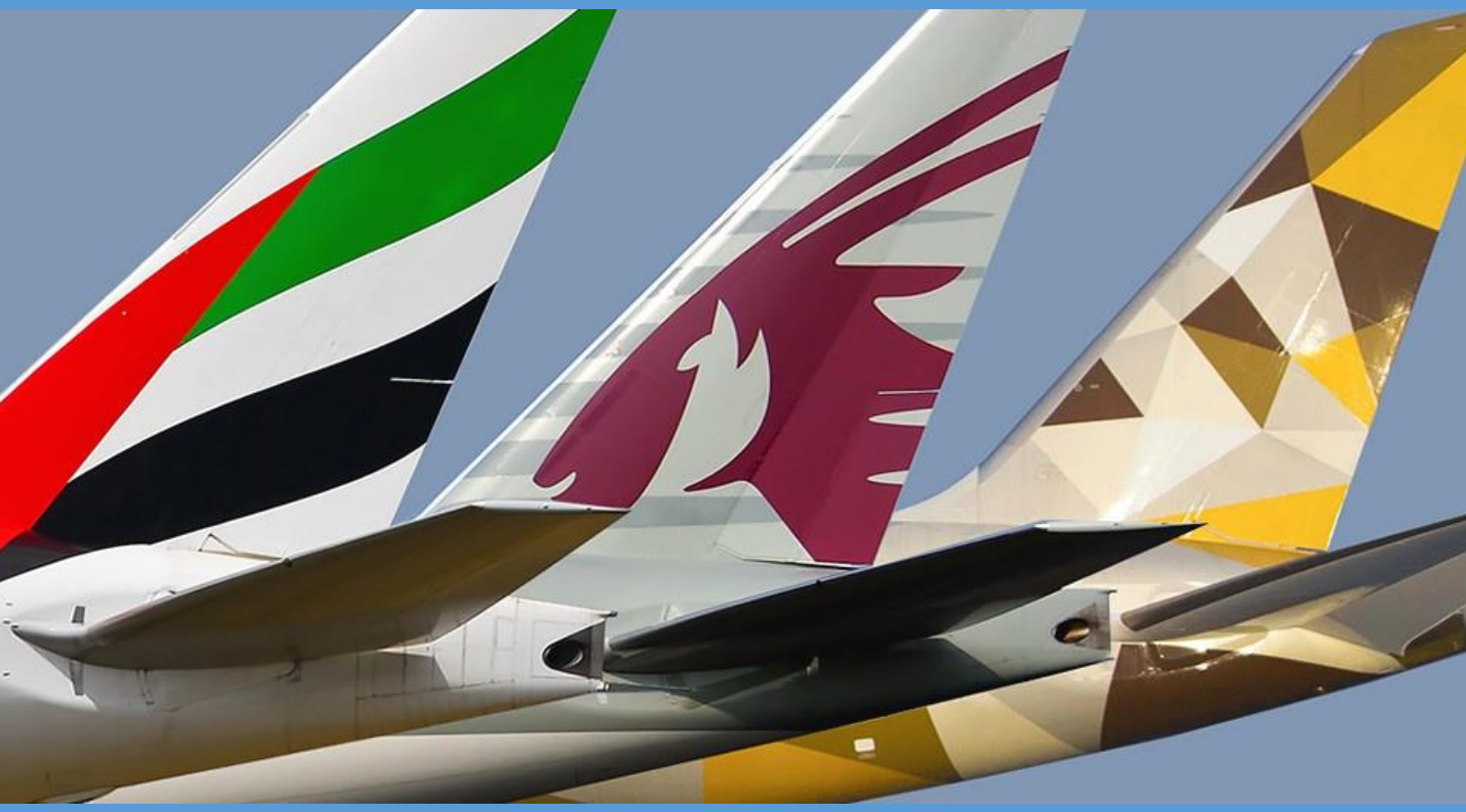
EFFECTIVE ENFORCEMENT OF THE REGULATION ON SAFEGUARDING COMPETITION IN AIR TRANSPORT



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Abstract

Competition is an important element in the EU markets. But, in a global context, there are cases of companies that apply practices affecting competition. One of these cases is the impact of the Gulf state airlines (from the United Arab Emirates (U.A.E.) and Qatar) on the European air transport market. As an answer to these problems, that arose due to ineffective bilateral regulatory frameworks between EU Member States and the Gulf states, the European Commission has proposed a regulation to tackle these issues.

This study has examined to what extent the regulation is effective in enforcement against the practices affecting competition of the Gulf states. Based on a theoretical framework using rational choice institutionalism and an analytical framework (the DREAM framework), this study illustrates that there have been difficulties in the detection process (i.e. high burden of proof, lack of transparency from the Gulf state carriers) and the response process (i.e. applicability of rules and tools). The new proposed regulation provides changes in these processes. Due to changes in the detection, response, and enforcement processes, it is assumed that it is likely that the regulation is effective in enforcement.

Consequently, as the regulation is effective in enforcement, it is assumed, based on rational choice institutionalism, that the behaviour of the Gulf state carriers will change. It is assumed that the shirking and cheating behaviour will decrease and as a result of that, the transaction costs for the Member States will decrease as well. These transaction costs are related to the monitoring and enforcement process against the practices affecting competition and due to effective enforcement from the supranational level, national transaction costs will be lowered.

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1. Introduction

The EU is one of the most sophisticated and integrated supranational organisations and an example of high levels of international cooperation among various Member States (Bickerton, Hodson and Puetter, 2015). As a block of states, representing together one of the world's largest economies, the EU has a significant degree of bargaining power in international relations (Meunier and Nicolaïdis, 2006). This can favour Member States, especially when their individual bargaining power is low. Moreover, when problems occur in international trade relations between a Member State of the EU and an extra-EU country, the EU might be an option for the Member State to sort out such a problem as well (Baldwin, 2006; Meunier, 2005).

As such, the case of the unfair practices affecting competition by Gulf state carriers can be seen as an example for the need of EU action. EU carriers face significant challenges when competing with airlines from the Gulf states. The considerable state aid received by these carriers and the benefits they enjoy from more lenient regulatory frameworks place European carriers at a disadvantage (Lufthansa, 2016). One think piece goes as far as to claim that since 2004 the major Gulf state carriers Qatar Airways, Etihad Airways, and Emirates have received over 52 billion dollars in subsidies and other benefits (Partnership for Open & Fair Skies, 2015)[1]. EU carriers claim to suffer from losses of market share on direct and indirect routes on which they directly compete with these carriers due to these unfair practices. This inevitably contributes to the deterioration of the overall competitiveness of the EU carriers, constituting a significant problem for the carriers and the aviation industry of the EU.

The current regulatory frameworks, based on bilateral regulatory frameworks (rules on competition between the Member States and the Gulf states are, thus, regulated in country pairs[2] and not by the EU) seems to be ineffective, as the enforcement of the rules and tools from the bilateral regulatory frameworks by the Member States seems to be ineffective. In order to tackle this problem, the Commission has proposed a regulation to protect European airlines against subsidies and unfair practices of extra-EU carriers. The proposal of the new regulation begs the question whether this proposed regulation would be effective in enforcement against the unfair practices affecting competition. Therefore, the research question in this study is as follows:

[1] In this study, unfair competition is based on these subsidies that the Gulf state carriers have received. This due to the fact that it is in line with the definition of unfair competition by the Commission in its proposed regulation to tackle unfair competitive practices by extra-EU carriers (Commission, 2017a).

[2] There are a few exceptions, since the US, Canada, Morocco, and various Balkan countries have multilateral aviation agreements with the EU.

"To what extent is the regulation on safeguarding competition in air transport effective in enforcement against unfair practices affecting competition of the Gulf state airlines?"

To answer the research question this thesis synthesizes theoretical and analytical frameworks. To examine the effective enforcement of the regulation, the DREAM framework is used. The DREAM framework provides a framework to analyse five distinctive functions that are related to effective enforcement. Based on these functions, regulation can be effectively enforced or not. Thereby, the DREAM framework is the analytical framework which illustrates the effectiveness of rules and regulations. Additionally, rational-choice institutionalism guides this research conferring an explanation for the motives to develop the regulation and the expectations on how it will impact the actors involved. This theory is used as it the most applicable to this case, as it provides for an explanation on multiple layers in international relation theory (i.e. both intra-EU and extra-EU).

This study shows that the new regulation simplified the detection process for the parties involved. Moreover, the tools that the regulation provide are used within other EU legislation regarding competition as well, which increases the likelihood of application and, thus, enforcement of the rules. Finally, the Commission as the enforcer increases the effectiveness as it has enforced competition policy in the past.

2. Materials and Methods

This study employs a content analysis to study the research question. A content analysis is defined by Babbie (2010) as "study of recorded human communications" (p.333). Content analysis is praised for its flexibility in analysing texts and other human communications (Cavanagh, 1997), while its weakness would derive from the lack of a firm definition and procedures, which, potentially, could lead to less utilization of this method (Tesch, 2013).

Since the research question of this study has the aim to investigate to what extent the regulation on safeguarding competition in air transport is effective in enforcement against unfair practices affecting competition of the Gulf state airlines, an appropriate approach to observe and unpack the main variables in this study is necessary. The independent variable of this study is the regulation, while the dependent variable is (effective) enforcement. For these variables different methods and materials are used in order to examine them.

In order to provide a comprehensive understanding of the independent variable, a content analysis has been conducted on particular sources related to the regulation. Most of these materials were government documents. The main body of sources were from the text of the regulation itself. This source has been chosen, since it represents the necessary information for the analysis of its effectiveness in enforcement. However, in combination with the text on the regulation, other government documents have been used as well. This since these sources strengthened the analysis by providing additional information to the independent variable. These materials originated from the Parliament, the Council, and additional interest groups. This body of literature consisted of 9 documents.

Codes to examine the extent of effective enforcement were based of literature about effective enforcement. The frame for the codes is based on the dimensions of the DREAM framework. Hence, codes have been assigned to the dimensions detection, response, enforcement, assessment, and modification. As such, these codes have been applied to the regulation in order to execute analysis according to the DREAM framework[3].

The literature on theory and the current situation are established as a literature review. Consequently, scientific articles were analysed in order to provide a theoretical framework for the

[3] The framework for the codes can be found in the appendix

analysis and discussion. Hence, the selection of these scientific sources was based on its relevancy and relation to rational choice theory, the theoretical framework used in this study.

Additionally, the theory chapter includes sections about the composition of the regulation and the DREAM framework. The section about the composition of the regulation includes the sub-sections on the problem statement, motives for the regulation, interactions among the main actors, and a description of the regulation. For each of these sub-sections different sources are used to compose the literature reviews. Firstly, for the problem statement scientific articles are used that were related to institutional norms and non-compliance theory. This since this is the basis of the problem in this study. In the second sub-section, related to the motives for the regulation, both government documents and scientific articles are used. The government documents are used to explain the functions of the different institutions in relation to the policies in place. Scientific articles are used in order to add an additional layer of information on this topic. Thirdly, the literature on the interactions among the main actors is based on government documents as well. These government documents originate all from the different institutions of the EU (Commission, Parliament, and Council) and indicate what their actions were related to the development process of the regulation. Lastly, to describe the composition of the regulation, the proposal document of the regulation is used. From this document the most important and relevant features and sections are described to provide a basis for the analysis chapter.

The literature review on the current situation consists of a mixture of scientific articles, news articles, and government documents. The scientific articles are most prominent in this chapter, as these provide the explanations for the aviation regime in place and the air transport markets in the EU and the Gulf states. These sources are, therefore, selected based on the relevancy to these features. Secondly, news articles are used in order to provide information for the description of the current situation, as well as examples in the analysis of the regulation. The articles that are selected concentrate on the relation between the EU Member States and the Gulf states regarding the competition issues of the Gulf state airlines. After searching news databases, a selection of a total of 16 news articles are included in this thesis. These articles derive from news papers from a number of countries (e.g. the Netherlands, the United States, and Belgium) and were published in a period from 2015 until 2017. Lastly, government documents from the Commission, on the topic of unfair practices from the Gulf state airlines, are included to provide an additional layer of information to this chapter.

The selection of government documents and news articles in this paper is done based on conditions relating to the time of publication and the relevancy to the subject. These sources are recent (i.e. information that is not older than 3 years). This due to the fact that the issue has been put on the agenda around three years ago, particularly by the publication of the white paper of the Partnership for Open & Fair Skies (2015). Hence, information from the aforementioned sources has been selected from 2015 onwards. Moreover, the documents that are included are selected based on relevancy to the subject. This selection process is conducted through analysis of the sources after these were found in databases, based on key word searches (e.g. “aviation” (and) “Gulf state(s)” (and) “competition”). After the selection of the data, codes have been applied to the data. These codes were derived based on open and axial coding, as pre-existing knowledge as well found knowledge during the coding process were used to create the codes (Boeije, 2009). The codes illustrated the most significant and relevant data and quotes to be included in this thesis.

Overall, the study consists of qualitative literature which is used in order to provide a literature review on the analytical and theoretical frameworks in the study. Moreover, the qualitative literature provides data necessary for the analysis, as it constitutes the foundation of description of the current situation, the units of analysis, and examples related to the subject.

3. Current Situation

This chapter begins with descriptions and explanations of the focal cases. To begin, the legal regimes within aviation are described. Thereafter, the air transport markets of the Gulf states and the EU are introduced. The main characteristics and structure of both of these markets will be outlined. The chapter proceeds with a discussion of the interests and the positions of the case study, i.e. the Netherlands, towards the unfair competition practices of the Gulf state airlines.

3.1 Aviation Regimes

Aviation is an international endeavour from its core existence. To regulate international aviation an international regime was established as early as 1944 when the Chicago Convention was set up. The Chicago Convention established a framework for international aviation. This framework is based on bilateral agreements about the traffic rights between two countries. The legal regime prohibits all international commercial passenger transportation (Havel, 2009). Bilateral agreements are the exception to this regime that allow aviation between two countries. The system is based on the principle of sovereignty, placing nation-states in the driver's seat with regards to deciding when airlines could fly to their country, how often they could fly to their country, etc. (Falkner and Müller, 2013). Today, the international aviation regime is still governed by the principle of sovereignty. A majority of all countries worldwide still only provide traffic rights to airlines that operate routes from their country's territory to the territory from the airline.

However, changes have occurred to these strict bilateral agreements by liberalization efforts in the United States and the United Kingdom. These efforts, called 'open skies' policies, changed the landscape of international aviation (Falkner and Müller, 2013). Bilateral agreements, with strict rules on, for example, which specific carrier could fly or what the price for a specific ticket should be, were changed into liberal agreements that allowed any airline to fly between the territories of the countries involved in the bilateral agreement. This means that currently there are bilateral agreements in place between EU Member States and extra-EU countries with a liberal nature, i.e. based on free competition.

3.2 Air transport market in the Gulf states

Aviation is one of the economic domains where the global presence of the Gulf states has been most visible. From the early 2000s onwards, the major airlines in the Gulf states began expanding and caught the attention of the world by placing large orders for new aircraft during international air

shows. As the governments of the Gulf states perceive aviation as a cornerstone of their economies, airlines from the Gulf states have grown significantly in recent years. For example, Dubai International Airport overtook London Heathrow Airport as the busiest airport for international passengers in 2015 (Ulrichsen, 2016). The growth of the airlines from these states is remarkable. Hvidt (2009) identifies the key parameters for the development path of Dubai. From these parameters the fact that it is government-led development is most important in the case of the unfair competition practices. As not the private sector (which is financially strong, but politically weak) but the government is leading development in Dubai, financing is also derived from the government.

This fact is also the foundation for the behaviour that is perceived as practices affecting competition. The practices affecting competition in this study are the subsidies that the Gulf state airlines receive. The Partnership of Open & Fair Competition (2015) has compiled evidence of direct funds that are transferred to the major airlines of the Gulf states (Emirates Airlines (Emirates), Etihad Airlines (Etihad), and Qatar Airways). These funds are transferred through different transactions, ranging from more indirect advantages (such as free land) to direct transactions (such as government loans without the obligation of repayment and government capital injections). The Partnership of Open & Fair Competition (2015) claims that the Gulf state airlines have received a total of 52 billion dollars in subsidies and other benefits.

Additionally to the subsidies that the Gulf state airline receive, there are other reasons to explain their strength. Firstly, the Gulf state carriers face, among other things, a fair amount of absence of political and legal restrictions. Moreover, their geographical position is very beneficial for international air traffic (Ulrichsen, 2016). This geographical position allows airlines from the Gulf states to connect many locations in the world with only one stop (e.g. routes between Europe and Australia). Therefore, the airlines from the Gulf states have been dubbed "global super connectors" by the Economist (The Economist, 2015; Ulrichsen, 2016). On top of that, the airlines generally have lower costs than incumbent airlines in Europe[4]. This is related to favourable tax, labour conditions, and the relatively new fleet, which means that maintenance and fuel costs are lower. Vespermann, Wald, and Gleich (2008) state that personnel costs for the Gulf states' carriers is approximately 48% lower, fees are 39% lower, and fuel costs is 20% lower on average compared to incumbent European carriers. These lower costs is linked to the aforementioned support from the Gulf states' governments to their airlines, as the governments own and operate the airports and oil supplies.

[4] Incumbent airlines are the former European flag carriers. Examples include Lufthansa, Air France, KLM, and British Airways.

The question that arises with the growth of the airlines in Gulf states is how is this growth sustained? In other words, where does the demand for their services come from? According to Vespermann et al. (2008) the demand comes from three markets. Firstly, the local Middle Eastern region, which is both traffic from and within the region. The second market is the market for traffic to the Middle East from other regions. The third market is the market for long-haul stop-over flights. This is, for example the market for traffic between Europe and South-East Asia. Through the hubs of the Gulf states' carriers, a passenger will transfer from its flight from Europe to its flight to its South-East Asian destination. This is the most important market for the Gulf states' carriers and most demand is derived from this last market. Therefore it comprises the main customer base of these airlines (O'Connell, 2011).

Vespermann et al. (2008) and O'Connell (2011) argue that the third market is of such importance that its business model mostly relies on it. This since the demand from the first and second markets is not sufficient for the capacity (i.e. size of the fleet and subsequently the amount of seats offered) that the airlines deploy. Emirates, for example, deploys 50% of its capacity to intercontinental services, while airlines such as Lufthansa and Air France only deploy around 30% of their capacity to intercontinental services. This is mostly due to the relatively small population of the Gulf States itself.

Gulf states' airlines impacts on the market are mostly felt by airlines which operate long-haul services from Europe and Asia. The airlines most strongly affected by the Gulf states' carriers market expansion are British Airways, Air France, and Lufthansa in Europe, and Singapore Airlines and Cathay Pacific in Asia. A study by Grimme (2011) posits that it is likely that incumbent airlines from Germany (including Lufthansa) are lowering fares due to the competition from Gulf states' airlines. However, no capacity for flights to Asia has been lost by these incumbent airlines in the period up to 2008 from their hub airports. This is mostly due to shorter flights by German airlines from their hub airports to Asia and schedule constraints of Gulf states' airlines for flights from secondary airports in Germany to Asia. Some of these airlines have tried to cope with the increased competition from the Gulf states. Lufthansa, for example, tried to limit the landing rights for Emirates to two cities in Germany: Stuttgart and Berlin. The German authorities have restricted Emirates to flying to four German destinations (Frankfurt, Munich, Hamburg, and Düsseldorf) and only allows the carrier to add Stuttgart and Berlin to their network as long as it lowers the capacity on operations to their other German destinations (Reuters, 2012). Emirates has refused to do that. Thus, Lufthansa has been relatively successful in limiting Emirates' expansion in Germany (Vespermann et al., 2008).

The airlines of the Gulf states are rapidly growing and strengthening their market position in the airline industry. The growth of the airlines can be linked to the support that they receive from the government, since air transport is a cornerstone of their economic policies. This includes the aforementioned subsidies of 52 billion dollar. This leads also to advantages that Gulf states have over incumbent airlines over the world.

Furthermore, as the subsidies are perceived by several European actors (including several Member States and airlines) as practices affecting competition, the Gulf state airlines do not perceive these subsidies as unfair behaviour. All three airlines have stated that they disprove the allegations of the unfair behaviour (Euractiv, 2015; Qatar Airways, 2016). Moreover, their reaction to the allegations is that the European airlines and Member States complaining about their subsidies are applying double standards, as major European carriers have received state-aid when it was not considered illegal yet (Kroet, 2018). As such, Etihad also stated that it advocated competition, consumer choice, and the respect towards the open skies agreements (Etihad, 2015), which can be harmed by the application of the regulation.

3.3 Air transport market in the EU

The EU air transport market is characterised by its deregulation and high degree of competition. The creation of the Single European aviation market in 1992 is the outcome of the deregulation process of the European aviation market. It is composed of a number airline types, which can be distinguished by their business models. On the one hand, there are the traditional national flag carriers. These are mostly the major airlines from one particular country that have mostly flourished in the time when the EU aviation market was still highly regulated and significant regulations existed to protect national markets and national competitors from foreign competitors. Many EU national flag carriers used to be state-owned, such as Air France (Doganis, 2009).

National flag carriers have had difficulties adapting to the changed environment when the EU liberalised their aviation market. One implication of liberalisation is that intra-European flights could be executed by any airline based in the EU. This means, for example, that in the deregulated situation a flight between Amsterdam and Paris could be executed by any EU airline, while in the regulated period only Dutch or French airlines could execute these flights. This deregulated environment was an enabler for low-cost airlines. These adaptive airlines were eager to operate from various bases throughout Europe, and become pan-European airlines. Therefore, low-cost carriers are the second type of airlines that are present in the EU, beside the traditional flag carriers.

Deregulation has also led to consolidation on the EU aviation market. Flag carriers, which were previously bound to national, usually, protective regulations, are able to merge and acquire other EU airlines in the deregulated environment. This process has taken place, for example, by the merger of KLM and Air France, Iberia and British Airways, and the acquisitions of Swiss and Austrian Airlines by Lufthansa. The EU market is, therefore, integrating more and more and national involvement, concerning regulation, in airlines has decreased. As a result, the mandate of the EU concerning aviation regulation has significantly increased over the years (Doganis, 2009).

A level playing field has been created among competing airlines headquartered in the EU by the creation of the Single European aviation market. Protective national regulation was changed into a legal system based on EU competition law, encouraging free and fair competition. Therefore, airlines in the EU have to obey to the competition laws that are imposed to them by the EU, while this is not necessarily the case for airlines which are based outside the EU.

There are various European flag carriers that have lobbied to get these rules concerning competition to be implemented on the global level as well, i.e. between the EU and the Gulf states. However, not every European flag carrier has significantly lobbied to get this issue on the agenda of the EU. The most important and largest airline group that does not lobby for this issue is IAG (International Airline Group), the airline group consisting of British Airways and Iberia. The airline group, which is owned for 10% Qatar Airways, is one of the few European traditional carriers that had no problems with the Gulf states carriers. It had also pulled out of a European trade association, led by Air France-KLM and Lufthansa, which was opposing the Gulf states' carriers practices. IAG stated that they pulled out of this association due to inconsistency with the position of IAG (The Economist, 2015). Therefore, a polarised landscape is present in the European airline market, where, on the one hand, there are traditional airlines significantly pushing for regulatory changes to fight unfair practices (i.e. subsidisation and unfair pricing practices (Lebray, 2015; Commission, 2004a) by the Gulf states, and, on the other hand, airlines which pursue a different strategy and position themselves within the control sphere of Gulf states' carriers.

3.4 Relations on air transport between the Member States and the Gulf states

Currently, the relations between the European Member States and the Gulf states are based on bilateral agreements. These agreements are "open skies" agreements that are an addition to the 1944 Convention of Chicago agreement. Most of the agreements are relatively similar and outline

the rules concerning competition among airlines from the Member States, on the one hand, and the Gulf states, on the other hand. These rules generally state that airlines that exploit a route between the territories of the Member States and the Gulf states need to bear in mind the interests of the other airlines operating in one of both territories in order to avoid that these will be affected unreasonably. Moreover, airlines need to align their services with customer demand on those routes. This means that airlines need to take the loading factors and their capacity into consideration. Hence, it states that a level playing field needs to be in place for competition.

The agreement also states the actions that both parties can execute when an airline would act in accordance with the terms stated in the agreement. There are basically two actions that the parties can take. First, when a dispute arises, the parties need to solve this, in first instance, by negotiations. When no solution is reached through negotiations, the parties will make use of a procedure in accordance with article 85 of the Chicago Convention. This article states that an arbitral tribunal should be formed with arbitrators put forward by each party. This tribunal shall settle the procedure and provide its decision by majority vote[5]. Secondly, the parties have the right to revoke the rights to exploit a route between its territory and the territory of the other party by an airline from the other party's territory. However, the agreements also states that this can only be done after consultation with the other party.

Looking at the application of the dispute settlement articles, it becomes apparent that it is not used by any of the parties. Moreover, a regulation of the EU from 2004 that needs to address this issue as well and lays down procedures to follow is nor applied by any of the parties nor ever. This is due to the fact that the regulations in force now are perceived as being ineffective (Fiorretti, 2017c). Therefore, there is no specific case that can be outlined to illustrate what happened when these procedures are applied. However, a possible scenario of what would happen to a Member State when it acts bilaterally with a Gulf state could be found in the example of Canada.

In 2010 Canada rejected these airlines more landing rights in Toronto. The U.A.E. responded by evicting Canadian troops from a base in Dubai which was used for combat in Afghanistan. Moreover, the U.A.E. installed visa requirements for Canadian nationals to enter the U.A.E., including fees of C$1000. The measures taken by the government of the U.A.E. have not caused an increase in landing rights in Toronto, since Emirates have not obtained more landing rights since 2010 (Campbell, 2017).

[5] Convention on International Civil Aviation (1994)

Another illustrative case that can be put forward in which a European Member State is involved. The reaction of the Dutch government towards the expansion of Qatar Airways is a prime example for the consequences the actions of the Dutch government have on the relationships between the two countries (Cohen, 2015a; Proper, 2015). The CEO of Qatar Airways threatened the Dutch government, after it was not providing new landing slots to his airline, that it could face repercussions for infrastructural contracts in Qatar for Dutch firms (Proper, 2015). The fact that a CEO of an airline is able to threat the Dutch government illustrates the direct lines that the airline has with the Qatari government. Additionally, it illustrates the weakness of a single Member State acted bilaterally with a Gulf state.

These cases illustrate the close ties between the Gulf state airlines and their governments and the willingness of these governments to take action when their interests are frustrated. Moreover, it also illustrates that the measures that are taken are not corresponding with the procedures from the open skies agreements. The case between Canada and the U.A.E. might possibly lead to a similar scenario for European Member States when they act bilaterally and when they frustrate the interests of the Gulf states significantly, as the threats of the CEO of Qatar Airways to the Netherlands illustrate.

All in all, the bilateral agreements between the European Member States and the Gulf states have not lead to procedures, on bilateral basis, to effectively enforce against practices affecting competition. This as a possible consequence of the weakness of a single Member State to act on a bilateral basis against the Gulf states, as the examples of the Netherlands and Canada have illustrated. Additionally, the overall problem of practices affecting competition by the Gulf state airlines cannot be solved on a bilateral basis within the European community, due to the differentiated interests among the Member States. This is an additional layer to the weakness of acting on a bilateral basis. Thus, a bilateral approach towards the problem of practices affecting competition by the Gulf states can be perceived as ineffective.

4. Theory

In this chapter the theoretical perspectives and analytical frameworks that will be used in order to analyse this case will be explained. Firstly, the theoretical perspectives towards effective institutional frameworks will be outlined, including perspectives on the gains that collective action can have. Subsequently, the analytical framework to assess under which conditions rules and institutional frameworks are effective will be presented, i.e. the DREAM framework.

4.1 Conceptual Framework: The Regulation

The regulation, called the regulation on safeguarding competition in air transport, repealing Regulation (EC) No 868/2004, has been proposed by the Commission on 8 June 2017 as an answer to the problem of unfair practices affecting competition of the Gulf state carriers. This chapter unpacks the creation of the regulation, as the foundation of the problem is discussed, while the reaction to this problem by the actors and their motives are explained afterwards.

4.1.1 Foundation of the Problem of Unfair Practices affecting Competition: Institutional Norms and Non-Compliance

Different norms apply and are adhered in the EU, including its Member States, compared to the Gulf States, which leads to market failure. Institutional norms can be defined as "the expectations of behaviour or practice that are acceptable within an institutional environment" (Wong & Boon-itt, 2008; pp.400-401), in which institutional environments "are characterized by the elaboration of rules and requirements to which individual organizations must conform in order to receive legitimacy and support" (Scott,1995; p. 132). The norms within the EU differ from the norms in the global context. Within the European community, fair competition is the norm. This norm is derived from the legal basis of the EU aviation market, which is the competition law from the Treaty on the Functioning of the EU. EU competition law prescribes rules relating to four main policy areas: mergers, state aid, market dominance, and cartels. As such, EU competition law dictates the conditions for fair competition as well. Therefore, the European aviation industry functions on these laws and fair competition is present. However, on the global level, this is not the norm. There are different norms regarding fair competition in the aviation sector in different countries. Therefore, there is a diffused perspective towards fair competition and no global system or institutional environment that prescribes fair competition to be the norm. The norms that apply in the Gulf states are different from those at the EU level. As described in the previous chapter, the airlines in the Gulf states are government-led. Moreover, the governments of the Gulf states are based on neopatrimonialism, "which implies that the regime is organized around the ruler as an individual, maintaining other

members of the elite in a relationship of personal dependence on his grace and good favour" (Hvidt, 2009; p.400; Herb, 1999). This illustrates the distinguishing norms between the EU and the Gulf states. These differing norms can explain the mismatch of behaviour and expectations between the EU and the Gulf states.

The non-compliance from the Gulf states airlines is not solely related to the bilateral agreements of the Netherlands and the Gulf states. Other Member States are also affected by the matter, as discussed earlier. Each of the affected Member States, however, has different interests towards the non-compliance of the Gulf States. Member States such as the Netherlands, Germany, and France want to fight the unfair practices, while this is not necessarily a prime interest of the United Kingdom, for example. As discussed in the previous chapter, a polarized view towards this issue is present among the Member States. This misalignment regarding goals is a factor that enables the Gulf states carriers to pursue their non-compliance strategy through the EU. The misalignment of goals is created due to the fact that numerous actors are present within the institutional environment, and can partly explain the non-compliance of the Gulf states airlines.

4.1.2 Motives for Regulation

To develop regulation, regulators have different forms of motives. These can be divided by functional and political motives. As the regulation in this case is developed in the domain of competition policy, it is important to understand the functional motives for the creation of competition policy. Basically, competition policy is developed to prevent anti-competitive practices and thereby "encourage enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality" (Commission, 2015a). This is the functional, and thus the justified motive, for the development of competition policy.

Focusing more on the layer beneath competition policy, the layer of state aid control is most relevant. State aid encompasses "an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities" (Commission, 2016). The functional motive behind state aid control is to regulate the exemptions and to monitor and enforce the violations of unjustified state aid. Thus, as state aid is essentially prohibited, the motives behind state aid control are there to ensure fair application of state aid to provide for a well-functioning and equitable economy (Commission, 2016).

In this case, state aid is provided to the Gulf state carriers from their respective governments. The motives from the Gulf states to grant these advantages to their carriers is related to the

aforementioned importance that these airlines have for the Gulf states' economies. On the other hand, the motives from the Member States to oppose the state aid granted by the Gulf States is related to protectionism of their own airline industries. Both of these motives are more political motives rather than functional motives. Hence, it can be stated that the motives for the creation of the regulation is based on the protectionist views of its Member States. This is in line with the statements of Erixon and Sally (2010) on protectionism within the EU, who stated that "the EU has not markedly increased traditional protectionism (e.g. tariffs and simple non-tariff barriers), but there are signs of regulatory protectionism" (Exiron and Sally, 2010; p.16).

4.1.3 Main Actors and Interactions

The problems and motives on which the regulation are based have been explained. In this section the focus is put on the process of developing the regulation and in specific the interactions between the main actors in this process. These are the Commission, the Parliament, the Council, and the Member States. These actors are related to the main concept of effectively safeguarding competition mainly due to their role in initiating the process of creating the regulation and the creation of the regulation. The actors are subdivided under the role that the Commission and the Council have played in the process of developing the regulation.

4.1.3.1 Commission

The Commission, in its role as legislator, has developed the regulation. This regulation has been developed within two mandates that the Commission has received from its Member States, i.e. state control within EU competition policy and its aviation strategy. The regulation is an implication of the aviation strategy it has proposed and created in 2015. As part of the Aviation Strategy it is one of the key priorities to "[tap] into growth markets, by improving services, market access and investment opportunities with third countries, whilst guaranteeing a level playing field" (Commission, 2015b; p.3). Hence, providing a level playing field for competition is an important element of this Aviation Strategy. As is further explained in the strategy proposal: "for the EU aviation industry to remain competitive, it is essential that market access is based on a regulatory framework which promotes EU values and standards, enables reciprocal opportunities and prevents distortion of competition" (Commission, 2015b; p.4). As a result of this, it has developed the new regulation.

The process of the development of the regulation is initiated by both some of the Member States and the Parliament. Several Member States had expressed the need to safeguard European airlines from unfair practices from third country airlines. Examples include Germany, France, and the Netherlands (Euractiv, 2015, Fioretti, 2015; Rijksoverheid, 2016a). In these cases, the Member States

supported their national airlines, who expressed the same need as well. The interaction between the Commission and these Member States was mostly one-sided, through public statements from representatives of the Member States' governments to the Commission, and Commissioner Bulc in particular (Euractiv, 2015). In addition to the Member States, the Parliament was involved in the initiation for the regulation also. The Parliament has stated in various resolutions the need to alter the former regulation that dealt with safeguarding competition, but which was ineffective. As such, the Parliament welcomed the revision, although it stressed that "neither an unacceptable trend towards protectionism, nor, on their own, measures to ensure fair competition can guarantee the competitiveness of the EU aviation sector" (Council, 2017a; p.2). Thus the role of the Member States and the Parliament in the process of developing the regulation is mostly based on the initiation and agenda-setting of the issue, with the result of the creation of the regulation.

4.1.3.2 Council

While the interactions with the Commission have illustrated the expressions of the actors that stress the importance of the need to safeguard competition and to revise the former regulation, the interactions within the council illustrate the expressions of other actors, that might not have this as a main interest as well. Consequently, these interactions also show the issues concerning misalignment of goals among the Member States.

The Council has dedicated a total of 11 meetings on the assessment of the regulation and its impact assessment. In this process, there was a division among the delegations of the Member States in their perspective on the issue. On the one hand, there was a group of Member States that supported the objectives regulation and the outcomes impact assessment, while, on the other hand, there was a group of Member States that did support the objectives of the regulation, but expressed concerns to several parts of the regulation and the outcomes of the impact assessment. The group that fully supported the regulation and the outcomes of the impact assessment included the delegations of Germany, France, and the Netherlands, while the delegations such as Italy and the UK had concerns. Thereby, the UK even has reserved the regulation for parliamentary scrutiny. Hence, this division is in line with the goal alignment issue as well (Council, 2017a).

All the actors involved in the process recognize the ineffectiveness of the current institutional framework in relation to tackling unfair practices of extra-EU airlines. Therefore, various actors (including the Commission, the Parliament, and several Member States) have called upon action and are an integral part of the initiation of the regulation. Nevertheless, safeguarding competition in the international aviation sector is not the main interest of each Member state of the EU, which is mainly

expressed through the Council. Therefore, the position of the Council towards the issue is more critical towards the means of safeguarding competition in comparison to the Commission, the Parliament, and the various Member States.

4.1.4 Composition of the Regulation

The regulation that is created by the Commission, is called the regulation "on safeguarding competition in air transport, repealing Regulation (EC) No 868/2004". This means that the regulation is a replacement for the former regulation 868/2004. As mentioned earlier, this regulation is about the "[…] protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community" (Commission, 2004a). The new regulation is broader in its reach, as its purpose is to lay down rules on the investigation and adoption of redressive measures on practices affecting competition and violation of applicable international obligations (Commission, 2017a). The regulation is, thus, twofold, since it is addressing both the practices affecting competition and the violation of applicable international obligations. In this context the regulation defines practices affecting competition as "discrimination and subsidies" (Commission, 2017a; p.13) and the violation of applicable international obligations as "any obligations that are contained in an international air transport or air services agreement to which the Union is a party or any provision on air transport services included in a trade agreement to which the Union is a party, and which relates to practices that may affect competition or other conduct relevant to competition between air carriers" (Commission, 2017a; p. 13). Hence, the regulation clearly mentions the practices of unfair competition and it includes the obligations of extra-EU countries have from their bilateral agreements with EU Member States. Thus, the obligations of the bilateral agreements between the Netherlands and the Gulf states are also included in the reach of this regulation.

According to the regulation, the Commission can start an investigation as a written complaint is submitted with the Commission by a Member State, a carrier from the EU, or an association related to a carrier from the EU. Moreover, the Commission can also initiate an investigation by itself. In order to initiate an investigation into the practices of extra-EU air carriers, prima facie evidence need to be added to the complaint. This applies to both the Commission as well as the written complaints by the parties mentioned before. Whenever the Commission starts an investigation, it will investigate whether there is an violation of applicable international obligations or practices affecting competition, adopted by a third country carrier that injure or threat to injure carriers from the EU. In its investigation the Commission may seek the assistance of a Member State, which shall do whatever is necessary to assist the Commission in its investigation. In its investigation, the

Commission may seek all the information it deems to be necessary to come with results (Commission, 2017a).

As the investigation may need information of third country carriers, the Commission may ask for this information. However, there may be cases of non-cooperation. Non-cooperation is defined in regulation as "cases where access to the necessary information is refused or is otherwise not provided within the appropriate time limits, or where the investigation is significantly impeded" (Commission, 2017a; p.17). In this case the findings of the Commission's investigation "[…] shall be made on the basis of the available facts" (Commission, 2017a; p.17). Hence, a case of non-cooperation does not lead to a case in which no decision can be made on redressive measures.

When the findings of the investigation of the Commission show that there has been a violation of applicable international obligations or practices affecting competition have been undertaken by third country carriers, the Commission can impose redressive measures to the carrier in question. These redressive measures are financial duties or any measure of equivalent or less value. These redressive measures should be proportional and shall not exceed the injury or threat of injury that they have or would have caused to EU carriers. In order to determine what redressive measure will be taken, the Commission will be assisted by a committee. The committee will work based on an advisory procedure as laid down in regulation 182/2011 (Commission, 2011).

Redressive measures will not be taken in every case in which an injury or threat of injury for the violation of applicable international obligations or practices affecting competition take place. This due to the fact that the regulation mentions that in the case the redressive measure would counter the interest of the EU. This means that the Commission should take interests from other parties from the EU into consideration when it will impose redressive measures to third country airlines.

4.2 Theoretical Perspectives

The problems that are described in the previous chapters are based on two different problems. The first problem is related to differentiating norms between the EU, including its Member States, and the Gulf states. The second problem is related to goal alignment among the Member States towards the issue in this case. In this chapter, rational choice institutionalism will be used to explain the theoretical motives to develop the regulation. This theory is used since it aims to explain the behaviour and actions of individual actors within various international political arenas (i.e. extra-EU as well). This is most applicable to this case, as the problems related to the development of the

regulation derive from more layers, i.e. intra-EU (goal alignment issues) and extra-EU (institutional norms) interactions.

4.2.1 Rational Choice Institutionalism

The two problems indicate that there are issues with differing norms and the amount of actors. In order to provide an theoretical explanation to these problems, rational choice institutionalism is introduced. This type of institutionalism is derived from rational choice theory, which "[…] is based on the idea that human beings are self-seeking and behave rationally and strategically. They form their preferences on the basis of their interests" (Cini, 2010). This type of behaviour does not constitute wrong doing in itself. In a perfect competitive market rational choice behaviour is common and accepted. However, in a situation where there is no perfect competition and the good is a common pool resource (in this case airways, that is the route from one destination to another, and airport slots, that is the right for an airline to take off and land at an airport) rational choice behaviour can cause problems. A theorem based on the allocation of airport slots illustrates that the outcome of allocating slots in a liberalized manner to different airlines which operate on a similar route result in an efficient outcome on this route (i.e. efficient use of the slot and thus the route) compared to allocating slots to historical or first users (i.e. airlines that own slots due to the fact that they used to own these in the past). This theorem holds only, however, under the condition of perfect competition and information, which means that there is no possibility of strategic behaviour from the producer (in this case the airlines) (Senguttuvan, 2007).

Thereby the addition of institutions are necessary in this situation. Institutions encompass three aspects, namely "[…] formal rules, informal constraints (norms of behaviour, conventions, and self-imposed codes of conduct), and the enforcement characteristics of both" (North, 2016; p.9). Institutions attenuate behaviour of actors in such a way that negative externalities associated with certain self interested behaviour is altered. As such, institutions can be added into rational choice theory. In that case, institutions act as intervening variables. This means that the institutions do not alter the preferences of the actors involved, but merely affect the ways in which the actors pursue their preferences. Hence, changes or additions of, for example, institutional rules, impact the behaviour of actors, as this will be reconsidered in order to realize or maximize their preferences in a strategic manner (Cini, 2010; Shepsle and Weingast, 1987). Therefore, the preferences of the actors are fixed. Moreover, the strategic calculus of behaviour of the actors is an important element of rational choice institutionalism as well. The behaviour is assumed to be based on strategic reasoning and on the likely behaviours of other actors. As such, institutions impact the strategic interaction of the actors. As, for example, enforcement mechanisms can be used to reduce the uncertainty of

behaviour of actors. Institutions can, thus, lead "[…] actors toward particular calculations and potentially better social outcomes" (Hall and Taylor, 1996; p.12).

4.2.2 Transaction costs: monitoring and enforcement costs

As behaviour is attenuated by institutions, institutions furnish lower transaction costs as well. Transaction costs are basically "[…] all those costs incurred in operating an economic system" (North, 2016; p.6). Under the neoclassical behavioural assumption of wealth maximization and rational choice behaviour of self-seeking interests, actors would maximize their opportunities. In other words, when cheating or shirking pays off, an actor will cheat or shirk. In this case, the misalignment within the interests of the EU aviation market and the misalignment of norms between the EU and the Gulf states constitute cheating and shirking behaviour from various actors. This raises transaction costs. However, transaction costs can be lowered when institutions are introduced (North, 2016). As the level of transaction costs per political transaction is determined by institutions, transaction costs can then be lowered by different structures of organization (Caballero and Soto-Oñate, 2016). Hence, when actors decide to organize themselves, and thus decreasing the amount of actors, transaction costs will be reduced. This due to the fact that a lower amount of actors eases the process of actors agreeing on changes (Ostrom, 2009a).

Focusing in on the transaction costs, two types of transaction costs tend to be positively influenced by the introduction of institutions and a decrease in the amount of actors. These types are the monitoring and enforcement costs.

In this case the current actors within the aviation regime between the EU and Gulf states have a significant amount of rules between them (i.e. separate bilateral agreements). Reducing the amount of actors, would lead to less rules, which would simplify the institutional setting and would therefore decrease monitoring and enforcement costs as a collective. Consequently, as actors within the institutional setting "have to bear the cost of monitoring, they are apt to craft rules that make infractions highly obvious so that monitoring costs are lower. Further, by creating rules that are seen as legitimate, rule conformance will tend to be higher" (Ostrom, 2009b; p.282). This would also lead to better goal alignment, as both less actors and less rules, which would also be more legitimate, are present. Hence, actors "[…] can potentially achieve better outcomes collectively than acting individually by reducing barriers to mutually advantageous collaborative action as represented by the transaction costs required for achieving joint projects" (Feiock, 2013; p.399). This is in line with the delegation of power to the EU, as Pollack (1997) states that most functions that are delegated to the

EU level are mostly based on monitoring compliance and enforcing treaty provision, and solving problems of incomplete contracting, thereby also lowering monitoring and enforcement costs.

As monitoring and enforcement costs will be lowered, and the enforcement is executed in an effective manner, rational choice institutionalism would expect that the incentive of the actors that were cheating or shirking in the current situation alter their behaviour to be more compliant towards the institutional setting. Thus, theory expects that a lower amount of actors would lead to lower transaction costs. In this case that would mean that delegation of power to the EU will lead to a situation in which the EU will interact with the Gulf states. This would mean that the EU should provide for lower transaction costs. The second expectation is that if problems with goal alignment are reduced, monitoring costs and enforcement costs are lowered, as rules are more effective. Focusing on this case, this would mean that goal alignment is achieved through the EU, as collective collaboration through the EU has resulted in a single voice towards the Gulf states. However, it is important to note that these collective gains (i.e. the lower transaction costs on monitoring and enforcement) can only be present when rules are effective. This consequently begs the question under what conditions rules are effective? That will be analysed through the DREAM Framework.

5. Analysis of institutional mechanism

In this chapter the institutional mechanism, the regulation, will be analysed. In order to conduct this analysis the DREAM framework will be used as the analytical framework. As such, the effectiveness of the detection, response, enforcement, assessment, and modification processes within the regulation will be analysed. Based on this analysis a conclusion can be drawn whether the regulation is an adequate means for effective enforcement.

5.1 DREAM Framework

In order to analyse the effectiveness of regulation, Baldwin, Cage, and Lodge (2012) suggest a framework, i.e. the DREAM framework. This is "[…] a framework for identifying those challenges that are encountered in carrying out a number of very different functions. It directly addresses the need to deal with change through performance assessment and strategic modification" (Baldwin and Black, 2008; p.76). Moreover, the distinctive approaches that need to be taken in order to deal with these challenges and interactions between the actions taken to the various challenges are clarified in this framework (Baldwin and Black, 2008). Hence, the DREAM framework provides for an analytical framework to identify the strengths and weaknesses in the regulation in the perspective of enforcement. As such, this framework has been applied in practice as well, for example in the case of the enforcement of environmental regulation (Baldwin and Black, 2005).

The framework stands for five tasks that involve effectively enforcing regulation. These characteristics are detecting, responding, enforcing, assessing, and modifying. From these five tasks detecting means gathering data on unwanted and non-compliant behaviour, while responding stands for the answer that is given by the regulators to the unwanted and non-compliant behaviour by creating new regulations. Within this context there are two necessary elements that the regulator needs to take into account when it develops new rules and tools. Firstly, it should determine what the undesirable behaviour is and what actors are behaving as such. Based on the intentions of the actors (e.g. ill-intentioned and seeking to not comply), the enforcement strategy should be chosen and the specific type of rules. This means that stricter rules and strategies need to be applied in case of ill-intentioned actors, while ill-informed actors, who are willing to comply, might need less rigid rules and strategies. The third step, enforcing, is the application of these regulations on the ground. After the regulations are enforced, they need to be assessed as well. In this tasks the regulator investigates whether the regulation is successful or failing in enforcement activities. The last task for the regulator is to modify its tools and strategies in order to achieve better compliance and to tackle

unwanted behaviour (Baldwin et al., 2012). In order for the enforcement to be effective, the five tasks need to be met (Baldwin and Black, 2008).

5.2 Detection

Baldwin et al. (2012) state that the detection of undesirable behaviour can be complex, due to the fact that regulated populations can be very extensive. As in the case of this study, the regulated population is limited: it includes airlines from the EU and from the Gulf States that operate routes to and from the EU to the Gulf States. However, this does not mean that catching misconduct is easy. This can be exemplified with a statement of the state secretary of the Netherlands. She made a statement on the subject of additional capacity by Emirates to Schiphol Airport in relation to article 9 of the bilateral agreement between the Netherlands and the U.A.E.: "The problem is that the burden of proof lies with someone who says to be potentially damaged. […] It is hard to prove that, for example, an additional A380, damages another airline seriously. That is a subjective concept. […]There must always be a test: if you object [the additional capacity], do you hold it up with a judge? The chance that you end up doing that, based on that extremely liberal treaty that we have, even including Article 9, is not that big" (Rijksoverheid, 2016b). Due to its open and liberal wording, which is primarily meant to provide equal and fair opportunities to operate routes[6], article 9 is a rather weak rule for the protection against undesirable competitive behaviour. Hence, this illustrates one of the challenges (i.e. detecting (i.e. delivering rigid proof of) undesirable behaviour) within the current regulatory frameworks within the EU Member states.

Additionally, while capacity on the routes between the EU and the Gulf States has grown significantly, delivering rigid proof of unfair practices affecting competition is challenging due to the fact that financial data from the Gulf State carriers is not disclosed (Zuidberg, Boonekamp & Burghouwt, 2015). The airlines from the U.A.E. and Qatar do not provide annual reports (with the necessary financial data), since these are state-owned (privately held) companies and are not obliged to provide this data. This presents another problem to the detection, since rigid proof of unfair practices cannot be presented without proper financial data. This while other airlines claim that unfair practices are executed by the Gulf state airlines (Partnership for Open & Fair Skies, 2015).

[6] Article 9 states, among others; "there shall be fair and equal opportunity for the designated airlines of each Contracting Party to operate the agreed services on the specified routes between their respective territories". This wording is open and liberal in the sense that it mostly advocates openness towards operating routes between the territories, instead of protecting parties against misconduct on the rules stated by article 9.

The detection process within the regulation includes some articles to deal with these challenges. As the composition of the regulation has illustrated, the first step to initiate an investigation by the Commission is the submission of a written complaint to the Commission, including prima facie evidence. Hence, in order to submit a written complaint to the Commission, prima facie evidence of a violation of applicable international obligations or practices affecting competition needs to be detected in an earlier stage. Therefore, detection will be the basis for the initiation of the process to tackle unfair practices by third country carriers in this regulation.

Prima facie evidence can be described as once a party has the presumption to prevail in a case (Herlitz, 1994). This is in line with the definition the Commission puts forward for a prima facie case, which is a case in which facts are presented and call for the need to be explained (Farkas and O'Farrell, 2014). This means that the Member States' government, EU airlines, or EU associations related to (EU) airlines can add the evidence they have gathered to a written complaint to the Commission. As a consequence of that, rigid evidence based on financial data could be changed to prima facie evidence that is based on more general observations. An example of such a change can be the observation of the lost of one third of the market share by Lufthansa at its main hub, Frankfurt Airport, on destinations between Europe and Asia since the entry of the Gulf state airlines on that airport, while more than 3 million people were flying through Gulf states' hubs from Germany (The Economist, 2015). Moreover, Lufthansa has cut 20 routes to Africa and Asia. Similar complaints were made by Air France-KLM, which cut routes to destinations in the Middle East and South-East Asia and lost major growth opportunities in this region, as stated by Air France-KLM. Furthermore, while the Gulf states' carriers combined almost doubled their amount of passengers between 2009 and 2014, by approximately 40 million passengers, Air France-KLM only increased their amount of passengers by 17 million (Air France-KLM, 2010; Air France-KLM, 2015). The Commission would be able to perceive these observations as prima facie evidence, which would make a clear difference between the rigid evidence needed in the regulatory frameworks that are in place at this moment (Britton, 2016).

Subsequently, the Commission will investigate the prima facie evidence and may expand it. Therefore, the party that submits the complaint will get assistance from the Commission. Moreover, its Member State can possibly be asked to assist in the investigation as well. Furthermore, it is also different from the procedure in the repealed regulation (868/2004). This due to the fact that regulation 868/2004 stated that a written complaint needed to be submitted to the Commission with sound evidence, which was hard to gather solely by one party (De Wit, 2014; Lebray, 2015). The

change into prima facie evidence, with the addition of the Commission which would execute the investigation, makes it different from the repealed regulation.

The detection process is in line with one of the challenges from the Member States regulatory frameworks, i.e. transparency of business operation by the Gulf state carriers. Transparency is particularly important for parties to provide evidence for practices affecting competition within a written complaint to the Commission. The regulation states that transparency is important within the process of investigation by the Commission (Commission, 2017a). Moreover, transparency is requested by the Commission from all parties that are under investigation. However, whenever a party that is under investigation does not cooperate, and thus is not transparent, this could still lead to the Commission imposing a redressive measure. Hence, a possible lack of transparency does not necessarily lead to a lack in enforcement. Furthermore, as mentioned before, to initiate an investigation, prima facie evidence need to be handed to the Commission. Hence, full transparency would not be necessary to start a procedure of tackling practices affecting competition, while this was necessary in the case of the Member States' regulatory frameworks (Zuidberg et al., 2015; Rijksoverheid, 2016b).

When one takes a critical perspective towards the regulation in relation with transparency, one can have various points of critique towards the regulation. One of these points is that it is unknown how much transparency is necessary in order to provide enough evidence that could become prima facie evidence. Due to the fact that the Gulf state carriers do not present their financial data, and are not obliged to do so since they are privately-held companies, transparency is lacking. The regulation does not obligate any carrier to be more transparent. Hence, the status-quo regarding transparency is not altered. Therefore, one can question whether, de facto, the actors involved are able to initiate an investigation. This depends to what extent the Commission is willing to start an investigation as well. When industry observations such as the ones of Lufthansa and Air France-KLM are sufficient, written complaints are easier to compile. Subsequently, the Commission should be able to start investigations relatively simply. However, when transparency can be burdensome for creating satisfying prima facie evidence, the initiation of an investigation becomes harder. Consequently, this would affect the effectiveness of the regulation. Additionally, one can be critical of the ability of the Commission to penalize misconduct when there is a lack of transparency. When the Commission has started an investigation and the investigation is negatively affected by the lack of transparency from the carriers under investigation, the regulation states that redressive measures will be taken based on the outcomes of the investigation. However, these outcomes might be less strong as they could be when the carriers under investigation would be transparent. Finally, this might lead to a situation

in which the investigation does not have enough evidence to prove practices affecting competition and that it, therefore, cannot impose redressive measures, while these practices might be present. This would mean that the effectiveness of the regulation might be diminished by the lack of transparency that could be present. Therefore, the fact that the regulation lacks clear rules or tools to obligate transparency from the carriers under investigation might affect the effectiveness of the regulation.

Furthermore, as stated by the Parliament, "the Commission may decide not to initiate an investigation where the facts put forward in the complaint neither raise a systemic issue, nor have a significant impact on one or more Union air carriers, and are unwarranted" (Parliament, 2018a). Hence, the fact that prima facie evidence is provided, does not mean that an investigation needs to be started immediately. In practice, this means that a prima facie complaint based on the lost of market share by Lufthansa at Frankfurt would not suffice, as it is related to solely one Member State. Prima facie evidence should therefore be compiled by more actors, such as a joint complaint by Germany and France/the Netherlands for example, which have put forward similar observations about lost of market share on routes due to the entry of Gulf state airlines. Moreover, this statement in the report of the Parliament can also be seen as a means to integrate cautiousness into the procedure and slightly contain the power of the Commission in the detection process.

5.3 Response and Enforcement

While detection is about finding undesirable behaviour, response is about the rules and tools at hand for the regulators. As the case illustrates, the Member States have not been able to prevent the unfair practices by the Gulf state carriers. This is partly due to the fact that the tools to respond to unfair practices[7] have not been applied in practice. Hence, the applicability of the rules set in the bilateral regulatory frameworks interfere with an effective response and enforcement.

The regulation provides rules and tools that are based on redressive measures. The Commission can impose these redressive measures as the outcomes of the investigation (i.e. the detection process) call for such a response. The regulation provides for a relatively limited amount of redressive measures, as these are financial duties or equivalent measures. The regulation does not clarify what equivalent measures would mean, however. Hence, the Commission has some room to impose an appropriate and proportionate redressive measure to a third country carrier. Since imposing financial

[7] According to Article 5 ("withdrawal or suspension of operating licenses") of the bilateral agreement.

duties are a common tool within the regulatory framework of competition and antitrust[8], its application is more common as well. There are various examples for the use of financial duties by the EU Commission to practices affecting competition. One of these examples is the fine that was imposed on Google for its abuse as a dominant search engine on its shopping service (Commission, 2017b), or the fines imposed on Microsoft for its market dominance (Commission, 2004b; Commission, 2013). Hence, the Commission has the power to enforce its rules, by imposing the redressive measures to firms.

In this regard, the regulation is clearly different from the current bilateral regulatory frameworks in place between the Member States and Gulf States. Since the regulation provides applicable tools for the Commission, it increases the applicability compared to those bilateral regulatory frameworks. This is an important difference, as it concerns the effectiveness of the enforcement of the rules with regards to unfair competition.

Despite the fact that the regulation provides common tools that have been applied in the past, this does not necessarily mean that redressive measures will always be taken towards third country carriers that have been found guilty of the violations of applicable international agreements or practices affecting competition. This due to the fact that the Commission will take the Union's interests into consideration as well (Commission, 2017a). This is related to the proportionality of the imposed redressive measure, as the regulation states that the redressive measure should take "[…] the interest of maintaining conditions conducive to a high level of Union connectivity" (Commission, 2017a; p. 5) into consideration. This means that once a redressive measure is against the interest of the Union, notably those of consumers and undertakings from the EU, a redressive measure should not be imposed (Commission, 2017a).

Some examples of these interests could include lobbies of airlines that cooperate or are partially owned by Gulf state carriers (e.g. IAG) or firms that are depended on investments of the Gulf state carriers (e.g. Airbus, which has an influential lobby system in Brussels (Transparency International, 2015). As such, Airbus has already addressed their worries during the development of the regulation that " […] unleashing EU competition authorities on rich foreign airlines could end up driving lucrative contracts toward rival Boeing" (Kroet, 2018). Moreover, these firms can possibly be supported by

[8] Laws on the regulation of imposing financial duties in accordance of practices affecting competition are laid down in regulation no. 1/2003 (on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty on the establishment of the EU) (Council, 2003), and its subsequent guidelines on article 23 from regulation no. 1/2003 in 2006/C 210/02 (Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003) (Council, 2006).

their designated Member State in the lobby process. In line of this, the interests of the Member States are differing on this subject in general. While the Member States with large flag carriers (Germany, France, and the Netherlands) support action, this is less the case for countries without (large) flag carriers. An example is Hungary, which welcomes additional traffic to Budapest from Qatar Airways (Kroet, 2018). As such, a division of interests among the Member States is present on this case as well, which results in difficulties of clarifying the Union's interest. Consequently, this may be against the interests of the party that submitted the written complaint and lower the likelihood of enforcement. However, this clause provides for a fairer treatment of other entities from the EU that are affected by a possible redressive measure from the Commission.

Related to the Union's interests, both the Council and the Parliament have made amendments to the proposed regulation. The committee of the Parliament considered to clarify the concept of Union's interest in the situation whether or not to apply redressive measures. As such, the Parliament proposes that all parties that might be affected should be able to make themselves known and deliver information on their interests (Parliament, 2018b). When the situation occurs that the Commission has to determine whether or not to apply redressive measures, the Parliament stressed that priority should be given to the need to restore effective and fair competition, ensure transparency, avoid any distortion to the internal market, avoid undermining Member States' socio-economic situation, and maintain a high level of connectivity for passengers and the Union. Moreover, the Parliament also stressed the importance of the proportionality aspect of the application of redressive measures. While redressive measures might be in the interests of one Member State, the Parliament's position is that more than one Member State should be affected by a third country carrier exploiting their bilateral regulatory frameworks and that the redressive measures applied should never be in the direct benefit of one carrier or group of carriers (Parliament, 2018a) .

The position of the Council, which made a similar amendment, is in line with the Parliament regarding the concept of Union's interest and the clarification thereof. The Council stated that the Union's interests should be conceived based the information of interested parties involved and as such these parties should have the ability to make their voice heard (Council, 2017b).

In addition to the clause of the Union interests, one can question the willingness of the Commission to impose redressive measures on a state-owned firm. Due to the fact the Gulf carriers are state-owned carriers, the redressive measure is indirectly given to the Gulf states it self. The reactions from the Gulf states on the actions of the Dutch and Canadian governments illustrate that the Gulf states

are willing to respond to sanctions that are imposed on their state-owned carriers. The fact that the Commission would impose a redressive measure on a multilateral basis might have a positive effect on the enforceability of the rules in the regulation and the subsequent penalization of misconduct. The fact that the Commission represents a block of countries makes its position stronger. Therefore, its ability to impose redressive measures is larger than one single Member State. Additionally, the Commission has shown in practice that it is willing to initiate investigations into state-owned firms as well. An example of this is Russian gas supplier Gazprom. The Commission initiated an investigation in 2011, into alleged practices affecting competition, such as "restrictions on cross-border sales; unfair pricing; and making gas supplies contingent upon countries' investing in infrastructure" (Toplensky and Foy, 2017), in several Central and Eastern European Member States. The Commission has received a proposal of Gazprom for remedies on the aforementioned practices, thereby possibly solving the issue with Gazprom in the Central and Eastern European Member States. Moreover, the proposal states that if Gazprom breaches any of the remedies suggested in the proposal, the Commission will impose a fine of 10 per cent of global turnover of Gazprom (Toplensky and Foy, 2017). However, the Commission has not yet accepted the proposal by Gazprom, due to the fact that interests in the case are diverged. For example, Polish state-owned oil and gas firm PGNiG states that the proposal needs to be rejected and that Gazprom needs to be fined for its behaviour instead (Guarascio, 2017). Hence, the Commission is able to initiate investigations and further act on this with state-owned firms as well as with private firms. However, the diverging interests from other parties in the case (e.g. the interests of PGNiG) can significantly influence the potential outcomes of the actions of the Commission.

The differences in the response and enforcement process between the bilateral regulatory frameworks and the regulation are in line with important aspects related to the effectiveness of the regulation, i.e. ensuring enforceability and penalizing misconduct. As the bilateral regulatory frameworks have not enabled the Member States to pursue these aspects, the regulation should. The tools that are presented in the regulation are common and several examples have been presented of when the Commission enforced its rules relating to competition and penalized firms for their conduct (Commission, 2017b; Commission, 2004b; Commission, 2013). However, there are clear issues concerning the clarification of the Union's interest in applying redressive measures. Since the Union's interest is compiled of multiple actors with multiple interests, it could become uncertain what actions the Commission would take in a situation in which there are practices affecting competition and opposing interests from the actors involved. This could potentially have effect on the effectiveness of enforcement against practices affecting competition.

5.4 Assessment and modification

In the process of the application of the unfair practices of the Gulf states carriers on the European aviation market, it has been found that the Member States have not been able to deal with the issue through the current regulatory frameworks. Since it provides a lot of freedom to the airlines involved and enforcement is hard due to inapplicable rules and tools, the current bilateral agreements do not suffice in properly dealing with the unfair practices of the Gulf states and in creating a level playing field for European and Gulf states' carriers.

Although a performance assessment of the regulation has not been carried out by any Member States, the need for modification of the current regulatory framework has been recognized by the Member States, the Commission, the Parliament, and the Council (Parliament, 2018b; Council, 2017b). This has resulted in support of most Member States to provide the Commission a mandate to negotiate a new multilateral aviation agreement with the Gulf states. Furthermore, the Commission has proposed the new regulation to tackle the issue of unfair competition from extra-EU airlines. As the regulation is developed on supranational level, there is a redistribution of costs of enforcement. While these costs used to be for the Member States, these costs are now shifted to the supranational level.

The proposed regulation is a form of modification of regulation 868/2004, which is repealed and replaced with the proposed regulation. This due to the fact that the Commission assessed that regulation 868/2004 was ineffective in its use and, thus, modification was deemed necessary. The fact that regulation 868/2004 was deemed ineffective is illustrated by the fact that the tools provided in the regulation have never been used (De Wit, 2014; Lebray, 2015). Moreover, this proposed regulation can be seen as a modification (or at least an addition) for the articles in the bilateral regulatory frameworks that should deal with unfair practices affecting competition. Hence, it can be seen as an alteration of the ineffective regulatory frameworks in which the national governments and the Commission had to work in order to fight unfair practices.

6. Conclusion

The analysis through the DREAM framework has established the strengths and weaknesses of the regulation related to effective enforcement. This chapter will shed its light on the results of the analysis to see what the implications of those outcomes are.

6.1 Conclusion

The outcomes of the analysis will be combined with the theoretical perspectives to provide an answer to the research question:

"To what extent is the regulation on safeguarding competition in air transport effective in enforcement against unfair practices affecting competition of the Gulf state airlines?"

The analysis has illustrated that there are problems concerning the detection process and the rules and tools that are provided in the bilateral regulatory agreements between the Member States and the Gulf states. Within those regulatory frameworks detection of the problem is crucial. Especially providing sound evidence of unfair practices, which is almost impossible due to the non-transparency of the Gulf state airlines concerning their financial data (Zuidberg et al., 2015). Hence, starting the process to penalize misconduct is rather hard. For the regulation, however, prima facie evidence is necessary to initiate an investigation by the Commission. This prima facie evidence can come from Member States, carriers from the EU, associations related to a carrier from the EU, or the Commission. Hence, various actors from the EU can initiate an investigation when they possess prima facie evidence for unfair practices from extra-EU carriers.

However, the Parliament has stressed that evidence does not necessarily mean that an investigation needs to be undertaken. Hereby the Parliament tries to integrate caution into the detection process and to contain the Commission's power, as it will not always be able to investigate. Moreover, one can critique the concept of prima facie evidence. As it is not clarified what the concept entails, the Commission can still relatively arbitrarily determine what evidence can be considered prima facie and what not. This might impact the effectiveness of the regulation.

As the investigation process deems it to be necessary to act, the rules and tools in the regulation are common in the area of competition policy (Commission, 2004b, Commission, 2013, Commission, 2017b). These tools are redressive measures (or any measure of equivalent or less value). The Commission has shown that it is also willing to apply these measures to both private as well as state-

owned firms (Toplensky and Foy, 2017). Hence, the actions that the Commission has taken in the past show that it is an entity that is able to enforce its rules upon extra-EU firms. Hence, the applicability of these rules and tools from regulation by the Commission is likely to be higher, compared to the status quo of the bilateral regulatory frameworks. Moreover, as it represents a block of economically powerful countries, it has a stronger position as an enforcer compared to a single Member state as well. Thereby, as the Commission is able to act, the effectiveness of enforcement is likely to be higher as well.

Although the redressive measures are common and applicable and the Commission is able to enforce them, critique has been placed at the foundation of determining when redressive measures should be applied or not. The foundation is namely the Union's interests. However, both the Parliament and the Council have stressed the importance to provide a precise clarification of the concept and a procedure on how the Union's interests are determined. Moreover, the Parliament stressed that proportionality and the interconnectivity of the EU should be taken into consideration in the process of determining the apply redressive measures. Moreover, the diverse interests of multiple actors (e.g. different interests by Member States) that are involved in the determination of the Union's interest can have a significant influence on the application of redressive measures by the Commission. This due to the fact that this has a direct effect on the effectiveness of the enforcement against the practices affecting competition.

The regulation itself is a form of modification of the regulatory framework. While the regulatory power was first at the level of the bilateral regulatory frameworks, which were ineffective in dealing with the issue, the power has shifted to the multilateral level. This has resulted in a redistribution of the costs of enforcement, which shifted from the bilateral level to the multilateral level as well. Thus, since the Commission is able to apply redressive measures in a supranational level, this is beneficial for the Member States as the Commission is likely to be more effective in enforcing the regulation.

This can also be seen in the interactions between the actors in the process of developing this regulation. The Parliament and several Member States had urged to develop a response to the unfair practices of third country carriers. As a result of this, the Parliament and the Council have responded positively to the development of the regulation. However, as mentioned before, these actors stressed the importance of several notions and critiqued some elements of the proposed regulation. By making amendments to the regulation and in the reports these actors have pushed the Commission to be clear on its procedures and in some cases they tried to contain the power of the regulation in the application of the enforcement.

Thus, the analysis illustrated that the regulation is likely to be effective in the processes of detection, response, enforcement, and modification. This is due to the detection process that introduced accessible conditions for starting an investigation into unfair practices and a response and enforcement process that introduced rules and tools that are common within EU competition policy and therefore applicable. As such it is a modification of the bilateral regulatory frameworks into a likely more effective regulatory framework against unfair practices affecting competition. This all despite the points of critique that have been placed at several aspects in the detection, and response and enforcement process. Although these points of critique might diminish the effectiveness of enforcing the regulation when the Commission does not handle these well (e.g. clarifying Union's interests and the procedure to come up with them), the regulation can still be considered to be effective in enforcing against the practices affecting competition in comparison with the current bilateral regulatory frameworks. This due to the strong points within the detection, response, enforcement, and modification process.

Consequently, these results of the analysis have an impact on the theoretical motives to develop this regulation as well. As mentioned before, rational choice institutionalism is used to explain the motives to develop the regulation. As such, it has been stated that the addition of institutions would alter the strategic interactions of the actors involved and consequently would lower transaction costs due to less cheating and shirking behaviour. The intention of the regulation is to alter the behaviour and thereby changing the institutional norms within the aviation regime. As mentioned before, the norms concerning fair competition between the EU and the Gulf states differ. Next to the institutional norms that are applicable to this case, there is also a difference in goals between the actors. Koelble (1995) states the goals of actors are shaped by institutions. Moreover, it also helps shaping the outcomes due to the fact that it distributes power among the actors. By introducing this regulation, the EU is exercising its power over the Gulf states. As such, it aims to change the payoffs from the current situation, by aiming to lower the economic power of the Gulf states airlines. The creation of the regulation is a change of the institutional environment and the use or a credible threat of using the regulation (i.e. the sanctions from the regulation) can positively change the position of the EU towards the Gulf states (Krasner, 1991). Krasner (1991) exemplifies a change of position within the payoff matrix as follows: "a large importer (read the United States) might threaten to bar imports from an exporter (read Japan) if the latter failed to make basic changes in the structure of its domestic economy, such as the distribution system" (p.340). This is essentially similar to the situation at hand, as the EU is able to use the regulation or threaten to use the regulation towards the Gulf states, so that it may demand changes within the unfair practices of the Gulf states.

Hence, as it is deemed that the regulation is effective in enforcement, it is likely that the regulation is able to alter the behaviour of the Gulf states.

As a result of this change in behaviour, it can be assumed that the transaction costs relating to monitoring and enforcement for the Member States will decrease as well. Since the regulation is an example of a uniform multilateral response from the EU level, it limits the amount of actors that are involved in the international relations about the issue of unfair competition towards the Gulf states. Hence, the regulation forms a uniform rule towards unfair competition of Gulf state carriers. This uniformity stands for goal alignment on the EU level as well. Since this regulation will apply to all Member States, the regulation illustrates the interests that will be expressed to this topic in a multilateral sense. Hence, when the results of the analysis are combined with the theoretical expectations it can be stated that it is likely that transaction costs relating to monitoring and enforcement will decrease, since it is likely that the regulation will provide for effective enforcement.

All in all, the analysis has illustrated that a simplified process of initiating an investigation in the detection process combined with more common and applicable rules and tools in the response and enforcement process result in the assumption that the regulation is effective in enforcement. These outcomes of the analysis provide an understanding of effectiveness of enforcement within the regulation and thereby it forms a firm basis for the theoretical expectations that were derived from rational choice institutionalism. Thus, it can be concluded that this result will likely constitute the implication that the behaviour of the Gulf states will change and that the transaction costs relating to monitoring and enforcing will decrease for the Member States.

6.2 Limitations and future research

The outcomes of the study are subject to some limitations. The most important limitation is related to the case that is selected for this research. The case resembles the problems with effective enforcement towards the practices affecting competition of the Gulf states. The results of the analysis have illustrated that it is likely that the regulation is effective in enforcement towards these problems. However, due to the relatively recent introduction of the regulation, ex-post evidence could not be gathered. This limits the outcomes on compliance and consequently effective enforcement, as the new behaviour the actors could not be studied.

A more specific limitation of this study, focusing more on the case, is related to the proposed regulation. As is mentioned before, this proposed regulation is an answer from the EU to practices

affecting competition of extra-EU airlines. However, it is a unilateral answer to the problem in a global context. This means that the Commission has created this new legislation without negotiations from extra-EU countries. Therefore, it is in essence different from the bilateral agreements between the Member States and the Gulf states. This due to the fact that these bilateral agreements are established in negotiations with the Gulf states. However, the regulation is chosen in this study, since it does offer an answer to the main problem that is studied in this research. However, future research into this problem needs to focus on the new multilateral agreements between the EU and the Gulf states, when these are established and ratified.

Future research is advocated in this topic, and possibly with this case, by conducting an ex-post study. Conducting an ex-post study would generate empirical evidence derived from the case, and thereby testing the outcomes from this research. Moreover, the theoretical framework in this study could be replicated in future research with other cases. This would add to the literature on the DREAM framework and expand the use of this analytical framework.

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Appendix

Coding framework:

Factor	Code
Detection	Gaining of information
	Aims and objectives of regulations
	Targets (subsidiary aims and objectives)
	Identification of levels and patterns of (non-) compliance
Response/ Enforcement	Developing rules
	Rule type
	Developing tools
	Insistent compliance seeking strategies
	Persuasive compliance seeking strategies
	Deterrence approach
	Application of rules
	Enforcement strategies (stricter rules for stricter enforcement (e.g. prosecution)
	Application of tools
	Preventative intervention
	Act-based intervention
	Harm-based intervention
Assessment/Modification	Performance assessment
	Adjusting tools and strategies

Sub-codes are shown in italic.