

ACI EUROPE WORKING PAPER underpinning the revision of Regulation 95/93

Practices and Recommendations related to the Handling of Airport Slots in case of Airline Bankruptcies and Airlines Ceasing Operations

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1. INTRODUCTORY REMARKS

- 1.1. Since the beginning of 2020, the COVID-19 pandemic has had a profound impact on air transport in Europe, with many airlines receiving financial assistance from Member States and their respective shareholders. Several airlines have entered into financial proceedings, including Flybe, Norwegian and Level Europe. Some airlines are ceasing operations, while others reported drastic reductions in flights. The future remains uncertain and it can be expected that more airlines will enter administration in 2021.¹
- 1.2. Airline bankruptcies and/or airlines ceasing operations are, however, a perennial issue resulting from market dynamics in a broad sense and are not necessarily related to the COVID-19 pandemic. Examples of airlines experiencing financial difficulty in pre-COVID times include Monarch Airlines, Jet Airways, Thomas Cook, Alitalia, Air Berlin and Malaysia Airlines. Several of these cases raised interesting slot-related questions, some of which will be elaborated upon in this paper.
- 1.3. The *Monarch* case in particular constitutes an important precedent for the management of slots in financial proceedings, to wit that a defunct airline is able to obtain and trade slots. The topic of slot trading and slot leasing is addressed in the ACI EUROPE WORKING PAPER on Secondary Markets for Airport Slots. It should be noted that these issues and cases raise questions of slot ownership, which require urgent clarification.

2. PROBLEM DEFINITION

- 2.1. Council Regulation (EEC) No. 95/93 on common rules for the allocation of slots at Community airports, also known as the Slot Regulation, does not fully cover the process in case of airline bankruptcies and/or airlines ceasing operations. Nor does the Slot Regulation explicate the legal status of the Slot Regulation vis-à-vis the legal status of administrators under national bankruptcy laws, or highlight how the key principles enshrined in the Slot Regulation are to be coordinated with the handling of slots in financial proceedings.
- 2.2. Though the Slot Regulation is silent on the handling of slots in financial proceedings, it prescribes that an airline should have a valid operating license to be allocated slots in Article 2(f)(i).² In order to obtain a valid operating license, airlines should have been granted a valid Air Operator's Certificate (AOC).
- 2.3. In the case of an airline entering administration or insolvency, the national licensing authority issues a notice to the airline to terminate the airlines' AOC. Normally, the airline is served notice by the licensing authority for a defined period and then has an opportunity to appeal as per the notice and appeal periods established under national bankruptcy laws.³ Should there be an appeal by the airline, then the appeal process can be subject to a lengthy court injunction and the timeframe for termination of the AOC is unknown. Meanwhile, the AOC is suspended. Should the appeal be granted, the timeline for slots hand-back becomes unknown and can be subjected to a protracted legal process.

¹ Eurocontrol, Aviation Intelligence Unit, Think Paper #8 – 1 January 2021.

² In the *Monarch* case, the Court of Appeal of England and Wales ruled that a carrier in bankruptcy proceedings can indeed be referred to as an air carrier in a legal sense, even if it has no realistic prospect of resuming air transport services. It is noted that, although the court's verdict in the *Monarch* case is based on the Slot Regulation, it is not binding for courts in EU Member States.

³ Member States may have different procedures and timelines in place for the handling of airline bankruptcies, so that airlines may be declared bankrupt at different stages of the process in different Member States. As a result, the AOC may also be terminated at different times.

- 2.4. The Worldwide Airport Slot Guidelines — provide that the airlines' administrators can request the coordinator to 'freeze' the slots until the financial difficulties have been overcome or pending formal acquisition of the company's activities by third parties.⁴ This is the case even if the slots are not used in practice. Although not legally binding in the EU, the WASG is an industry best practice which is nonetheless widely applied by coordinators to provide the global air transport with a single set of standards for the management of airport slots at coordinated airports. This is permitted by the EU Regulation, though not required and is indeed not possible when there is a conflict with the EU Regulation, which takes legal precedence.
- 2.5. The 'freezing' of slots may leave slots subject to the control of appointed administrators for extensive periods of time, in particular since the WASG does not present a timeframe during which slots may be frozen by the coordinator. Hence, valuable capacity is wasted, affecting the airport's ability to optimize capacity to the benefit of consumer choice, in particular where highly capacity-constrained airports are concerned. The omissions in the Slot Regulation with regard to the handling of slots in case of airlines entering administration may act as a barrier to market access.
- 2.6. As opposed to the WASG, which provides guidance for the freezing of slots, the Slot Regulation does not cover the assumption of 'freezing'. Moreover, in the absence of a clear provision on what constitutes a reasonable deadline for notice and appeal processes in the Slot Regulation, perspectives may vary depending on the various interests of the parties involved.
- 2.7. In addition to the negative impact on capacity, national policies on the applicable timelines in case of bankruptcy and insolvency form somewhat of a patchwork, especially outside the EU. This may leave the slot coordinator in ambiguity in case of a non-EU airline entering administration and may erode its independent function in the performance of their exclusively assigned duties as capacity allocator as per Article 4(5) of the Slot Regulation.
- 2.8. Furthermore, it appears at odds with the supremacy of EU law and the principle of subsidiarity to let national bankruptcy laws prevail where the handling of slots in financial proceedings is concerned, given the Commission's intention to confer upon the coordinator the exclusive responsibility for the allocation and management of slots.⁵
- 2.9. In conclusion, it seems ill-considered to leave slot allocation to the whims of national bankruptcy laws, often outside the view of the coordinator, given that the Slot Regulation presumes an open, transparent and optimal allocation of scarce capacity by an independent coordinator for the benefit of all parties involved. Reform is needed, both from an airport capacity as well as from a legal point of view.

3. RECOMMENDATIONS

- 3.1. ACI EUROPE calls for a clear definition in the Slot Regulation of reasonable deadlines for notice and appeal periods, since the insolvency procedures at court can be slow and therefore slots may be held by the coordinator for long periods of time.
- 3.2. ACI EUROPE recommends to solve the existing *lex lacunae* through a requirement that slots should be returned to the coordinator no later than 60 days from the date that the airline has operated its last flight, so that potentially scarce airport capacity may be released to other airlines. In the meantime, the affected slots should be released to other airlines on a non-historic basis. Slots operated on a non-historic basis will be awarded with priority over new requests in the subsequent equivalent season, if not requested by the recovered airline or its legal successor. It is recommended to explore the option of providing coordinators with the authority to impose fines on airlines/administrators for non-compliance with the applicable timelines

⁴ See paragraph 8.15.3 of the WASG.

⁵ Since the Commission, by way of the adoption of the Slot Regulation, identified the coordinator as the sole entity responsible for the allocation and management of slots, individual Member States are not allowed to instigate policies based on national laws that detract from the independent position of the coordinator. Thus, only the Commission has exclusive competence to legislate and adopt legally binding acts in this area. See Article 2 of the TFEU and the CJEU's 2002 Open Skies-judgments.

3.3. ACI EUROPE recommends the incorporation of a provision in the Slot Regulation that blocks administrators, operating under national bankruptcy laws, from circumventing the regular procedure for slot allocation carried out by the independent coordinator who has the exclusive responsibility for the allocation and management of slots. It should be remembered that slots are, in their essence, an entitlement to use airport infrastructure, and not intended as an asset of the airline.