In November the EU Commission finally approved the acquisition by Etihad of a 49% stake in struggling Italian flag carrier Alitalia (Case M.7333), following an examination under Article 6 of Council Regulation (EC) No. 139/2004 (The Merger Regulation). The move by Etihad is the latest in a targeted and proactive strategy towards consolidating its foothold in Europe and increasing its reach from its Abu Dhabi hub. However, the acquisition also raised interesting issues from a consumer law viewpoint concerning competition in the European aviation market.

Since its establishment in 2003, Etihad has embarked on a campaign of acquisitions and codeshare agreements designed to channel passengers into its network and reach markets in Europe, Asia, and North America. For an airline which initially found itself on the periphery of European air operations, this was a necessary move. The airline started by acquiring a 29% stake in Air Berlin, and then a 40% stake in Air Seychelles. In 2012 Etihad acquired a 3% stake in Aer Lingus and a stake in Virgin Australia. Then, in August 2013, Etihad took a 49% stake in Serbian flag carrier Jat (later re-named Air Serbia), followed in October 2013 by a 24% stake in Indian airline Jet Airways.

However, this expansion has not always been smooth: in October 2013 a proposed codeshare agreement between Etihad and Jat on routes between Belgrade and Chicago O’Hare, Washington Dulles, and JFK airports was challenged by Delta Airlines on competition grounds. The proposed codeshare agreement was subsequently rejected by the US Department of Transport.

Etihad’s latest acquisition did not raise any serious competition concerns on any routes apart from the Rome Fiumicino-Belgrade route. Previously, Alitalia and Air Serbia had been the only carriers operating direct services between those airports. By virtue of Etihad’s existing stake in Air Serbia, an acquisition of Alitalia would give Etihad an effective monopoly on that route. The Commission had concerns that this would lead to higher prices and a loss of service quality for passengers, and accordingly made a finding under Article 6 (1) (c) of the Merger Regulation.

Arrangements (either codeshares or acquisitions) concerning airlines that share a route will always attract closer scrutiny from regulators than arrangements under which one airline gains access to a route it has not previously flown. This is because in the former case there is greater scope for anti-competitive outcomes and the attendant detriment to consumers.

While a monopoly situation in itself will give rise to competition concerns, such situations also have to be looked at in the context of the likelihood and feasibility of a new entrant entering the market. In the Etihad/Alitalia case, the monopoly is exacerbated by the fact that Rome Fiumicino is a congested airport, with no available slots other than those already occupied by Alitalia and Air Serbia. It is therefore arguably both a route-dominance and slot-dominance situation.

In the Etihad/Alitalia case, the matter was resolved by the parties giving a series of commitments, the effect of which is to open up the Rome-Belgrade route to prospective entrants and ensure that any such entrants can operate competitively on that route. The main commitment given was to make available up to two daily slot pairs at Rome Fiumicino and Belgrade for prospective entrants to take up. It seems likely that this will be accomplished by the existing operators divesting themselves of some of their own slots, rather than the creation of new ones. Needless to say, “prospective entrants” are defined as operators who are unconnected with the parties, a definition which excludes those carriers belonging to the same holding company, or who co-operate with the parties in the provision of air transport services, save for some secondary activities carried out at arm’s length.

However, creating capacity for new entrants to the market is not always enough to alleviate competition concerns. In this case, the Commission also had to consider how viable it would be for prospective entrants to take up the new capacity offered. To this end, there is a further series of commitments designed to provide incentives for new entrants to enter the market and allow them to compete with the incumbent carriers. These include grandfathering rights (under which, once the slots have been used in accordance with the terms set out in the commitments for a fixed “utilisation
period”, they can be used without restriction), an interline agreement, a prorate agreement (which sets out how fares are to be apportioned where different legs of a journey are flown by different airlines), a fare combinability agreement, and access to the incumbents’ frequent flyer programmes.

The interline agreement provides for the contracting parties agree to accept each other’s travel documents when operating different legs of a journey. The effect is that a passenger only needs to book a single ticket for the entire journey, rather than separate tickets for each leg. In the Etihad/Alitalia case, this is designed to allow new entrants access to passengers travelling between Rome and Belgrade on one of the incumbent airlines and wishing to fly a return leg. If a new entrant were unable to accept an Alitalia or Air Serbia ticket, a rational consumer is likely to choose one of those airlines for for the return leg rather than make separate bookings in order to fly with the new entrant. Allowing new entrants to accept tickets issued by the Etihad-allied incumbents therefore levels the playing field, allowing them to compete fairly with the incumbents and promotes choice and competitive pricing for passengers.

The fare combinability agreement allows a new entrant to offer a return fare between the airport pair comprising one non-stop leg on its own aircraft and one non-stop leg on a service operated by one of the incumbents. This further allows consumers to combine fares for different legs into a single itinerary and select the best prices for each leg of a trip, regardless of which carrier is offering them. Combined with the interline agreement, its effect is to ensure that consumers are not restricted in their choice of airline for a particular leg of a journey where they have booked another leg with a particular carrier.

The overall effect for consumers flying between Rome and Belgrade is that they are able to select a carrier for each leg of their journey based on who is offering the best fares and departure or arrival times, and then to book a single ticket to cover the whole itinerary. The Commission held that the proposed combination of commitments adequately ensures that new entrants to the Rome Fiumicino-Belgrade route are not put at an undue disadvantage in accessing customers, and allows all carriers operating services on that route to do so competitively. Accordingly, a Phase I clearance was granted under Article 6 (2) of the Merger Regulation.