

Comments of the Association of European Airlines

on

Commission proposal COM(2001)335 final of 20Jun01 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports

(Brussels – 27 July 2001)

The revision of the slot regulation is intended to be carried out in two different stages: first a limited revision that is meant to focus on a number of basically non-controversial practical improvements of the present system, to be followed by a second stage in which the desirability and possibilities of more radical changes of the system will be considered, including the question of slot trading. The second stage will begin with a detailed professional study and subsequent consultations with stakeholders.

The present Commission proposal largely concerns the first stage of the revision of the slot regulation. A great number of the proposed modifications are of a practical nature, effectively amounting to the 'limited revision' intended by the Commission. Most of these practical proposals have the full support of the AEA. Reference in this respect is made to the views and comments put forward by IATA, to which the AEA associates itself.

The problem with the Commission's proposal is that it contains, in addition to these practical elements, a number of important policy measures that would bring about major changes in the existing slot allocation system with significant implications for the airline industry. These measures include, contrary to the Commission's explanatory statement, also certain market access related measures.

Because of this mixture of practical elements and important policy measures, the Commission's present proposal cannot reasonably be qualified as a 'limited revision' of the slot regulation in the true sense of that term. Moreover, including these policy measures in the present proposal unnecessarily hinders a speedy completion of the first stage of the revision process and demonstrably leads to less instead of more flexibility. It is also inconsistent with the overall objective of the two-stage approach, in which major changes are first to be examined in detail. In fact, none of the policy measures in question has been the subject of the type of prior in-depth analysis and consultations as announced for the second stage.

For the AEA airlines, which operate the major part of the Community's air transport system and depend entirely on slots at their increasingly congested hub airports, unduly burdensome slot rules affecting their operations are a matter of very serious concern.

The AEA airlines therefore urge the Community institutions to remove the following provisions from the present proposal, for possible consideration in the second phase.

**1. Art. 2(a) – Definition of a slot
[and in conjunction therewith the proposed Artt. 8(1) and 8a(2)]**

<u>Present text – Art. 2(a)</u>	<u>Proposed text – Art. 2(a)</u>
(a) ‘slot’ shall mean the scheduled time of arrival or departure available or allocated to an aircraft movement on a specific date at an airport coordinated under the terms of this Regulation;	(a) ‘slot’ shall mean the entitlement established under this Regulation of an air carrier to use the airport infrastructure at a coordinated airport on a specific date and time for the purpose of landing and take-off as allocated by a coordinator in accordance with this Regulation;

This proposal has major market access related implications:

- (a) Changing the definition of a slot from a purely factual description to a concept of a legal nature clearly anticipates the introduction of future conditions limiting the use that airlines can make of their ‘entitlement’, e.g. a limitation in time of the entitlement, a fee charged for the entitlement, etc.
- (b) Moreover, the proposal that slots are to be considered as ‘public goods’ entirely ignores the question of airline proprietary rights in slots under the present regulation (see in this context the enclosed AEA comments of Feb01 on the legal nature of a slot). In reality, it is the airport owner who provides the infrastructure and the airlines that provide the services, which together create the value of a slot. The fact that slots are not shown on airport or airline balance sheets does not mean that they are not regarded as valuable “assets”. Route and operating licences held by airlines are also not shown on balance sheets even though without them no airline could operate.

It is entirely unclear why at this stage the current definition of a slot needs to be changed in the sense proposed by the Commission. Any such change should at least be the subject of in-depth analysis in the context of the intended phase 2 of the revision of the slot regulation.

**2. Art. 2(b) – Definition of a new entrant
[and in conjunction therewith the proposed Artt. 2(f)(ii), 8a(4), 10(5) and 10(7)]**

<u>Present text – Art. 2(b)</u>	<u>Proposed text – Art. 2(b)</u>
(b) ‘new entrant’ shall mean: <ul style="list-style-type: none"> (i) an air carrier requesting slots at an airport on any day and holding or having been allocated fewer than four slots at that airport on that day, or (ii) an air carrier requesting slots for a non-stop service between two Community airport where at most two other air carriers operate a direct service between these airports or airports systems on that day and holding or having been allocated fewer than four slots at that airport on that day for that non-stop service. An air carrier holding more than 3 % of the total slots available on the day in 	(b) ‘new entrant’ shall mean: <ul style="list-style-type: none"> (i) an air carrier requesting as part of a series of slots, a slot at an airport on any day, where, if the carrier’s request were accepted, it would in total hold fewer than five slots at that airport on that day, or (ii) an air carrier requesting a series of slots for a non-stop scheduled passenger service between two Community airports where at most two other air carriers operate the same non-stop scheduled service between these airports or airport systems on that day, where, if the carrier’s request were accepted, it would nonetheless hold fewer than five slots at that

<p>question at a particular airport, or more than 2 % of the total slots available on the day in question in an airport system of which that airport forms part, shall not be considered as a new entrant at that airport;</p>	<p>airport on that day for that non-stop service;</p> <p>(iii) an air carrier requesting a series of slots at an airport for a non-stop scheduled service between that airport and a regional airport where no other air carrier operates a direct scheduled service between these airports or airport systems on that day, where, if the carrier's request were accepted, it would nonetheless hold fewer than five slots at that airport on that day for that non-stop service.</p> <p>For the purpose of paragraphs (i) and (ii), an air carrier shall not be considered as a new entrant if at the time of allocation:</p> <ul style="list-style-type: none"> - it has, at the airport concerned, a joint operation, code sharing or franchise arrangement with another air carrier which itself is not considered as a new entrant, or - the majority of its capital is held by another air carrier which itself is not considered as a new entrant (subsidiary company), or - it holds directly or indirectly the majority of the capital of another air carrier which itself is not considered as a new entrant (parent company), or - it forms part of a group of air carriers of which one is not considered as a new entrant; <p>For the purpose of paragraph (ii), an air carrier which alone or together with other partners in a group of airlines holding more than 7% of the total number of slots on the day in question at a particular airport, or airport system shall not be considered as a new entrant at that airport on that day.</p>
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Modifying the new entrant definition is clearly a market access related issue.

Whether and, if so, to what extent at congested hub airports, on which the respective hub airlines entirely depend for the operation of their integrated networks, the opportunities of new entrants should be increased at the expense of those of incumbent airlines, raises fundamental policy questions that require detailed analysis, notably against the background of the continued strong growth of the European 'no-frills' airlines. This need for analysis concerns in particular:

- (a) the proposal to raise the upper limit from the current 2% resp. 3% to 7% of total slots, the consequences of which are totally unclear;
- (b) the proposal to grant new entrant status to operations on new regional routes;
- (c) the proposal under Art. 10(5) to give preferential treatment to new entrants in the allocation of available slots, notwithstanding the fact that the current 50-50 rule of equal entitlement already *de facto* works out in favour of new entrants, because their collective volume of services will invariably be smaller than that of the incumbent airlines;

Questions also arise with respect to the proposed restrictions that penalise new entrants, in particular:

- (d) the proposal to deny new entrant status to an airline that has forged a link/relationship in the form of a joint operation, code sharing or franchise arrangement with another airline at the airport concerned; the proposal (i) disregards the fact that cooperation with larger airlines is nowadays indispensable for the viability of smaller airlines, (ii) will have the effect of stopping a small start-up airline from actually getting started on a new route because it has concluded such a cooperative arrangement with a major operator, and (iii) works against the necessary consolidation of the European airline industry;
- (e) the proposal to deny new entrant status to an airline that forms part of a ‘group of air carriers’ of which one is not considered as new entrant; in addition to the negative effects mentioned under (d) above:
 - (i) this introduces a new concept, the definition of which in Art. 2(f)(ii) is wholly inadequate (“... carriers which ... *in any other way* cooperate for the purpose of operating a specific air service”), and the effect of which would be that most airlines would disqualify for new entrant status;
 - (ii) the new concept as defined in Art. 2(f)(ii) partly overlaps the proposal under (c) above, but without the limitation of the latter that a joint operation, code sharing or franchise operation with another airline take place at the airport concerned;
- (f) the proposal under Art. 8a(4) to increase the minimum time during which new entrants may not transfer/exchange slots from two to three scheduling seasons.

The whole question of ‘new entrant status’ must therefore be the subject of an in-depth analysis in the context of the intended second phase of the revision of the slot regulation.

3. Art. 8(2) (last paragraph) – Limitation of historic slots to services operated with minimum aircraft size

Present text - Art. 8(1)(a)	Proposed text – Art. 8(1) and (2)
<p>(a) Subject to the provisions of Article 10, a slot that has been operated by an air carrier as cleared by the coordinator shall entitle that air carrier to claim the same slot in the next equivalent scheduling period.</p>	<ol style="list-style-type: none"> 1. Series of slots are allocated from the slot pool to applicant carriers as entitlements to use the airport infrastructure for the purpose of landing and take-off for the scheduling period for which they are requested, at the expiry of which they have to be returned to the slot pool as set up according to the provisions of Article 10. 2. Without prejudice to Articles 7, 8a, 9, 10(1) and 14, paragraph (1) of this Article shall not apply when the following conditions are met: <ul style="list-style-type: none"> - a series of slots has been used by an air carrier for the operation of scheduled and programmed non-scheduled air services and - that air carrier can demonstrate to the satisfaction of the coordinator that the series of slots in question has been operated, as cleared by the coordinator, by that air carrier

	<p>for at least 80% of the time during the scheduling period for which it has been allocated.</p> <p>In such case that series of slots shall entitle the air carrier concerned to the same series of slots in the next equivalent scheduling period.</p> <p>Member States may limit such entitlement to series of slots operated with a minimum aircraft size.</p>
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The size of aircraft used for a route depends on many factors but is primarily a matter to be decided by the airline concerned.

If Member States could condition the continued use of slots by the use of a minimum aircraft size, this would undermine the basic principle of airline commercial freedom and could

- interfere with the economics of the hub-and-spoke networks operated by the AEA airlines;
- have particularly detrimental effects on regional services, which often are operated with relatively small aircraft and form part of these integrated networks;
- lead to discrimination and distortion of competition in the Single Market.

Any such type of regulatory intervention, if contemplated at all, raises basic questions of market access that should be part of the detailed analysis envisaged for the second phase of the revision of the slot regulation.

4. Art. 8(4) – Restriction of priority re-timing of slots

<u>Present text – Art. 8(1)(c)</u>	<u>Proposed text – Art. 8(4) and (5)</u>
<p>(c) The coordinator shall also take into account additional priority rules established by the air carrier industry and if possible additional guidelines recommended by the coordination committee allowing for local conditions, provided such guidelines respect Community law.</p>	<p>(4) Re-timing of series of slots before the allocation of the remaining slots from the pool referred to in Article 10 to the other applicant air carriers shall be accepted only for operational reasons due to changes in the type of aircraft used or route operated. It shall not take effect prior to the express confirmation by the coordinator.</p> <p>(5) The coordinator shall also take into account additional rules and guidelines established by the air transport industry world-wide as well as local guidelines proposed by the Coordination Committee and approved by the Member State responsible for the airport in question, provided that such rules and guidelines do not affect the independent status of the coordinator, comply with Community law and aim at improving the efficient use of airport capacity. These rules shall be communicated by that Member State to the European Commission.</p>

The Commission's proposal would deviate from and upset established worldwide industry practices by restricting priority re-timing of historic slots to a few specific situations. In doing so, the Commission disregards the many legitimate reasons for

airlines to re-time their slots and wrongly assumes that current re-timing practices are ossifying the market and constraining competition.

In practice, priority re-timing is required to meet market demand and competition, facilitate connections (of major importance for hub-and-spoke networks), optimise the use of aircraft and crew, accommodate changes in ATC patterns and airport infrastructure, etc. By creating the flexibility that allows for multi-airline exchanges, priority re-timing is one of the basic essentials for the smooth running of the entire allocation system. Restricting re-timing to “operational reasons due to changes in the type of aircraft used or route operated” would effectively atrophy existing slot holdings to such an extent that the entire system would fail. It would also create serious practical problems in the case of services between the Community and third countries, where airlines and coordinators would face different re-timing systems.

Moreover, new entrants would not benefit from the proposal. As happens more often than not, a new entrant is not lucky enough to get at the outset exactly the slots it wants. Consequently, for the next corresponding season, with 50% of the available slots going to new entrants, the now incumbent airline would only have the remaining 50% from which it could possibly achieve a re-time. Therefore, the Commission’s proposal to help new entrants will, in reality, penalise them.

In light of the major consequences of the proposed restriction of priority re-timing of slots, this matter – if pursued at all – should clearly be the subject of detailed study and impact analysis, as foreseen for the second phase of the revision of the slot regulation.

5. Art. 8(6) – Routes satisfactorily served by other means of transport

<u>Present text</u>	<u>Proposed text – Art. 8(6)</u>
(none)	(6) In situations where Article 9 of Council Regulation (EEC) No 2408/92 is applicable, the coordinator shall not give priority to requests of air carriers intending to use the series of slots concerned for routes where satisfactory service by other means of transport exists.

This proposed intervention in market access would restrict the freedom of airlines to decide which routes to operate, which is an essential principle of the Single Market. It would lead to discrimination between transport modes and amount to an indirect subsidy of surface transport. Moreover, the whole question of comparison with surface transport is subjective, would give rise to different interpretations (as has been the case with respect to Art. 4 of Regulation 2408/92 concerning public service obligations), and is not within the remit of a co-ordinator. On many so-called short-haul routes there is a very high percentage of connecting traffic for which surface transport is no substitute and where the time-sensitivity of passengers greatly varies.

Any market access restriction of the type proposed, if considered at all, should therefore be the subject of in-depth analysis, as foreseen for the second phase of the revision of the slot regulation.

**6. Art. 8a(1)(c) – Restriction of slot exchanges
[and in conjunction therewith the proposed Artt. 8a(3)(d) and 14(3)]**

<u>Present text – Art. 8(4)</u>	<u>Proposed text – Art. 8a(1)</u>
<p>(4) Slots may be freely exchanged between air carriers or transferred by an air carrier from one route, or type of service, to another, by mutual agreement or as a result of a total or partial takeover or unilaterally. Any such exchanges or transfers shall be transparent and subject to confirmation of feasibility by the coordinator that:</p> <p>(a) airport operations would not be prejudiced;</p> <p>(b) limitations imposed by a Member State according to Article 9 are respected;</p> <p>(c) a change of use does not fall within the scope of Article 11.</p>	<p>1. Slots may be:</p> <p>(a) transferred by an air carrier from one route or type of service to another route or type of service operated by that same air carrier,</p> <p>(b) transferred</p> <p>(i) between parent and subsidiary companies,</p> <p>(ii) as part of the acquisition of the majority of the capital of an air carrier,</p> <p>(iii) in the case of a total or partial take-over when the slots are directly related to the business taken over.</p> <p>(c) exchanged, one for one, between two air carriers where both air carriers involved undertake to use the slots received in the exchange.</p>

This Commission proposal is highly impractical. It deprives the slot allocation process from an important element of flexibility and will not result in improving the effective use of existing capacity, which the proposal aims at.

The proposal is based on the misconception that airlines exchange slots on a one-time basis. In reality, airlines often exchange slots many times. This means that an airline may not use slots received through an exchange, because the slots may thereafter have been the subject of one or more further exchanges. The flexibility permitted through such subsequent and multiple exchanges ensures that in practice the most effective use will be made of slots.

Withdrawing slots that have been the subject of an exchange, on the grounds that these slots have not been used as initially envisaged at the time of the exchange, misjudges the actual exchange system and would unduly penalise airlines (and their customers) in the event that one of the airlines involved in an exchange would, for genuine economic or operational reasons, decide that it cannot use the slots. Moreover, by that time the original slots may have exchanged several times, involving various airlines, and it will be impossible to unravel the process. In practice, a coordinator is in no position to evaluate at the time of confirmation of the exchange whether both parties to an exchange will use the slots, as required under Art 8a(3)(d).

In light of the above, any proposal to modify the current rule on slot exchanges, if contemplated at all, warrants detailed prior analysis.

7. Art. 8a(2) – Exclusion of slot transfers with or without monetary compensation

<u>Present text</u>	<u>Proposed text – Art. 8a(2)</u>
(none)	(2) Slots cannot be transferred in any way between

	air carriers or between air carriers and other entities with or without monetary compensation other than between those air carriers referred to in Article 8a(1)(b).
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This Commission proposal is at odds with the announced intention of the Commission to develop, as part of the second phase of the revision of the slot regulation, a slot trading system as alternative to the present system of allocation. It makes no sense first to remove the trading option in the first phase and then return to it in the second phase. Moreover, instead of increasing flexibility, which is one of the explicit objectives of the Commission, this proposal would have the opposite effect.

The entire question of slot trading will be a key element of the second phase and should therefore in no way be prejudiced by action in the first phase.

8. Art. 10(4) – Restriction of the exceptions to the ‘use-it-or-lose-it’ rule

<u>Present text – Art 10(5)</u>	<u>Proposed text – Art. 10(4)</u>
<p>(5) If the 80 % usage of the series of slots cannot be demonstrated, all the slots constituting that series shall be placed in the slot pool, unless the non-utilization can be justified on the basis of any of the following reasons:</p> <ul style="list-style-type: none"> (a) unforeseeable and irresistible cases outside the air carrier's control leading to, for example: <ul style="list-style-type: none"> - grounding of the aircraft type generally used for the service in question, or - closure of an airport or airspace; (b) problems relating to the starting up of a new scheduled passenger service with aircraft of no more than eighty seats on a route between a regional airport and the coordinated airport and where the capacity does not exceed 30 000 seats per year, or (c) serious financial damage for a Community air carrier concerned, with, as a result, the granting of a temporary licence by the licensing authorities pending financial reorganization of the air carrier in accordance with Article 5 (5) of Regulation (EEC) No 2407/92; (d) an interruption of a series of non-scheduled services due to cancellations by tour operators, in particular outside the usual peak period, provided that overall slot usage does not fall below 70 %; (e) an interruption of a series of services due to action intended to affect these services, which makes it practically and/or technically impossible for the air carrier to carry out operations as planned. 	<p>(4) If the 80 % usage of the series of slots cannot be demonstrated, all the slots constituting that series shall be placed in the slot pool, unless the non-utilisation can be justified on the basis of any of the following reasons:</p> <ul style="list-style-type: none"> (a) unforeseeable and irresistible cases outside the air carrier's control leading to: <ul style="list-style-type: none"> - grounding of the aircraft type generally used for the service in question, or - closure of an airport or airspace; (b) an interruption of air services due to action intended to affect these services, which makes it practically and/or technically impossible for the air carrier to carry out operations as planned. (c) serious financial damage for a Community air carrier concerned, with, as a result, the granting of a temporary license by the licensing authorities pending financial reorganisation of the air carrier in accordance with Article 5(5) of Regulation (EEC) No 2407/92.

The proposed restriction of the exception to the ‘use-it-or-lose-it’ rule, including the limitative catalogue of the consequences of ‘unforeseeable and irresistible cases outside the air carrier’s control’, disregards the reality of airline operations and would result in coordinators putting an undue number of slots into the pool, to the overall detriment of scheduling. In particular, start-up airlines struggling to maintain a credible schedule may be affected. There are many other cases outside airline control that do not lead to grounding of an aircraft type or closure of an airport or airspace but nevertheless justify an exception to the ‘use-it-or-lose-it’ rule, e.g. ATC delays, weather disruptions, and political unrest. The recent strike of bus drivers at Palma forcing airlines to cancel flights is another relevant example.

Therefore, pending further analysis of this matter in the context of the second phase of the revision of the slot regulation, the present ‘use-it-or-lose-it’ rule should remain in place.

9. Art. 12 – Relations with third countries

Present text – Art. 12	Proposed text – Art. 12
<p>1. Whenever it appears that a third country, with respect to the allocation of slots at airports,</p> <ul style="list-style-type: none"> (a) does not grant Community air carriers treatment comparable to that granted by Member States to air carriers from that country, or (b) does not grant Community air carriers <i>de facto</i> national treatment, or (c) grants air carriers from other third countries more favourable treatment than Community air carriers, appropriate action may be taken to remedy the situation in respect of the airport or airports concerned, including the suspension wholly or partially of the obligations of this Regulation in respect of an air carrier of that third country, in accordance with Community law. <p>2. Member States shall inform the Commission of any serious difficulties encountered, in law or in fact, by Community air carriers in obtaining slots at airports in third countries.</p>	<p>1. Whenever it appears that a third country, with respect to the allocation and use of slots at its airports,</p> <ul style="list-style-type: none"> (a) does not grant Community air carriers treatment comparable to that granted by this Regulation to air carriers from that country, or (b) does not grant Community air carriers <i>de facto</i> national treatment, or (c) grants air carriers from other third countries more favourable treatment than Community air carriers, <p>the Commission may, in accordance with the procedure of Article 13(2), decide that a Member State or States shall take measures, including the suspension in whole or in part of the application of this Regulation in respect of an air carrier or air carriers of that third country with a view to remedying the discriminatory behaviour of the third country involved.</p> <p>2. Member States shall inform the Commission of any serious difficulties encountered, in law or in fact, by Community air carriers in obtaining slots at airports in third countries.</p>

In principle, it is entirely appropriate to monitor at Community level the treatment of Community airlines in third countries in terms of slot allocation in comparison with the treatment that third country airlines receive in the EU in this respect. However, when contemplating any measures against third country airlines on grounds of unfair treatment of Community airlines in the allocation of slots in the third country concerned, due consideration must be given to:

- (a) The fact that both the present EC slot regulation and the Commission proposal for revision contain certain provisions under which slots are to be allocated on a priority basis to airlines for the operation of intra-Community routes, thereby creating to some extent a *de facto* inequality in the treatment of Community and non-Community airlines, to the disadvantage of the latter (in particular as a consequence of the proposed Artt. 2(b) and 9(1) and 10(5)).
- (b) The fact that aviation relations with most third countries are governed by bilateral air services agreements concluded by Member States individually and that Community measures against a third country in the absence of an agreed common air transport policy with that country may unduly strain the relations between individual Member States and that country and could result in discrimination between Community airlines.

The Commission's proposal, with its emphasis on the authority of the Commission to decide on action to be taken at Member State level, provides insufficient built-in guarantees against undue interference in third country relations.
