

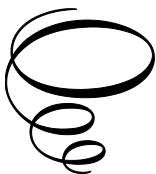
Competition and Regulation in the Airport Sector

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By

Marcelo Cesar Guimarães

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*TO RENATO AND TERESA,
FOR ALL THE LOVE THEY GAVE ME.*

*Oh! I have slipped the surly bonds of Earth
And danced the skies on laughter-silvered wings;
Sunward I've climbed, and joined the tumbling
mirth
of sun-split clouds, – and done a hundred things
You have not dreamed of – wheeled and soared and
swung
High in the sunlit silence. Hov'ring there,
I've chased the shouting wind along, and flung
My eager craft through footless halls of air*

*Up, up the long, delirious, burning blue
I've topped the wind-swept heights with easy grace
Where never lark nor ever eagle flew –
And, while with silent lifting mind I've trod
The high untrespassed sanctity of space,
Put out my hand, and touched the face of God.*

(MAGEE JR., John Gillespie. "High Flight", 3
September 1941)

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FOREWORD

It is with great pleasure that I accepted Marcelo Guimarães' invitation to write the preface of this book, which reflects his doctoral research entitled "Competition and Regulation in the Airport Sector: The Emergence of a Pro-Competitive Regulatory Approach in Brazil". This book represents a rigorous academic achievement, but also the intellectual maturity of a professional whose career I have had the privilege to follow closely for the past decade.

I first met Marcelo in 2015, during his Master's studies at the Federal University of the State of Pernambuco (UFPE). At that time, one could easily notice his intellectual curiosity, analytical skills and serious commitment to research. I had the privilege to co-supervise his research at that time, and it quickly became evident that Marcelo had a great potential – which has been confirmed in his subsequent roles and activities.

After his Master's degree, Marcelo moved to Brasília, where he began working at the Federal Prosecutor's Office before the Brazilian Competition Authority (CADE). This transition marked the beginning of an important chapter in our professional relationship, as we collaborated on several matters related to competition policy and regulation. Marcelo stood out not only for his technical competence, but also for his style which combined high standards of quality and important soft skills including diplomacy in collaboration with colleagues and other institutions – qualities that have continued to define his career.

As his doctoral supervisor at the University of Brasília (UnB), I witnessed firsthand Marcelo's intellectual growth. This thesis is the product of years of careful study, reflection, and engagement with complex legal and economic questions. It tackles the complex intersection between competition law and sectoral regulation in the airport industry, with a particular focus on Brazil's institutional framework. Marcelo builds a compelling case for a pro-competitive regulatory approach, combining theoretical insights with practical relevance. The result is a valuable contribution to contemporary debates in public policy, regulation, and competition law in regulated industries in general.

Since 2021, Marcelo has also distinguished himself on the international stage through his work at the Organisation for Economic Co-operation and Development (OECD), where I have had the pleasure of overseeing his

work once again. His professionalism, clarity of thought, and team spirit have left the best possible impression on colleagues from around the world. He is a great example of committed public servant, prominent researcher, and a generous human being – driven not only by intellect, but also by integrity and a sense of purpose.

This book reflects Marcelo's intellectual excellence and career development in the past 10 years. I am proud of his achievements and grateful for having the opportunity to closely follow his trajectory from a young graduate student to the accomplished scholar and professional he is today.

Sincerely,

Paulo Burnier da Silveira

Professor at University of Brasilia (UnB)

Former Commissioner at Brazilian Competition Authority (CADE)

Senior Competition Expert at Organisation for Economic Co-operation
and Development (OECD)

PREFACE

Competition law and sectoral economic regulation occupy overlapping and complex jurisdictional territories, primarily because the goals of these frameworks prove to be alternately convergent and antagonistic in practice. While both can be conceptualised as governmental strategies designed to address market failures,¹ regulation may pursue broader policy objectives not directly related to the exercise of market power—such as ensuring universal service access or addressing distributive concerns—even when ostensibly addressing economic problems like natural monopolies.²

Despite the multidimensional nature of these interactions, Brazilian legal scholarship has predominantly confined its focus to debates surrounding the "regulated conduct defence" within the well-established framework of antitrust immunities doctrines.³ This analytical concentration stems largely from intense disputes over the matter in the decisional practice of Brazil's Administrative Council for Economic Defence (CADE) in infrastructure sectors including telecommunications, ports, and transportation during the early 2000s.⁴

Such scholarly predilection, however, has left underexplored more sophisticated inquiries from an institutional design perspective regarding

¹ Shelanski, Howard A. 2018. "Antitrust and Deregulation." *The Yale Law Journal* 127 (7): 1922-1960. p. 1928; Veljanovski, Cemto. 2010. "Economic Approaches to Regulation." In *The Oxford Handbook of Regulation*, by Baldwin, Robert, Cave, Martin, Lodge, Martin. Oxford: Oxford University Press. p. 18.

² Dunne, Niamh. 2015. *Competition Law and Economic Regulation: Making and Managing Markets*. Cambridge: Cambridge University Press. p. 38.

³ In this regard, see Oliveira, Gesner, Rodas, João Grandino. 2004. *Direito e Economia da Concorrência*. São Paulo: Renovar. pp. 154-156; Marques Neto, Floriano de Azevedo. 2005. "A articulação entre regulação setorial e regulação antitruste." *Regulação Brasil* 1 (1): 69-87; and Pereira Neto, Caio Mário da Silva, and Prado Filho, José Inacio Ferraz de Almeida. 2016. "Espaços e interfaces entre regulação e defesa da concorrência: a posição do CADE." *Revista Direito GV* 12 (1): 13-48.

⁴ Sampaio, Patrícia Pinheiro. 2013. *Regulação e Concorrência: a atuação do CADE em setores de infraestrutura*. São Paulo: Saraiva and Fernandes, Victor Oliveira. "Os desafios do Antitruste no Setor Portuário Brasileiro: As Inovações da Lei no 12.815/13 Seus Reflexos Concorrenciais." *Revista de Direito Setorial e Regulatório* 2 (1): 161-210.

the coordination between regulators and antitrust authorities, particularly in examining the competitive impacts of regulatory polices.

This book represents a significant step toward bridging this scholarship gap. It emerges from Dr. Marcelo Guimarães's Ph.D. thesis in law at the University of Brasília (UnB), whose thesis committee I had the honour to serve on. Leveraging his extensive professional experience at the Organisation for Economic Cooperation and Development (OECD), Guimarães explores how competition law's foundational principles and analytical frameworks can inform the design of pro-competitive regulatory options for Brazil's airport sector.

Through this analytical lens, the author conducts a comprehensive assessment of Brazil's regulatory-competitive policy framework for airports. As astutely identified, this represents a sector where competitive regime penetration through recent concession rounds has fundamentally challenged the traditional classification of airports as essential facilities. As documented in chapters 2 and 3, there has been remarkable evolution in sectoral regulation, which has begun incorporating pro-competitive choices and fostering both intra- and inter-airport competition through auction design and rules governing slot allocation and secondary economic activities such as ground handling services and jet fuel supply.

The dissertation's analytical centrepiece, chapter 4, demonstrates that dialogue between competition and regulatory systems in the airport sector nonetheless requires further advancement. The analysis reveals that competition advocacy in the sector has been exercised by CADE and SEAE in a predominantly reactive manner, lacking continuous market monitoring and constructive engagement in public policy design. Deployment of instruments such as Regulatory Impact Assessments, ex-post evaluations, and policy recommendations to government agencies could significantly expand these boundaries. Moreover, more sophisticated instruments adopted in foreign jurisdictions—such as market investigations—could serve this purpose, enabling antitrust authority intervention to address structural aspects of the sector rather than merely specific conduct.

The practical viability of such approaches is exemplified by the OECD's Competition Assessment Review of Brazil's civil aviation and ports sectors,⁵ published in 2022, in which Dr. Guimarães played an active role. This comprehensive study, conducted in co-operation with CADE, demonstrates precisely the type of systematic, forward-looking competition analysis that Brazilian authorities should embrace more extensively. The

⁵ OECD. 2022. OECD Competition Assessment Reviews: Brazil. Paris: OECD Publishing. <https://www.oecd.org/publications/oecd-competition-assessment-reviews-brazil-d1694e46-en.htm>.

review identified 368 specific recommendations to mitigate competitive harm, with conservative estimates projecting annual savings of BRL 700 million to BRL 1 billion for the Brazilian economy. The study's rigorous methodology and quantified economic impact projections illustrate how competition authorities can move beyond pure enforcement toward proactive market design that anticipates and prevents competitive distortions.

Dr. Guimarães's work thus establishes itself as a watershed contribution to Brazilian legal-economic scholarship, setting new methodological standards for prospective analysis of competition and regulatory policy. By demonstrating how systematic incorporation of competitive criteria in regulatory design can transcend the traditional dichotomy between *ex ante* and *ex post* analysis, the author charts a course for interdisciplinary research that recognises the structural complementarity between these systems. Even beyond the airport sector, this investigation provides an operational roadmap for policymakers and scholars to develop more integrated and preventive approaches capable of anticipating and mitigating competitive tensions across strategic sectors of the Brazilian economy.

Victor O. Fernandes

Commissioner at Brazilian Competition Authority (CADE)

ACKNOWLEDGMENTS

This publication originates from my PhD thesis in law at the University of Brasilia, defended in February 2024, marking the culmination of four years of dedicated and intense work. While it is often said that writing a thesis is a solitary endeavour, this is not entirely accurate. This journey involves—directly and indirectly—various individuals and institutions whose support, guidance and encouragement were indispensable. I would like to express my deepest gratitude to those who played the most significant role in this process, without whom the completion of my PhD would never have been possible.

First of all, I must thank Professor Paulo Burnier, whom I had the privilege of meeting during my Master's studies and who has since become not only a mentor but also a friend. After providing extensive support during the challenging PhD recruitment process, he accepted to be my doctoral supervisor and has performed this role proficiently. He assisted me in refining my arguments and structuring my research, providing guidance throughout this arduous experience. In addition, he was very patient, consistently pushing me to increase my confidence as a scholar and encouraging me when I felt unmotivated.

I would also like to thank Gilvandro Araújo, who directly contributed to the achievement of this thesis. I never imagined that his unexpected invitation in January 2019 to work with him and delve deep into the world of airports would change my life. This research incorporates several elements that we have extensively discussed over the years. His partnership during the Covid-19 pandemic, one of the most challenging periods in history—perhaps even more so for those working in the airport sector—, helped me grow and motivated me to face new challenges.

Furthermore, I am thankful to the University of Brasilia, for welcoming me and fostering my professional development, including through the opportunity to teach at the Faculty of Law. I extend my thanks to the exceptional professors I had, whose lectures greatly contributed to the writing of this book. In particular, Professors Amanda Athayde, Amanda Flávio de Oliveira, Ana Frazão and Márcio Iório. I am also grateful to Professor Amanda Athayde for her encouragement and the insightful discussions we shared while working together at MPF-CADE.

Moreover, I also extend my gratitude to Professors Camila Pires Alves and Victor Fernandes (in addition to Professors Amanda Athayde and Gilvandro Araújo, once again) for joining the jury, providing numerous insightful comments.

A special thank also goes to Professor Catherine Prieto, who kindly welcomed me to her lectures at Paris 1 Panthéon-Sorbonne University, allowing me to deepen my knowledge of EU competition law, which was significantly valuable for the development of this research.

Additionally, I must acknowledge the former universities where I had the opportunity to study, which played a significant role in shaping who I am today: Federal University of Pernambuco (on behalf of Professor Eugênia Barza), University of Quebec in Montreal (on behalf of Professor Michèle Rioux) and University of Coimbra (on behalf of Professor Rui Moura Ramos).

I also thank Márcio Barra Lima, who invited me to move to Brasília in 2017 and gave me the opportunity to work with competition law in practice for the first time. His friendship and encouragement were instrumental to my professional development and played a crucial role in the path that led to my thesis.

Moreover, I am thankful to the OECD Competition Division for providing me with a remarkable experience in an international working environment. In particular, I extend my sincere thanks to Federica Maiorano for the many enriching discussions on competition and regulation, which were essential to the development of this research.

I am also grateful to my friends—in Recife, Brasília, Paris and around the world—for their support and patience in listening to me speak endlessly about my thesis, particularly Fernanda Braz, Natália Cursino, Vitor Ferreira, Rodrigo Victor dos Santos and Dimitri Dubessy.

Concluding my PhD would never have been possible without the unwavering love and support of my family, who patiently endured my—sometimes far too long—absences. I thank my parents, André and Roberta, who provided me with a solid education and incentivised this endless process of learning. I am also thankful to my brother, André, and to my nephew, Lucas, who was born at the start of this journey and has brought smiles to my face, even if only through a screen. Finally, I am deeply grateful to my beloved grandparents, Renato and Teresa, my first supporters and the finest examples of who I aspire to become. They passed away during the writing of my thesis and unfortunately did not witness its completion. Yet they were in my thoughts every day I sat down to write, and, their memory gave me the strength to complete my PhD.

INTRODUCTION

Civil aviation is a multifaceted industry, with a special role in the promotion of social development and regional integration, helping to improve the lives of people and contributing to good health and well-being. The civil aviation sector also plays a crucial role in supporting economic activity across the world. Indeed, aviation is the only rapid worldwide transportation network and is a driver of economic progress by promoting economic growth, creating jobs and facilitating international trade and tourism.⁶

In recent decades, the civil aviation sector has undergone continuous liberalisation and deregulation reforms, increasing the room for competition. These changes have had an overall positive impact on air transport connectivity, traffic growth and the economy at large, despite being subject to a series of crises, exogenous shocks and financial difficulties. For instance, the Covid-19 pandemic disrupted the civil aviation industry at an unprecedented level, but the sector demonstrated resilience and has already reached or surpassed the pre-crisis level.⁷

In this context, civil aviation is one of the most global industries, connecting people, cultures and business worldwide. In 2019, every day there were nearly 12.5 million passengers, 128 000 scheduled flights and USD 18 billion worth of goods carried.⁸

⁶ IHLG. 2019. "Aviation Benefits Report: 2019."

<https://www.icao.int/sustainability/Documents/AVIATION-BENEFITS-2019-web.pdf>. pp. 24-33; ATAG. 2020. Aviation - Benefits beyond borders. Geneva: Air Transport Action Group. <https://aviationbenefits.org/downloads/aviation-benefits-beyond-borders-2020/>. pp. 19-33.

⁷ ICAO. 2022. Overview of Regulatory and Industry Developments in International Air Transport. Montreal: ICAO.

https://www.icao.int/Meetings/a41/Documents/Overview_of_Regulatory_and_Industry_Developments_in_International_Air_Transport.pdf. p. 2-1. According to ICAO, air traffic on most routes reached or surpassed pre-pandemic levels by the end of 2023 (ICAO. 2024. Passenger air traffic surpasses pre-pandemic levels. February 27, 2024. <https://www.icao.int/Newsroom/Pages/Passenger-air-traffic-surpasses-pre-pandemic-levels.aspx>).

⁸ IHLG, "Aviation Benefits Report: 2019", p. 13; ATAG, Aviation - Benefits beyond borders. Geneva: Air Transport Action Group, p. 14.

Also, the economic impact of the civil aviation industry (i.e. direct, indirect, induced and tourism catalytic) was around USD 3.5 trillion, accounting for 4.1% of world gross domestic product (GDP).⁹ In addition, the global civil aviation industry supported 87.7 million jobs worldwide, among which 648 000 were employed by airport operators (including operations, planning, engineering and security) and 5.5 million by other on-airport activities (e.g. retail, car rental, freight forwarders and government agencies such as customs and immigration).¹⁰ In Brazil, civil aviation accounted for BRL 103.4 billion (i.e. 1.4% of the Brazilian GDP) in 2019. The industry also supported around 1.5 million jobs,¹¹ among which 44 600 related to airport activities.¹²

The airport¹³ sector is part of the civil aviation industry, involving a complex operation, with different activities and market players. Airports provide the necessary infrastructure for achieving connectivity and the economic and social functions of air transport. Each airport features one or

⁹ These figures would be considerably higher if other economic benefits of civil aviation were taken into account, such as the economic activity and jobs that exist only because of air travel, domestic tourism and trade (ATAG, Aviation - Benefits beyond borders. Geneva: Air Transport Action Group, p. 10).

¹⁰ ATAG, Aviation - Benefits beyond borders. Geneva: Air Transport Action Group, p. 10. On average, aviation jobs are 4.3 times more productive than other jobs. Aviation also makes jobs in other sectors more productive, as it opens markets and enable knowledge transfer and other catalytic effects (ATAG, Aviation - Benefits beyond borders. Geneva: Air Transport Action Group, p. 11).

¹¹ ABEAR. 2020. "Panorama 2020: O setor aéreo em dados e análises." https://aviationbenefits.org/media/167517/aw-oct-final-atag_abbb-2020-publication-digital.pdf. p. 8.

¹² OECD. 2022. OECD Competition Assessment Reviews: Brazil. Paris: OECD Publishing. <https://www.oecd.org/publications/oecd-competition-assessment-reviews-brazil-d1694e46-en.htm>. p. 35.

¹³ It should be noted that airports are sometimes referred to as aerodromes, which according to the International Civil Aviation Organization (ICAO) are "a defined area on land or water (including any buildings, installations and equipment) intended to be used either wholly or in part for the arrival, departure and surface movement of aircraft" (ICAO. 2022. Annex 14 to the Convention on International Civil Aviation, Aerodromes, Volume I – Aerodrome Design and Operations. Montreal: ICAO. <https://store.icao.int/en/annex-14-aerodromes>. p. 1-2.). In general, an airport is categorised as a specific type of aerodrome with a given stature. While the use of the term "aerodrome" is becoming increasingly rare, it is still in use in certain jurisdictions, including in Brazil. Article 31 of the Brazilian Aeronautical Code (Law No. 7.565/1986) defines an airport as a public aerodrome equipped with installations and facilities to support aircraft operations, as well as boarding and disembarking of passengers and cargo.

more runways (the heart of the airport), a set of aprons and taxiways, as well as one or more passenger and cargo terminals, which combined develop specific activities that allow the movement of persons and goods worldwide.¹⁴ In 2019, there were 3 780 commercial airports globally providing scheduled commercial flights (around 120 of them in Brazil). It was also estimated there were 41 764 airports and airfields worldwide, including military and general aviation airports.¹⁵

Airport activities comprise aeronautical and non-aeronautical services.¹⁶ More specifically, aeronautical services include two different groups of activities, which are provided to airlines and other aircraft operators: essential operational services and ground handling services, both focusing on the operation of aircraft and the movement of passengers and freight.¹⁷

Essential operational services constitute the core business of an airport and encompass activities such as access to runways for take-off and landing, access to aprons and taxiways, as well as the use of terminal facilities. These services are typically directly provided by the airport operator.¹⁸

¹⁴ Betancor, Ofelia, and Rendeiro, Roberto. 1999. "Regulating Privatized Infrastructures and Airport Services. Policy Research Working Paper, World Bank Group." <https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-2180>. p. 1.

¹⁵ ATAG, Aviation - Benefits beyond borders. Geneva: Air Transport Action Group, p. 11; OECD, OECD Competition Assessment Reviews: Brazil, p. 53; Ministério da Infraestrutura; Empresa de Planejamento e Logística. 2021. "Plano Nacional de Logística: PNL 2035." https://ontl.epl.gov.br/wp-content/uploads/2021/10/PNL_2035_29-10-21.pdf.

¹⁶ As defined by the United Nations Department of Economic and Social Affairs' International Standard Industrial Classification of All Economic Activities – ISIC (UN DESA. 2008. International Standard Industrial Classification of All Economic Activities (ISIC), Rev.4. New York: United Nations.

https://unstats.un.org/unsd/publication/seriesm/seriesm_4rev4e.pdf). This classification was adopted by ICAO Council in 2010 (ICAO. 2019. Aviation Satellite Account - Recommended Methodological Framework Draft. Montreal: ICAO.

<https://www.icao.int/sustainability/Satellite/Documents/Draft%20Aviation%20Satellite%20Account%20Methodological%20Framework.pdf>).

¹⁷ Betancor, and Rendeiro, "Regulating Privatized Infrastructures and Airport Services. Policy Research Working Paper, World Bank Group", pp. 1-3.

¹⁸ Betancor, and Rendeiro, "Regulating Privatized Infrastructures and Airport Services. Policy Research Working Paper, World Bank Group", p. 1; OECD, OECD Competition Assessment Reviews: Brazil, p. 65.

Ground handling refers to the “services necessary for an aircraft’s arrival at, and departure from, an airport, other than air traffic services”,¹⁹ such as passenger and baggage handling, aircraft maintenance and catering services. These services can be provided directly by the airport operator, by airlines or by third-party companies—the latter being the most common model worldwide.²⁰

Non-aeronautical services refer to a wide range of activities that may be provided at the terminal or around the airport to passengers and other customers (e.g. local business communities). These services include, for example, duty-free shops and other retail shopping, restaurants and bars, car parks, hotels and conference facilities. Although a few of these services can sometimes be directly provided by the airport operator (e.g. car parks), most of them are performed by third parties, typically under commercial concession contracts.²¹

The airport sector has significantly changed in the last decades. While in the past airports were considered natural monopolies—and therefore seen as passive service providers—, since the late 1980s they have been increasingly subject to competitive forces, being more commercially focused. In this context, airports have competed with other airports, at least in some markets, to attract airlines, passengers and other service providers (e.g. ground handling suppliers and businesses providing commercial services). Competition within airports has also increased substantially, for instance as regards access to airport slots and ground

¹⁹ ICAO. 2022. Annex 6 to the Convention on International Civil Aviation, Operation of Aircraft, Part I – International Commercial Air Transport – Aeroplanes. Montreal: ICAO.

<https://store.icao.int/en/annex-6-operation-of-aircraft-part-i-international-commercial-air-transport-aeroplanes>. p. 1-6.

²⁰ ICAO. 2019. Manual on Ground Handling, Doc 10121. Montreal: ICAO. <https://store.icao.int/en/manual-on-ground-handling-doc-10121>. pp. 1-4, App B-1-App B-3. In Brazil, ground-handling services also include activities related to aviation security (e.g. screening of passengers, aircrew and baggage; searching and checking aircraft; protection of aircraft; access control to security restricted areas; and security controls of cargo) and air freight forwarding (Annex to Resolution ANAC No. 116/2009).

²¹ Betancor, and Rendeiro, "Regulating Privatized Infrastructures and Airport Services. Policy Research Working Paper, World Bank Group", pp. 1-3, pp. 1-3; OECD, OECD Competition Assessment Reviews: Brazil, pp. 65, 69. Nevertheless, this classification is not perfect and there may be grey areas where the distinctions between aeronautical and non-aeronautical services become blurred. For example, concessions related to aircraft or traffic handling (e.g. rentals of hangars and other airport operational areas to airlines or ground handling service providers) share characteristics of both aeronautical and non-aeronautical services.

handling services. Although airport regulation has undergone reforms, these changes were more limited than those observed in other activities in the civil aviation industry.

Regulation is an important tool to address market failures and to achieve other relevant non-economic objectives. In particular, civil aviation regulation is primarily founded on internationally accepted standards,²² promoted by the International Civil Aviation Organisation (ICAO), and implemented domestically by national civil aviation regulators, with the aim of ensuring safety and security, two top priorities of the industry.²³ Thus, civil aviation (including airports) is highly regulated,²⁴ leading to significant entry barriers and making operation complex and expensive.²⁵ While most civil aviation regulation is technical, it also involves economic elements, seeking to ensure the efficient operation of civil aviation activities

²² The Convention on International Civil Aviation (also known as the Chicago Convention) is the central international agreement in the area of civil aviation, providing States with the legal and operational framework to create and sustain a civil aviation safety and security system (ICAO. 2005. "ICAO Secretariat Study on the Safety and Security Aspects of Economic Liberalization. Presented to the Council on 1 June 2005."

https://www.icao.int/sustainability/Documents/SafetySecurityStudy_en.pdf. p. 5). For instance, Annex 14 to the Chicago Convention covers airports, with a volume on aerodrome design and operations (ICAO, Annex 14 to the Convention on International Civil Aviation, Aerodromes, Volume I – Aerodrome Design and Operations).

²³ ICAO. 2006. "Convention on International Civil Aviation. Doc. 7300/9, Ninth Edition, 2006." https://www.icao.int/publications/Documents/7300_cons.pdf.

²⁴ For example, according to the 2022 OECD Services Trade Restrictiveness Index (STRI), which measures the level of regulatory restrictions (e.g. barriers to competition) affecting trade in services in 22 sectors across 50 jurisdictions, air transport services were the most restrictive sector on average. In the STRI, air transport services comprise passenger and freight air transport, carried domestically or internationally, covering commercial establishment only. Brazil was ranked as the third least restrictive jurisdiction in the air transport services, after Chile and the United Kingdom (OECD. 2023. OECD Services Trade Restrictiveness Index: Policy trends up to 2023. Paris: OECD Publishing.

<https://www.oecd.org/trade/topics/services-trade/>. p. 5).

²⁵ ILO. 2023. "Towards a Green, Sustainable and Inclusive Recovery for the Civil Aviation Sector. Report for the Technical Meeting on a Green, Sustainable and Inclusive Economic Recovery for the Civil Aviation Sector, Geneva, 24-28 April 2023." https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_873059.pdf. p. 9. According to this document, for example, compliance with regulatory security requirements accounts for around 35% of the operating costs of an airport.

within a market economy.²⁶ Nevertheless, regulation often unduly hampers competition, in circumstances where less restrictive alternatives can be implemented to achieve the legitimate public objectives intended by the regulation in question. This suggests that commonly there is room for increasing competition in regulated sectors, including the airport sector.

Two recent examples in Brazil illustrate that airport regulation can unnecessarily limit competition, suggesting that further pro-competitive reforms can be implemented. First, in 2019 a discussion emerged after an airline exited the market, regarding the reallocation of its slots at São Paulo/Congonhas airport, the most congested Brazilian airport. The market power of the incumbent airlines would have further increased had the regulation then in force been followed. Nonetheless, the policy maker decided to adopt a more flexible approach that amounted to a more competitive distribution of the slots. Second, in 2023 the Brazilian government decided to limit the number of transported passengers and restrict operations at Rio de Janeiro/Santos Dumont airport to specific destinations, in order to prevent competition against Rio de Janeiro/Galeão airport. While the second restriction was ultimately withdrawn, the maximum traffic at Rio de Janeiro/Santos Dumont airport was established at a level below its technical capacity, with the goal of concentrating the traffic at Rio de Janeiro/Galeão.

Against this background, this study aims at analysing the interactions between sector regulation and competition law in the airport sector,²⁷ in order to better understand how this relationship occurs in practice and how

²⁶ IHLG, "Aviation Benefits Report: 2019", p. 14.

²⁷ This research does not address the other civil aviation activities, even though they may influence the competitive environment of airports. Therefore, the following activities are outside the scope of this research: commercial air transport services (air transport services available to the general public for the transportation of passengers, mail and/or freight for remuneration, including scheduled and non-scheduled air transport), general aviation (all civil aviation operations other than scheduled and non-scheduled commercial air transport operations, such as non-commercial business aviation and instructional flying) and air navigation services (provided to air traffic during all phases of aircraft operations, e.g. air traffic management and meteorological services) (UN DESA, International Standard Industrial Classification of All Economic Activities (ISIC); ICAO, Aviation Satellite Account - Recommended Methodological Framework Draft). It should be noted that although air navigation services are provided at the airport, they are not technically considered airport services. While in some jurisdictions the airport operator can also provide air navigation services, more often they are performed by a third party, usually a public-owned body—even though there are a few jurisdictions where these services have been privatised.

it could be improved. In this context, this research intends to develop a consistent approach to regulation and competition in the airport sector, particularly supporting the institutionalisation of an airport pro-competitive regulatory approach.

While the existing literature on regulation and competition in the civil aviation industry focuses mainly on air transport, studies on airport competition have emerged in recent years, delving into the changes the airport industry has undergone and discussing whether and to what extent airports compete among themselves. There are also several papers on specific topics related to competition within airports, such as airport slots and ground handling services. However, there is no structured and broad-based research on the interactions between regulation and competition in the sector, particularly from the perspective of a pro-competitive airport regulation. As mentioned above, this is crucial in the context of an emerging pro-competitive regulatory approach that needs to be consolidated and lead to further reforms, which will ultimately help develop the civil aviation sector, with several economic and social benefits.

To address these issues, this research primarily employs qualitative analysis, drawing from the regulatory framework and caselaw, as well as legal and economic literature. While it focuses primarily on the Brazilian context, this study also builds on foreign experiences from pertinent jurisdictions for the discussions in question. However, it should be noted that this is not a comparative law research, and the international perspectives aim at contextualising the main issues under analysis and inform potential avenues for future perspectives.

This study is structured as follows. Chapter 1 sets out the theoretical framework concerning competition law and sector regulation. It starts by discussing the objectives of competition law and sector regulation, as well as their similarities and differences. Then, competition enforcement in regulated sectors is analysed, describing the issue of concurrent application of competition law and sector regulation, including the so-called regulated conduct defence. The following sections focus on the institutional set-ups for applying competition law and sector regulation, and the tools for co-operation between competition authorities and sector regulators.

Chapters 2 and 3 delve into airport competition, regarding competition between airports and competition within airports, respectively. While the analysis of these two areas in separate chapters is justified for academic purposes, it should be noted that they mutually influence each other.²⁸

²⁸ For example, increased competition within an airport (e.g. as regards ground handling services) enhances its overall competitiveness vis-à-vis its competing airports, by offering better and more affordable services and therefore attracting

Chapter 2 first sets out the economics of airports, highlighting the changes the airport sector has undergone in recent decades, from a natural monopoly to a competitive market, as well as presenting the main airport management models. Then, the main issues related to competition between airports are discussed, including the scope of competition between airports, economic regulation of airport charges, common ownership of airports and competition between airports in the same metropolitan area. In turn, Chapter 3 focuses on competition within airports, covering airport slots, ground handling services, on-airport jet fuel supply and airport commercial services. By disentangling airport competition, Chapters 2 and 3 intend to present the state of play of competition in the airport sector, illustrating how it interacts with airport regulation.

Chapter 4 examines how competition policy can help shape airport regulation. It shows that airport regulation can be further embedded into competition policy, through both competition law enforcement and competition advocacy. With regard to competition law enforcement, the chapter demonstrates that competition authorities can advance more pro-competitive regulation through remedies imposed within merger control and anti-competitive behaviour investigations. In addition, it discusses how joint and co-ordinated efforts of competition authorities, civil aviation regulators and other relevant policy makers in advocating for pro-competitive airport regulation can result in enhanced competition in the airport sector.

Finally, the main conclusions of this study are presented, highlighting the need for institutionalising a pro-competitive regulatory approach in the airport sector in Brazil.

more airlines and passengers. Similarly, at airports facing competition, services within the airport are likely to be more competitive.

CHAPTER 1

COMPETITION AND REGULATION

This chapter provides an overview of competition and regulation as background for the specific analysis of the airport sector. It covers the general objectives of competition law and sector regulation, as well as how they interrelate with each other.

1.1 General objectives

Even the neoclassical economic theory, which defends that the state should remain absent from the economy,²⁹ recognises that the market does not always work well when left to its own devices, therefore requiring a corrective intervention. Under this context, competition law and sector regulation are two instruments for state market supervision, aiming at securing a better outcome for society.³⁰

Indeed, the existence of market failures (or market absences, where no effective market exists) requires a state corrective action, which can be achieved by competition law and/or regulatory instruments.³¹ According to the economic literature, market failures occur when a market left on its own fails to produce an efficient allocation of resources.³² Examples include the existence of market power (especially in case of monopolies),

²⁹ It should be noted, however, that the concept of free markets is a myth, since all markets depend on law to exist (e.g. the notion of private property and contract). Accordingly, Cass Sunstein refers to the myth of *laissez-faire*, indicating that “markets should be understood as a legal construct (...) rather than as a part of nature and the natural order” (Sunstein, Cass R. 1997. *Free Markets and Social Justice*. Oxford: Oxford University Press. p. 5).

³⁰ Dunne, Niamh. 2015. *Competition Law and Economic Regulation: Making and Managing Markets*. Cambridge: Cambridge University Press. p. 3.

³¹ Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*, p. 6.

³² Mankiw, N. Gregory. 2018. *Principles of Economics*. Boston: Cengage Learning. p. 12.

public goods, externalities, asymmetric or imperfect information, moral hazards, factor immobility and the lack of clear property rights.³³

However, the mere existence of a market failure does not necessarily require a state intervention. In fact, a collective action should only be needed if a market failure cannot be addressed effectively by private law. Even in case of private law failures, a regulatory solution may still not be required since private law may not be more successful in addressing the inefficiencies than the market itself. At the same time, the efficiency gains that a regulatory solution produce may be outweighed by increased transaction costs or misallocations created in other sectors of the economy.³⁴

State interventions may also achieve public policy objectives that go beyond the fixing of market failures, which are usually linked to economic reasons. For instance, regulatory actions may address non-economic rationales related to distributional justice and fairness, as well as health, safety and environmental quality.³⁵⁻³⁶

In this regard, to control market behaviour and address market failures or achieve other public policy objectives, the state can implement regulatory policy mechanisms, which prohibit or require certain market

³³ Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*, pp. 8-9; OECD. 2019. *Independent Sector Regulators*, OECD Competition Policy Roundtable Background Paper. Paris: OECD Publishing. [https://one.oecd.org/document/DAF/COMP/WP2\(2019\)3/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2019)3/en/pdf). p. 27.

³⁴ Ogus, Anthony. 2004. *Regulation: Legal Form and Economic Theory*. Oxford and Portland: Hart Publishing. pp. 29-30.

³⁵ Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*, p. 9; Ogus, *Regulation: Legal Form and Economic Theory*, pp. 46-54; OECD. 2019. *Competition Assessment Toolkit - Volume 2: Guidance*. Paris: OECD Publishing. <https://www.oecd.org/daf/competition/45544507.pdf>. p. 7.

³⁶ It should be noted that some authors consider that in essence these non-economic rationales are only reformulations of the concept of market failure. Tirole, for instance, classifies market failures into six categories, comprising both economic and non-economic goals: (i) the exchange can affect third parties, who are, by definition, not consenting; (ii) the exchange may not take place with full knowledge and consent; (iii) buyers can become victims of their own actions; (iv) implementing the exchange may exceed the individual's capacities; (v) businesses can have market power; and (iv) although the market improves efficiency, there is no reason it will deliver equity (Tirole, Jean. 2017. *Economics for the Common Good*. Princeton and Oxford: Princeton University Press. pp. 154-160). Other authors propose a broader definition of dysfunctional markets, such as market "defects", to encompass both economic and non-economic goals of regulation (Breyer, Stephen G. 1982. *Regulation and Its Reform*. Cambridge, MA: Harvard University Press).

practices. Competition law and sector regulation are two possible instruments to do so.³⁷

Although competition law and sector regulation intend to make markets work better to the benefit of consumers, they pursue distinct objectives, use different tools and affect different aspects of business conduct.³⁸

Competition law is a mechanism of market supervision that aims to prevent anti-competitive accumulation of market power and to control its exercise, in order to fully realise the typical benefits of competition—i.e. lower prices, greater choice, higher quality and innovation.³⁹

Competition laws provide two main prohibition tools. First, prohibition of anti-competitive practices:⁴⁰ (a) collusion between two or more companies (including cartels) and (b) abuse of dominant firms (exploitative and exclusionary unilateral conducts). Second, prohibition of mergers that have a substantial detriment effect on competition (merger control).⁴¹

Beyond these enforcement activities, which correspond to the core of competition law in most jurisdictions, an additional and complementary advisory tool has been increasingly adopted by jurisdictions: competition advocacy. This refers to the efforts conducted by competition authorities “related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition”.⁴²

Over the last decades, competition law has been spreading over the world, and today more than 125 jurisdictions have a competition law

³⁷ Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*, pp. 9-10.

³⁸ OECD. 2011. *The Regulated Conduct Defence*, OECD Competition Policy Roundtable Background Paper. Paris: OECD Publishing.
<https://www.oecd.org/daf/competition/mergers/48606639.pdf>. p. 25.

³⁹ Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*, pp. 14, 18.

⁴⁰ Also called “antitrust” in the EU competition law. In the United States and Brazil, “antitrust” has a broader sense, being synonym of “competition law” (i.e. comprising both anti-competitive practices and merger control). This research uses the term “antitrust” in the latter sense.

⁴¹ Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*, pp. 18-19; OECD, *The Regulated Conduct Defence*, p. 22.

⁴² ICN. 2002. *Advocacy and Competition Policy*, Report prepared by the Advocacy Working Group, ICN’s Conference. Naples: ICN.
https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_AdvocacyReport2002.pdf. p. 25.

regime, most of them also having an active competition authority. This has led to a proliferation of investigations, decisions and advocacy initiative worldwide.⁴³

In spite of specific differences among national regimes, there has been an overall substance convergence of competition laws, especially as regards merger control and cartels. Indeed, today, most competition laws use comparable tools and principles, and competition authorities speak a similar economic and legal language.⁴⁴⁻⁴⁵⁻⁴⁶

On the other hand, although the notion of regulation can be significantly broad, the term is used in this research to refer more specifically to sector-specific regulation or sector regulation, which is the instance of regulation

⁴³ OECD. 2020. OECD Competition Trends 2020. Paris: OECD Publishing. <https://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf>. p. 3.

⁴⁴ Capobianco, Antonio, Davies, John, and Ennis, Sean F. 2015. Implications of Globalisation for Competition Policy: The Need for International Cooperation in Merger and Cartel Enforcement. E15Initiative. Geneva: International Centre for Trade and Sustainable, Geneva: ICTSD/WEF.

<http://e15initiative.org/publications/implications-of-globalisation-for-competition-policy-the-need-for-international-cooperation-in-merger-and-cartel-enforcement/>.

⁴⁵ The work of international organisations (such as the OECD and UNCTAD) or fora (such as the ICN) has contributed to this outcome, through soft convergence (Fox, Eleanor M. 2011. "Antitrust Without Borders: From Roots to Codes to Networks." In Cooperation, Comity, and Competition Policy, by Guzman, Andrew T., 265-285. New York: Oxford University Press). See, for instance, the following OECD recommendations that reflect the substantial convergence on mergers and cartels: OECD. 2005. "Recommendation of the Council on Merger Review." <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0333>; OECD. 2019. "Recommendation of the Council concerning Effective Action against Hard Core Cartels." <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452>.

⁴⁶ It should be noted, nevertheless, that competition law has been given different goals over time and throughout jurisdictions. For instance, the Harvard School (industry structure and performance); Chicago School (economic efficiency); Freiburg School or Ordoliberalism (economic freedom); Post-Chicago approaches (game theory and behavioural economics); Hipster or Neo-Brandeis movement (proposing additional goals to competition law, such as labour, privacy, innovation, environment, democracy, protection of small businesses and reduction of poverty) (Salomão Filho, Calixto. 2013. *Direito Concorrencial*. São Paulo: Malheiros; Castro, Bruno Braz. 2019. *A Que(m) serve o antitruste: eficiência e rivalidade na política concorrencial de países em desenvolvimento*. São Paulo: Singular). These different approaches are relevant since the broad language of competition law requires an interpretative exercise in light of what is understood by its policy objectives in order to determine the anti-competitive practices (Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*, pp. 26 ff.).

that is likely to overlap with competition law.⁴⁷ In this sense, sector regulation intends to regulate specific economic sectors (e.g. public utilities), addressing it by controlling entry and prices, establishing quality and conditions of service, as well as setting universal service obligations.⁴⁸ In other words, sector regulation imposes public constraints on business behaviour to address market failures.⁴⁹

Sector regulation involves three different categories: technical regulation (determination of standards, relating to issues of safety, environment and privacy), economic regulation (pricing issues and standard marketing practices) and access regulation (ensuring non-discriminatory access to necessary inputs).⁵⁰

Even though sector regulation and independent sector regulators exist for more than a century (e.g. the US Interstate Commerce Commission, created in 1887⁵¹), their importance became more prominent since the end of the 1980s, when a process of massive privatisation, liberalisation and deregulation has boomed throughout the world,⁵² including in Brazil.

In fact, many jurisdictions implemented programmes of privatising state-owned assets, especially network utilities, which led to the need for some kind of regulatory supervision over the activities, since many of these industries retained their natural monopoly characteristics. At the same time, many markets were opened to competition, and there was a change in the traditional forms of regulation, which were replaced by less intrusive means. Also, there was a shift in the role of the state: rather than

⁴⁷ Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*, pp. 33-34.

⁴⁸ Kahn, Alfred E. 1970. *The Economics of Regulation: Principles and Institutions*, Volume 1 - Economic Principles. New York: John Wiley & Sons. p. 3.

⁴⁹ OECD. 2021. *Competition Enforcement and Regulatory Alternatives*, OECD Competition Committee Discussion Paper. Paris: OECD Publishing. <https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives-2021.pdf>. p. 4.

⁵⁰ Dabbah, Maher M. 2011. "The Relationship between Competition Authorities and Sector Regulators." *Cambridge Law Journal*, 113-143. doi:<https://doi.org/10.1017/S0008197311000195>. pp. 114-115.

⁵¹ To a historical analysis of the creation of regulatory agencies and their evolution, see McCraw, Thomas K. 1984. *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis and Alfred E. Kahn*. Cambridge/MA: The Belknap Press of Harvard University Press.

⁵² Tapia, Javier, and Mantzari, Despoina. 2013. "The regulation/competition interaction." In *Handbook on European Competition Law: Substantive Aspects*, by Lianos, Ioannis and Geradin, Damien, 588-627. Cheltenham: Edward Elgar. p. 590.

direct service provider, it became a regulator (marking the rise of the so-called regulatory state). Thus, there was a separation of public policy making functions from operation or service delivery functions. In this context, many states created independent regulatory agencies, established by statute and endowed with statutory powers, operating at arm's length from the government in order to insulate them from the influence of national governments.⁵³

1.2 Differences and complementarities

Despite the fact that the precise differentiation of competition law and sector regulation can often be fluid and elusive, the literature provides a set of elements that differentiates both instruments. First, as for the scope of application, there is a generalised vs. specialised divergence: while competition law generally applies economy-wide (unless a sector is expressly or impliedly exempted), sector regulation applies in a sector-by-sector basis, usually to address identified and discrete failures within particular markets (typically network industries or natural monopolies). As a consequence, sector regulators tend to hold more technical market expertise and institutional resources relating to the sectors under supervision, while competition authorities have specialist expertise in competition law and economics.⁵⁴

A second difference commonly highlighted concerns the temporal nature of enforcement. On the one hand, sector regulation is inherently *ex ante* or prospective in its approach, as it aims to establish a structural framework to prevent market failures from occurring. On the other hand, competition law is largely *ex post* or retrospective (with the exception of merger control), since it is used once competition problems arise or anti-competitive behaviour is identified. Therefore, the former would be more pro-active while the latter more reactive.⁵⁵⁻⁵⁶

⁵³ Yeung, Karen. 2010. "The Regulatory State." In *The Oxford Handbook of Regulation*, by Baldwin, Robert, Cave, Martin, and Lodge, Martin, 64-83. Oxford: Oxford University Press. pp. 65-66; Aranha, Márcio Iório. 2018. *Manual de Direito Regulatório*. London: Laccademia Publishing. pp. 135-136; Tapia, and Mantzari, "The regulation/competition interaction", p. 590.

⁵⁴ OECD. 2016. *Key points of the Roundtables on Changes in Institutional Design*. Paris: OECD Publishing.
[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M\(2015\)1/ANN9/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)1/ANN9/FINAL&docLanguage=En). p. 4; Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*, p. 43.

⁵⁵ Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*, pp. 43-44; Dabbah, "The Relationship between Competition Authorities