



WORKING PAPER

WORLDWIDE AIR TRANSPORT CONFERENCE (ATCONF)

SIXTH MEETING

Montréal, 18 to 22 March 2013

Agenda Item 2: Examination of key issues and related regulatory framework

2.4: Fair competition

FAIR COMPETITION AND REGULATORY COOPERATION IN THE AVIATION SECTOR

(Presented by United States of America)

EXECUTIVE SUMMARY

One of the most effective curbs on anticompetitive behavior is operation of normal, undistorted market forces. Competition issues in a liberalized environment can be addressed most effectively through direct regulatory cooperation between States, in particular their government authorities responsible for competition policy, rather than through the development of static competition guidelines.

ICAO can continue to promote fair competition by developing a body of knowledge concerning existing competition laws and practices, and assisting States in establishing new cooperative relationships with their aviation partners. These bilateral or multilateral relationships will allow States to achieve their aviation and competition policy objectives without constraining the growth of global aviation or permitting anti-competitive behavior or unfair methods of competition.

Action: The Conference is invited to:

- a) endorse the conclusions presented in paragraph 5; and
- b) adopt the recommendation presented in paragraph 6.

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

1. INTRODUCTION

1.1 Maximizing the economic benefits of liberalization requires a pragmatic, market-oriented approach to the application of competition policy in the airline industry. Many air services agreements provide that each party shall allow a fair and equal opportunity for the airlines of both parties to compete in providing the international air transportation governed by the agreement, and bilateral partners often discuss competition issues under the consultation provisions of their agreement. In addition, the experience of the United States in developing regulatory cooperation to deal with airline cooperative arrangements provides a prototype for addressing competition issues on a broader basis.

2. AIRLINE COOPERATIVE ARRANGEMENTS AND REGULATORY COOPERATION

2.1 In order to meet demand for access to an ever larger number of points across the globe, many carriers have entered into commercial relationships. These complex arrangements, often the product of unique competitive forces, take the form of code shares, alliances, joint ventures, or other cooperative arrangements. These agreements often require review to ensure compliance with competition policies and laws in the jurisdictions of the air carriers involved. Thus, there is a significant need to foster compatible regulatory approaches to the review, evaluation, and monitoring of commercial relationships between air carriers based in different States.

2.2 By establishing relationships with their counterparts, States can better understand these complex arrangements and the competitive conditions that give rise to them. When the relationships are based upon trust and dialogue, member States may also develop common views of the competitive environment, identify areas of common interest and concern for further study or investigation, and, when a transaction arises, avoid conflicts in the application of separate competition rules. Unlike universal guidelines that would provide merely a perception of safeguarding competition, direct regulatory cooperation allows States to develop customized tools to address specific competition issues and transactions in particular aviation markets.

2.3 States can implement regulatory cooperation through a variety of means to foster trust, communication and dialogue on competition issues, as well as to reduce conflicts in the application of competition policies and rules in a given market. Cooperative activities may include informal discussions, consultations under air services agreements, and formal agreements or memoranda of understanding (MOUs) between two or more regulatory authorities. Where an agreement or MOU is concluded, the following elements should be considered:

- a) a statement of objectives, including enhancing mutual understanding of each party's rules and regulations, facilitating understanding of competitive conditions and industry developments, reducing the potential for conflicts in the application of competition rules, and promoting compatible approaches to analytical techniques and regulatory practices;
- b) periodic discussions, in person or through electronic or telephonic means, to discuss aviation and competition issues;
- c) consultations at the request of any party;
- d) timely notifications of proceedings and matters of interest to any party; and
- e) protections against the unauthorized disclosure of confidential information.

2.4 Regulatory cooperation, especially when it involves joint study, should include constructive engagement with the aviation industry, which must operate in many jurisdictions to compete effectively. Constructive engagement allows regulators to understand how the airline business is affected by regulatory, geographic, and technological factors, and to exercise more responsible oversight, with a view towards adopting approaches that are compatible with those of other jurisdictions, to the extent possible.

2.5 Through greater cooperation, States can also address their aviation and economic policy objectives. For example, they may eliminate impediments faced by carriers seeking to maintain and

expand their international operations and promote compatible regulatory approaches toward competitive and infrastructure access issues, in order to maximize the economic benefits of aviation while preserving a fair and equal opportunity to compete.

3. U.S.-EU COOPERATION

3.1 The cooperation between the United States Department of Transportation (DOT) and the European Commission's Directorate General for Competition (DG COMP) serves as a good example of the benefits that can be achieved quickly and cost-effectively through regulatory cooperation. Under the U.S.-European Union (EU) Air Transport Agreement, the parties confirmed that they apply their respective competition regimes to protect and enhance overall competition and not individual competitors, and recognized that competition can be fostered by minimizing differences in the application of their respective competition regimes and that cooperation between their competition authorities would promote competition and help achieve compatible regulatory results. Annex 2 of the Agreement established a formal framework for cooperation that has been successful for both parties.

3.2 As a first step, DOT and DG COMP launched a joint study of alliances in 2007-08. Staff from each agency developed a study plan, visited extensively with aviation industry representatives off the record, and published a general report describing the rules and practices of each jurisdiction and the state of alliance competition in the transatlantic market. The agencies also commissioned a detailed quantitative study based upon confidential data obtained with permission from industry sources. The quantitative study, which was reviewed by experts, allowed each agency to develop, discuss, and refine analytical techniques.

3.3 The joint study efforts paid large dividends for each party, as well as for the industry they oversee and the consumers they serve. In 2009, DOT and DG COMP engaged in parallel reviews of the same transaction involving the oneworld alliance. DOT and DG COMP applied different procedures, views, and resolutions to the transaction. However, with a foundation of trust and mutual understanding of airline industry competitive developments, the two agencies were able to communicate effectively and take into account the impact of the other party's decisions. As a direct result of the cooperation, the agencies made minor adjustments to their decisions to ensure compatible outcomes while still adhering to their own procedures, standards, and precedent. But for the regulatory cooperation, the cost of the remedy imposed by both parties would have increased for the airlines, the transaction may not have closed, and the benefits to consumers that each party had identified may not have materialized.

3.4 The U.S.-EU experience demonstrates that regulatory cooperation is beneficial for aviation competition authorities, the aviation industry, and consumers. Over time, partners can develop common views of competition issues, narrow conceptual differences, identify remedies that address the concerns of each party without imposing unnecessary costs, and begin to achieve convergence in practice and standards. None of these accomplishments require changes to law or unauthorized disclosure of confidential information.

4. ICAO'S ROLE

4.1 ICAO could play an important role in facilitating direct regulatory cooperation between States, which offers the best prospect for addressing airline competition issues in a pragmatic, positive way. ICAO should facilitate regulatory cooperation between States, and develop a body of knowledge concerning existing competition laws and practices to share with States and the aviation industry.

4.2 This approach would be much more productive than attempting to establish a static, general set of “core principles” on fair competition, an inventory of suspect commercial or governmental practices, or other guidelines that might create the illusion of safeguarding fair competition but would provide little if any real-world benefit. Agreeing in advance on core principles or a list of unfair competitive practices in a dynamic global industry would be extremely difficult. Whether anticompetitive actions have occurred is too dependent on the specific facts of each case to develop a definitive list that would provide useful guidance to States or carriers. Under the guise of protecting competition, such mechanisms could, on the contrary, replace one kind of government regulation with another that would be equally damaging in stifling real competition and preventing the very benefits that liberalization brings, *e.g.*, increased service and price options for air transport responsive to the dynamically changing needs of consumers and the global economy.

5. CONCLUSIONS

5.1 Direct regulatory cooperation between competition authorities, including aviation authorities where a State does not have a separate competition authority or oversight responsibilities are shared, offers the best path forward in safeguarding fair competition.

5.2 ICAO could play a key role in the efforts of its member States to foster compatible regulatory approaches in the application of competition policy to the airline industry, as an organizer and exchange for information. As proposed in WP/4, ICAO could develop a facility similar to the existing Air Services Negotiation Conference (ICAN) to bring together aviation competition authorities responsible for the airline industry, to facilitate the exchange of information and views. In addition, ICAO could undertake to compile the institutional structure of competition policy in its member States, catalogue applicable laws of various national and multinational authorities, and document and explain different regulatory approaches, processes, and applications of international aviation law concepts.

6. RECOMMENDATIONS

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

- a) States should give due consideration to the concerns of other States when national competition laws are applied to international air transport, with a view towards fostering compatible approaches that minimize regulatory conflicts;
- b) ICAO should develop a compendium of competition policies and practices, with detailed information concerning the structure of aviation regulation and competition policy in major States, rules and standards applied, applicable legal texts, and contact points; and
- c) ICAO should consider development of a facility similar to the existing ICAO Air Services Negotiation Conference (ICAN), to foster dialogue and exchange of information and views among aviation competition authorities.