



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

Agenda Item 2.4: Fair competition

ENHANCING FAIR COMPETITION IN THE INTERNATIONAL AIR TRANSPORT

(Presented by the Republic of Korea)

EXECUTIVE SUMMARY

This working paper discusses the extent of application of competition laws, the regulatory authorities supervising competition and recent trends, as these pertain to competition issues in international air transport. It also looks into the actions that ICAO has taken so far and recommends actions that States and ICAO should take assuming that safeguards are required in terms of liberalization, promotion of competition and prevention of anti-competitive practices in the future.

Action: The Conference is invited to:

- a) review the information and assessment presented in the paper;
- b) endorse the conclusions presented in paragraph 6; and
- c) adopt the recommendations presented in paragraph 7.

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

1. INTRODUCTION

1.1 Competition amongst airline alliances as well as airlines has intensified. We are also witnessing increased competition and integration, and at the same time a high risk of anti-competitive practices such as monopolies and oligopolies.

1.2 Some States, in an attempt to secure competitiveness of their domestic airlines in the liberalized market, are likely to use means, such as subsidies, to preclude fair and equal opportunities to airlines of other countries, and consequently, provide support to the domestic airlines.

1.3 The Convention on International Civil Aviation states that “International air transport services may be established on the basis of equality of opportunity.” In general, a sound order in the market may be disturbed as a result of a fare increase by a monopoly and oligopoly, a fare fixing based on collusion, decreased competition because of the emergence of market-dominating carriers after merger

and acquisition (M&A) and dumping sales caused by excessive competition. The aforementioned practices are causing serious concerns as a hindrance to fair competition. Further, discrimination in the application of competition law between domestic airlines, or between domestic and foreign airlines, is another practice impeding fair competition.

2. APPLICATION OF THE COMPETITION LAW

2.1 It can be said that competition laws related to air transport apply to almost the entire air transport field, such as: the freedom of fare fixing; the prevention of collusion; the ban on predatory fares; M&As between airlines; alliances and cooperation; code-sharing; the possibility of impeding competition in the market caused by an alliance, cooperation and agreement; the fairness of a computer reservation system; and check-in counter, gates, and slot allocation at airports.

2.2 In a number of States, such competition laws (e.g. the Fair Trade Act in the Republic of Korea (ROK)) are established in addition to an aviation act. Also, in a number of States, a separate authority in charge of competition issues deals with air transport-related violations of the competition law, e.g. the Department of Justice in the US, the Commission on Competition in the EU and the Fair Trade Commission in the ROK. Further, in most of cases, anti-trust immunity is granted which means that an evaluation of actions such as M&A will not undermine competition.

2.3 Unfair competition in the international air transport field may disadvantage air transport service users, and the competent authorities in each State punish violations based on their own competition law. An example in which an action was taken on a national level was when the Fair Trade Commission of the ROK, regarding the resolution on the unfair common action taken by 26 air freight carriers dated 29 November 2010, imposed a fine of KRW 124,180,000,000 (USD 111,372,190) based on the Fair Trade Act, saying that 18 domestic and foreign airlines had agreed with other air freight carriers to jointly introduce or change the bunker adjustment factor and consequently, unfairly limited competition in the air transport service market.

3. RECENT DEVELOPMENTS

3.1 As the competition in the air transport market gets fiercer, the impediment of competition amongst legacy carriers, Low Cost Carriers (LCCs) and airline alliances (e.g. Star Alliance, Sky Team and One World) have newly emerged as an issue. In addition, there is a high possibility of damage being caused by a conflict amongst States regarding measures related to fair competition, as well as the application and interpretation of those measures. Cooperation and adjustment amongst States is necessary for the balanced and harmonious application of such laws.

3.2 Some recent cases in which articles on fair competition were included in the Air Services Agreement on a bilateral level are: Article 2 Fair and Equal Opportunity in the US-EU Air Services Agreement signed in 2007; Article 14 Competitive Environment, Article 14 Government Subsidy and Support and Article 20 International Cooperation in Canada-EU Air Services Agreement signed in 2009; and, Article 10 (Fare Fixing), Clause 1 Restriction of the Intervention of Contracting Parties on the Fare Fixing of Designated Airlines in the MOU on the amendment to the ROK-Uzbekistan Air Services Agreement that was exchanged in 2011.

3.3 On a multilateral level, many States have sought for regional solutions. Namely, regional organizations like the Association of South East Asian Nations (ASEAN) have referred to the ICAO's guidance materials when developing articles pertaining to fair competition.

4. **ACTIONS OF ICAO**

4.1 The 5th ICAO Worldwide Air Transport Conference in 2003 recognized that “Economic liberalization in international air transport should proceed in a gradual, progressive and orderly manner, with appropriate safeguards to ensure safety, security and fair competition.” A variety of general competition acts may become efficient tools, but at the same time, it was agreed that safeguards that are suitable for aviation were necessary to prevent and eliminate unfair competition; therefore, Contracting States attending the Conference agreed to consider using the ICAO’s model clause on “the safeguards on anti-competitive practices” in the Air Services Agreement.

4.2 After the Conference, the ICAO Secretariat revised its policy and guidance materials to include issues such as State support and fairness of the law in the Manual on the Regulation of International Air Transport (Doc 9626). At the same time, the ICAO inserted a model clause related to “safeguards against anti-competitive practices” to amend the Policy and Guidance Material on the Economic Regulation of International Air Transport (Doc 9587). The ICAO Template Air Services Agreements (TASA) includes Article 15 Fair Competition and Article 19 Competition Laws.

5. **DISCUSSION**

5.1 The regulated market must yield to a more liberalized market and be able to form a competitive environment in which foreign airlines could invest in national carriers. In addition, infrastructure, such as runways, airspace, facilities at the airports and slots, shall be sufficiently ensured so that latecomers may find it easier to enter the market.

5.2 ICAO’s guidance material and manuals shall be revised to propose solutions to new challenges, and States should implement the above-mentioned recommendations from ICAO.

5.3 States are required to utilize the ICAO’s guidance materials for fair competition and domestic or regional competition laws and to actively utilize the ICAO’s recommendations when dealing with the Air Services Agreement. Further, the ICAO’s guidance materials shall be revised in response to new changes in the field of fair competition.

6. **CONCLUSIONS**

6.1 The Republic of Korea (ROK) as stated in the Convention on International Civil Aviation, is moving forward with liberalization by promoting open, transparent and undistorted fair competition in order to make the opportunities between airlines fair and equal. Also, the ROK strongly supports the efforts to ensure safeguards that will eradicate all kinds of anti-competitive and predatory practices.

6.2 In light of the discussion above, the following may be concluded:

- a) States shall take into appropriate consideration other States’ interest in domestic competition laws and the application of such laws to international air transport;
- b) States shall use ICAO’s guidance materials and domestic or regional competition laws for Air Services Agreements; some of which that were signed after April 2003 have referred to the ICAO model clause, but most Air Services Agreements do not include articles on safeguards;

- c) negotiations between States about the approval of alliances and mergers shall be encouraged;
- d) ICAO shall develop a series of core principles about fair competition in international air transport in order to support the enactment or application of competition laws and policies by States so that they can adopt a balanced and harmonious approach; and
- e) ICAO shall continue to monitor the process continuously and shall revise its guidance material about competition and safeguards in response to changes and the needs of States.

7. **RECOMMENDATIONS**

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

- a) States should support the recommendations in ATConf/6-WP/4 from a) to f);
- b) regarding recommendation d) of ATConf/6-WP/4, a Panel of Experts on Competition Issues on International Air Transport (tentative name) under the ICAO Air Transport Committee should be established and operated
- c) States should support other measures that have been taken up by ICAO in the field of fair competition so far; and
- d) ICAO guidance material including core principles shall be promptly enacted or revised in response to any change in the international air transport environment.

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