The power of pre-existing agreements

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In two recent decisions, the Commission considered the impact of cooperation agreements that the notifying parties had entered into before the notified transaction and came to two different conclusions.
In *Iberia/British Airways* (decision of 14 July 2010), the Commission was confronted with combined shares of 70-80% for time-sensitive passengers on two city pairs, London-Madrid and London-Barcelona.

Despite these high shares, the Commission found that competition from mainly Easyjet (20-30% on London-Madrid and 30-40% on London-Barcelona) and to a lesser extent Air Europa and Ryanair on London-Madrid would provide sufficient competitive constraints on the combined firm. In addition, and perhaps more important, the parties had argued that, due to their pre-existing close cooperation on the basis of a Joint Business Agreement, there was very little residual competition between them. The Joint Business Agreement in its current form had been in existence since 2004, pursuant to an exemption granted by the Commission in 2003. While the exemption expired in 2009 (and under the rules currently governing Article 101, the parties could not apply for a new exemption), the parties at the time of the merger notification continued to operate their alliance under the same agreement.

The Commission accepted the parties' argument that the effects of the transaction were confined to the transformation of the parties' previous contractual cooperation into a permanent structural link and concluded that the transaction did not raise serious doubts on the two city pairs.

A similar argument was made by the parties in *DFDS/Norfolk* (decision of 17 June 2010). The main overlap between the parties' activities was in short sea transport and more specifically unitized freight services: freight stored on standardized modes (such as driver accompanied vehicles, unaccompanied vehicles and containers), and transported on roll-on/roll-of ("Ro-Ro") vessels and Ro-Pax vessels (transporting cargo, drivers and passengers).

This proposed transaction would have resulted in a combined share of 50-60% (from an increment of 5-10%) in the so-called UK-Scandinavia corridor; within this segment, combined shares in the UK-Denmark corridor would have been 70-80 %. Taking into account the results of the Commission's market investigation, these shares could even increase to 90-100%.

However, Norfolk does not operate its own vessels in the UK-Denmark corridor. Instead, under the so-called Space Charter Agreement, it purchases given volumes of annual capacity on DFDS' vessels and then prices, sells and markets these volumes independently.

In order to dispel the Commission's concerns based on the high combined shares, the parties made an argument similar to the one analyzed in *Iberia/BA*. It is clear from the decision however, that given the different facts, the argument could not be made as strongly as in the airline case.

The parties submitted that the Space Charter Agreement is similar to a free flow code sharing agreement in the aviation industry and that therefore competition between the parties was not "vigorous." The Commission rejected the point because Norfolk uses the capacity on DFDS' vessels independently, bearing all the risks and gaining all the profit. Under a typical free flow code share agreement, the charterer normally receives only a commission fee, limiting both profits and risks.

Second, the parties argued that they would only compete from a "technical point of view" as DFDS could terminate the agreement. However, the Commission found that termination was not a likely scenario, given the existence of the agreement since 1993. Moreover, the Commission considered that, even absent the Space Charter Agreement, Norfolk would be the most likely entrant on the UK-Denmark route.

As a result, the different characteristics of the Space Charter Agreement as compared to the Joint Business Agreement between Iberia and BA led the Commission to a different conclusion.

The Commission was consistent in the conclusions it drew with regard to remedies it required from DFDS and Norfolk. Instead of requiring for example a divestiture of vessels, it accepted that DFDS would offer capacity under a Space Charter Agreement to a third party. Post-merger, DFDS would still be the only operator on the UK-Denmark corridor. However, given that the Commission concluded that there had been competition between the notifying parties because Norfolk purchased and resold capacity on DFDS' vessels, the competition concerns raised by the merger could be addressed by offering such capacity to a third party post-merger and by transferring Norfolk's customers to the purchaser.