for a "spring of hope"⁹⁰ to fall over this troubled form of inter-carrier cooperation.

⁸⁸ IATA Multilateral Interline Traffic Agreement, *supra* note 71, 3.

⁸⁹ R. Abeyratne, *Competition and Investment in Air Transport* 192 (2016).

⁹⁰ C. Dickens, *supra* note 2, 1.

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