



WORKING PAPER

WORLDWIDE AIR TRANSPORT CONFERENCE (ATCONF)

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Agenda Item 2: Examination of Key Issues and Related Regulatory Framework

Agenda Item 2.4: Fair competition

FAIR COMPETITION IN INTERNATIONAL AIR TRANSPORT

(Presented by the Secretariat)

EXECUTIVE SUMMARY

This working paper examines various aspects relating to fair competition in international air transport, notably the issue of safeguards to ensure fair competition.

The issue of safeguards for air transport liberalization is discussed separately in ATConf/6-WP/3, Agenda Item 2.5.

Action: The Conference is invited to:

- a) review the information and assessments presented in this paper;
- b) endorse the conclusions presented in paragraph 5; and
- c) adopt the recommendations presented in paragraph 6.

References: ATConf/6 reference material is available at www.icao.int/meetings/atconf6.

1. INTRODUCTION

1.1 The reduction by States of controls within the air transport industry, known as “liberalization” or “deregulation”, has fostered competition between air carriers. Enhanced competition, in turn, has led many carriers to consider consolidation as a means by which to achieve economies of scale and scope and to respond to consumer demands for global networks. The three major airline alliances, *Star Alliance*, *SkyTeam* and *Oneworld*, now represent more than 60 per cent of the global market share, measured in available seat-kilometres for total scheduled passengers. Competition today is not just between individual airlines but increasingly between these alliances. With heightened competition and consolidation has come a heightened risk of anti-competitive behaviour, including abuse of a dominant position and oligopoly practices. In addition, in order to keep their national airlines competitive in a liberalized market, some governments may be tempted to lend support to their airlines through means that could deny the airlines of other States a fair and equal opportunity to compete.

2. RECENT DEVELOPMENTS

2.1 At the bilateral level, there have been recent examples of Air Services Agreements (ASAs) which include provisions related to fair competition, such as Article 14 — *Competitive Environment* of the Canada-European Union (EU) ASA of 2009, as well as Article 2 — *Fair and equal opportunity*, Article 14 — *Government Subsidies and Support*, and Article 20 — *Competition* of the EU-United States ASA of 2007. However, analysis of the liberalized air transport agreements that were concluded after April 2003 shows that while the ICAO model clause has been used in some cases, such as in Article 6 of the United Kingdom-Dominican Republic ASA of 2006, a majority of ASAs concluded after April 2003 do not contain provisions on safeguards.

2.2 At the multilateral level, many States have recently turned to regional solutions. Several regional bodies, such as the African Union (AU), the Association of Southeast Asian Nations (ASEAN), the Arab Civil Aviation Commission (ACAC) and the Latin American Civil Aviation Commission (LACAC), have been developing provisions on fair competition, using in some cases ICAO guidance. In 2007, the AU adopted comprehensive competition rules for the air transport sector which are similar to those previously developed and adopted by States belonging to the Common Market of Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC) and the Eastern African Community (EAC).

3. ICAO WORK

3.1 The Chicago Convention Preamble states that international air services should be established “on the basis of equality of opportunity”. Over the years, an increasing number of States have applied the principle to permit vigorous airline competition for the benefit of national economies and consumers, as opposed to interpreting the concept narrowly to achieve “equality of benefits”.

3.2 The issue of how to ensure fair competition in an environment of liberalization was discussed by the Fifth Worldwide Air Transport Conference (ATConf/5, 2003). The Conference considered a proposal for a regulatory arrangement in the form of a model clause in air services agreements which States may use as an additional means to identify, prevent and eliminate anti-competitive abuse. In its conclusions, the Conference agreed that liberalization must be accompanied by appropriate safeguard measures to ensure fair competition. While general competition laws may be an effective tool in many cases, it was felt that aviation-specific safeguards to prevent and eliminate unfair competition were required for international air transport. The Conference agreed that States should give consideration to the use of the ICAO model clause on “Safeguards against anti-competitive practices” in air services agreements.

3.3 The ICAO Secretariat updated its policy and guidance material by incorporating relevant topics in the *Manual on the Regulation of International Air Transport* (Doc 9626, Second Edition), including topics such as State aid and competition laws. Concurrently, *Policy and Guidance Material on the Economic Regulation of International Air Transport* (Doc 9587) was updated with the incorporation of the model clause on “Safeguards against anti-competitive practices”. The ICAO Template Air Services Agreements (TASA) includes two articles on competition issues: Article 15 on Fair Competition, and Article 19 on Competition Laws. Finally, as recommended by the ICAO Air Transport Regulation Panel (ATRP) during its Eleventh Meeting (Montréal, 4 to 8 June 2012), the Secretariat developed a non-exhaustive summary of competition policies and practices developed by other organizations, presented in the Appendix.

4. DISCUSSION

4.1 In liberalizing international air services, States have opted for greater reliance on competitive forces and, accordingly, have a greater need to address potential anti-competitive abuse or collusion than in the past era of tight government regulation of routes, frequencies, and fares. A fundamental issue is the question of the tools best suited to address this concern. Options include a continued reliance on mechanisms within air services agreements, the application to international air services of national competition laws or policies of general applicability, or some combination of the two.

4.2 Although there is presently no consensus on a single approved approach, certain conclusions may be drawn. The first is that, in a liberalized market, the distortive effect of unilateral government assistance known as “state aids” has been broadly recognized. Such assistance is largely outside the scope of national competition laws, which address the actions of private sector competitors, and is thus more amenable to regulation through provisions in ASAs. This point is underscored by the inclusion in a growing number of liberalized air services agreements of non-exhaustive enumerations of conditions likely to adversely affect a fair and competitive environment, such as capital injections, cross subsidization, grants, guarantees, government ownership, tax relief or tax exemption and protection against bankruptcy or insurance by a government entity. It should be noted that there is also control of state aid at the European Union level in order to avoid distortions within the Single Market.

4.3 A second conclusion is that States must exercise care in applying their national competition laws and policies to international air services. With increased globalization and the adoption of market economy principles in aviation, it is not surprising that States would respond by seeking to apply their competition regulations to the sector. However, national competition laws, notably those governing mergers or alliances, may conflict with each other. Moreover, certain States do not have competition laws. Furthermore, the traditional approach in many bilateral agreements favouring airline cooperation on issues like capacity and pricing is squarely at odds with competition laws that strictly prohibit price-fixing, market division and other collusive practices by market competitors.

4.4 In cases where national competition laws or policies are applied to international air transport, States should give due consideration to the concerns of other States involved. Cooperation is needed between States, and especially between competition authorities. At a minimum, such cooperation should aim at avoiding outright conflicts of legal obligations placed upon airlines. Although wide-ranging legal harmonization remains a distant objective, consultation and information-sharing between competition authorities can foster better understanding and, as has been demonstrated in the review of certain airline alliance agreements, greater compatibility in competition law analyses and remedies. For States that do not have competition laws, additional ICAO guidance could be developed for inclusion in air services agreements to ensure that airlines operate in a framework covering the basic competition affecting them.

4.5 A theme often sounded in the discussion of international air transport competition is the need for a “level playing field”. On an abstract level, there is broad acceptance of the principle that a fair and equal opportunity is required to allow airlines to succeed and grow in the liberalized global market. In fact, some air services agreements refer explicitly to the principle of a level playing field by noting that “where there is not a level competitive playing field for airlines, potential benefits deriving from competitive air services may not be realised”. However, it must be recognized that there is currently no commonly accepted definition of the conditions constituting a “level playing field”. It is unlikely that consensus on a comprehensive definition can be achieved at this time, given the widely different circumstances of States and their aviation sectors, including such fundamental issues as state ownership, policies on maintenance of national air carriers and airport development, and widely divergent State policies on taxation, labour regulation, bankruptcy, and health insurance.

4.6 Therefore it is suggested that the aviation community focus its efforts on fostering compatibility of the competition rules applied to international aviation and, at a minimum, avoid outright conflicts of the obligations imposed on air carriers. To facilitate States' efforts in this direction, ICAO should update its guidance, taking into account the different circumstances of States and their aviation sectors. With a view to helping States adopt compatible approaches when enacting or applying competition laws and policies, a set of core principles on fair competition in international air transport could be developed by ICAO.

5. CONCLUSIONS

5.1 ICAO policies on competition are still valid, based on observed practices, such as the inclusion of ICAO model clauses on competition in air services agreements. While there are significant differences between competition policies adopted by different regions, a number of common types of anti-competitive practices could be tentatively identified. Examples of such practices could include abuse of dominant position, predation, unauthorized collusion on pricing or capacity, or unfair State aid. Based on existing ICAO guidance, as well as on practices and rules observed in a broad sample of States and regions (see Appendix), the most prominent anti-competitive practices in air transport could be further analysed and more precisely defined. Those common elements could form the basis for the development of a set of core principles on fair competition in international air transport.

5.2 There is a recognized need for cooperation among competition authorities notably in the context of approval of alliances and mergers. In this regard, ICAO should identify and develop tools to foster dialogue and exchange of information among interested authorities. Such tools could include the development of a facility similar to the existing ICAO Air Services Negotiation Conference (ICAN).

6. RECOMMENDATIONS

6.1 The following recommendations are proposed for consideration by the Conference:

- a) States should give due consideration to the concerns of other States over application of national competition laws or policies to international air transport;
- b) States should use ICAO guidance in ASAs and national or regional competition rules;
- c) States should encourage cooperation among competition authorities notably in the context of approval of alliances and mergers;
- d) ICAO should develop tools to foster cooperation, dialogue and exchange of information between and among competition authorities to achieve a better competitive environment for international air transport;
- e) ICAO should develop a set of core principles on fair competition in international air transport; and
- f) ICAO should continue to monitor developments in this area and update its guidance in response to changes and State needs.

APPENDIX

OVERVIEW OF COMPETITION POLICIES AND PRACTICES APPLICABLE TO
AIR TRANSPORT

	Existing ICAO guidance	Asia Pacific	China	Africa	Europe	Latin America	North America	International guidance	Possible core principles*
Reference	ATConf/5 Safeguards [2.3.3.2]	ASEAN (b)	China Competition laws (q)	COMESA-EAC-SADC (a)	EU Law	LACAC (j)	Title 49 United States Code (notably § 41712 (e))	OECD, UNCTAD	
General (anti-competitive practices)	<ul style="list-style-type: none"> * Charges insufficient to cover costs * Excessive capacity/frequency * Sustained practice * Negative economic effect * Intent/effect of damaging airline * Abuse of dominant position 	<ul style="list-style-type: none"> * Charges insufficient to cover costs * Excessive capacity/frequency * Sustained practice * Negative economic effect * Intent/effect of damaging airline * Abuse of dominant position 	<ul style="list-style-type: none"> * Agreements, decisions and other concerted conducts designed to eliminate or restrict competition * Price fixing * Restricting the lowest price * Restricting production * Splitting market * Joint boycotting of transactions * Abuse of dominant position 	<ul style="list-style-type: none"> * Charges insufficient to cover costs * Excessive capacity/frequency * Sustained practice * Negative economic effect * Intent/effect of damaging airline * Abuse of dominant position 	<ul style="list-style-type: none"> Agreements, decisions, concerted practices: * Price fixing * Limit/control production * Market/supply sharing * Dissimilar conditions * Supplementary obligations (g) 	<ul style="list-style-type: none"> * Excessive capacity/frequency * Excessively low occupancy factors * Rates not covering costs of services (permanent) * Serious economic damage * Attempt to weaken/destroy carrier * Different from previous conduct 	<ul style="list-style-type: none"> * Unfair or deceptive practice * Unfair method of competition (l) 	<ul style="list-style-type: none"> * Anti-competitive acquisitions * Predatory behaviour toward competitors * Unreasonable refusal to deal * Anti-competitive abuse of industrial property rights * Discriminatory (i.e. unreasonably differentiated) pricing (m) 	<ul style="list-style-type: none"> * Charges insufficient to cover costs * Excessive capacity/frequency * Production restrictions * Joint boycott of transactions * Sustained practice * Negative economic effect * Intent/effect of damaging airline * Abuse of dominant position * Different from previous conduct * Discriminatory pricing
Dominant position	Behaviour indicating an abuse of dominant position on route		<ul style="list-style-type: none"> * Refusal to trade with counterparty without legitimate reasons * Requiring counterparty to trade exclusively without legitimate reasons * Tying products or requiring unreasonable conditions for trading * Applying dissimilar prices or other transaction 	<ul style="list-style-type: none"> * Limiting production * Dissimilar conditions * Forced contracts 	<ul style="list-style-type: none"> * Unfair price/trading conditions * Limit production/markets * Dissimilar conditions * Supplementary obligations (h) 			<ul style="list-style-type: none"> * Control of the market (based on market shares; turnover; assets, employees, etc.) * Ability to raise/depress prices above/below competitive level 	<ul style="list-style-type: none"> * Controlling position * Ability to manipulate prices or to force entering into agreements * Unfair price/trading conditions * Limit production/markets * Dissimilar conditions * Supplementary obligations

	Existing guidance	ICAO	Asia Pacific	China	Africa	Europe	Latin America	North America	International guidance	Possible core principles*
				terms to equivalent counterparties						
Predation	Price-cutting			* Unreasonably selling commodities at prices below cost * Buying commodities at unfairly low prices	Excessively low price	* Fares charged sufficiently below competition to cause injury * Distinguishable from normal pricing practices (o) * Unfair price/trading conditions (h)	Purchase/selling prices insufficient to cover direct operating costs of services		* Using below-cost pricing to eliminate competitors (n) * Charging prices below short-run marginal cost w/ expectation of eliminating competitor (d)	*Purchase/selling prices insufficient to cover direct operating costs of services. * Charging prices below short-run marginal cost w/ expectation of eliminating competitor * Unfairly low purchase pricing
	Excessive capacity/frequency			Selling at unfairly high prices					Excessive pricing (n)	Excessive sale pricing
Discrimination				Discriminatory pricing or other transaction terms	Discrimination by national rules against services from other Member States	Discrimination is unfair if dissimilar conditions to equivalent transactions (competitive disadvantage) (h)			* Discriminatory (i.e. unreasonably differentiated) pricing (m)* Unjustifiably differentiated pricing (n)	Unjustifiable difference in pricing
State aid					Granting of subsidies if distorts/threatens to distort competition	State aid acceptable if: * part of restructuring programme * limited duration * secure future viability restructuring * self-contained * no expansion * no Govt management (i), (o)		Federal subsidies OK for: * war risk insurance * public need * small communities * 9/11 damages (f) Unfair: capital injections; cross subsidization; grants; guarantees; ownership; tax relief/exemption; protection against bankruptcy; insurance(k)		Competition-distorting public funds into operators unless: * public policy reason * limited duration * related to a valid economic objective * is not to be expanded * does not involve Govt. intervention in managt.

Notes

The right hand column attempts to synthesize the main principles identified in other columns and to offer possible outlines for such principles. By no means does this compilation constitute any official policy.

- (a) Meeting of African Ministers Responsible for Air Transport (16-19 May 2005)
- (b) ASEAN Multilateral Agreement (12 Nov. 2010)
- (c) Also defined in Massimo Galosh Gross, Air Transport Services in APEC: Impact of Regulation on Trade and Political Economy of Reform (Oct. 2010)
- (d) The Future of International Air Transport Policy, Responding to Global Change, OECD, 1997
- (e) Transportation Code (Unfair and Deceptive Practices and Unfair Methods of Competition)
- (f) Air Transportation Safety and System Stabilization Act
- (g) Art. 81(1) EC Treaty (Art. 101(1) Treaty on the Functioning of the European Union (TFEU))
- (h) Art. 82 EC Treaty (Art. 102 TFEU)
- (i) Art. 87 & 88 EC Treaty (Art. 107 & 109 TFEU)
- (j) LACAC Recommendation A13-3
- (k) EU-Canada ASA 2009
- (l) 49 USC § 41712 (e)
- (m) OECD Guidelines for Multinational Enterprises
- (n) United Nations Conference on Trade and Development (UNCTAD) Model Law on Competition, Geneva, 2000
- (o) Regulation (EC) 868/2004
- (p) Communication from the European Commission - Guidance (2009/C 45/02)
- (q) China: Anti-monopoly Law (2008), Anti-unfair competition law (1993), Price law (1998)

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