



**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**

**ANTITRUST IMMUNITY FOR AIRLINE ALLIANCES**

(Presented by the Republic of Korea)

**EXECUTIVE SUMMARY**

This working paper examines various policies relating to antitrust immunity for airline alliances, provides Working Groups or tools for information exchanges and makes a request to ICAO to recommend guidelines (proposals) regarding whether one's national airline should be included in the airline alliance in order to grant antitrust immunity and whether a foreign alliance partner's government has to sign an Open Skies Agreement for granting antitrust immunity.

**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) agree to the recommendations presented in paragraph 6.

*References:* ATConf/6 reference material is available at [www.icao.int/meetings/atconf6](http://www.icao.int/meetings/atconf6).

**1. INTRODUCTION**

1.1 Since the 2003 Fifth Worldwide Air Transport Conference (ATConf/5), the focus of ICAO's work has concentrated on the promotion and implementation of assisting States in the liberalization process. As a result of this liberalization process, alliances between airlines have worldwide expanded. However, alliances between airlines may appear as collusion or price-fixing between airlines and thus may violate competition laws. In this regard, the last 2003 Fifth Worldwide Air Transport Conference (ATConf/5) raised concerns about the damage in the fair market order occurring from dumping and price discrimination in the liberalization and alliances expansion process. Therefore, discussions on how antitrust immunity shall be granted under domestic competition laws in each State for airline alliances have been widely continued. Each State is still granting antitrust immunity for airline alliances in accordance with its own competition laws and no international standards or agreements currently exists. As a result, each alliance currently has to comply with different systems or standards depending on each State's competition law. As it can be known from the fact that three global alliances,

Star Alliance, SkyTeam and Oneworld dominate 75 per cent of air transport market worldwide, currently the international air transport market is being reorganized with the great influence of global alliances. Therefore, it is necessary to establish minimal international guidelines regarding the antitrust immunity for airline alliances

## **2. THE CONCEPT OF GLOBAL ALLIANCES**

2.1 Although no explicit definition and delineation exists for global airline alliances, according to the report published by IATA and the report jointly published by The United State Department of Transportation ("DOT") and Europe Commission, airline alliances are generally classified into the following three categories. Depending on the degree of cooperation, alliances can be (i) merger-like integration, (ii) expanded cooperation to develop joint network or (iii) limited cooperation on specific routes. Since expanded cooperation to develop joint network or limited cooperation on specific routes exhibit lesser degree of cooperation and relatively less likely to violate competition laws, granting antitrust immunity is not significantly problematic for these categories in each State. However, in the case of merger-like integration, since the violation of competition laws is more likely, whether each State grants antitrust immunity to such type of airline alliances became an issue

2.2 In Practice, the Eleventh Meeting of the Air Transport Regulation Panel (ATRP/11) pointed out that it is a problem that competition laws of each State have different systems in regards of airline industry. The Panel agreed that ICAO should consider measures to foster cooperation between competition authorities. To foster regulatory convergence and compatibility, the Panel recommended that ICAO explore the possibility of developing a set of core principles on fair competition in international air transport. Notwithstanding such recommendation, since no international standard has been currently established, it should be noted that different outcomes are possible depending on competition laws of each State. In case of alliances in the merger-like integration, if antitrust immunity is granted differently in each State, airlines have to formulate different policies for each State in the global airline market and there is a problem that customers in each State may receive different benefits since only customers of airlines with antitrust immunity can offer benefits of lower prices. In its report dated on November 28, 2011, IATA confirms that customers who used immunized alliance partner airlines approximately benefit 27 per cent lower fares than customers who used non-aligned airlines. Furthermore, according to the Working Paper presented by Pakistan in the 2003 Fifth Worldwide Air Transport Conference (ATConf/5), due to lack of an international standard for airline alliances, the extra-territorial application of competition laws could lead to controversy and conflict between States. From this point of view, international standards for airline alliances are currently needed and this Paper shall especially review the alliances in the merger-like integration.

## **3. COMPARISON OF REGULATORY REGIMES**

3.1 Prior to agreeing on international standards for antitrust immunity for airline alliances, it is necessary to compare regulatory regimes in each State and review their similarities.

3.2 In the United States, the DOT has the sole authority to grant antitrust immunity to airline alliances. Although not explicitly stated, the DOT tends to grant antitrust immunity only for airline alliances containing airlines with American nationality (exception exists such as the grant of antitrust immunity for alliances between Scandinavian Airlines and Icelandair), and considers whether a foreign alliance partner's government has signed an Open Skies Agreement with the United States as a condition for antitrust immunity

3.3 In Europe, the Commission has the sole authority to grant antitrust immunity for airline alliances. Unlike the United States which adopts *ex ante* control of agreements, the Commission has introduced *ex post* control for airline alliances. Similar to the United States, although not explicitly stated, the Commission also tends to only grant antitrust immunity for alliances containing airlines with European nationality and although not explicitly stated like in the case of the United States, the Commission also considers whether a foreign alliance partner's government has signed an Open Skies Agreement with the European Union as a condition for antitrust immunity.

3.4 In Japan, Department of Land and Transportation, has the authority to grant antitrust immunity to airline alliances. However, since only airlines with Japanese nationality may apply for antitrust immunity under Japanese air transportation laws, antitrust immunity is not granted to alliances between foreign airlines not including airlines with Japanese nationality. Although not explicitly stated like in the case of the United States, the Department of Land and Transportation also considers whether a foreign alliance partner's government has signed an Open Skies Agreement with the Japan as a condition for antitrust immunity.

3.5 Singapore takes a very different position from other States and it appears that Singapore has very permissive position toward airline alliances due to the adoption of liberalization policies. Singapore grants antitrust immunity even to alliances not containing airlines with Singapore nationality and does not connect Open Skies Agreement to the grant of antitrust immunity.

3.6 In the Republic of Korea the authority for granting antitrust immunity is vested in both, the Ministry of Land, Transport and Marine Affairs and the Korean Fair Trade Commission. However, similar to policies of the United States, Europe and Japan, although not explicitly stated, Korea also tends to grant antitrust immunity for airline alliances containing airlines with Korean nationality and connects the grant of such immunity to Open Skies Agreement.

#### 4. THE NECESSITY FOR INTERNATIONAL STANDARD

4.1 Currently States have not established uniform international standards for antitrust immunity for airline alliances. Furthermore, although the United States and Europe are cooperating through the EU-U.S. Joint Commission, other States have not reached stages of such cooperation. Although the regulatory regimes in each State reveals that certain similarities exist, since no internationally unified standards exist, certain issues may arise. For example, if airline A and airline B have formed alliances on the identical international route and only airline A was not granted antitrust immunity from its State, airline A may still participate in alliances network and marketing programs but it can be prohibited from even discussing ticket price, route allocation or anything else that would make them less aggressive competitors with their partners and therefore the situation is unilaterally unfair to airline A. In other words, antitrust immunity is arbitrarily granted and customers in each State could pay different fares according to the airline policy of each State. In its Analyst Viewpoint dated April, 2008, IATA pointed out the price discrimination situation in current airline market due to reasons mentioned above.

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## 5. CONCLUSION

5.1 It is revealed that currently States have significant similarities in the implementation of granting antitrust immunity for airline alliances. As reviewed in this Paper, since some similarities exist as to whether one's national airline has to be included in the eligible airline alliance and whether Open Skies Agreement is connected to the antitrust immunity, international understanding is needed to be formulated at least in these areas.

5.2 If the above mentioned international agreement were to be reached, the possibility that customers in each State having different benefits from airline alliances will be reduced. Consequently, international agreement creates more benefits to customers. Therefore, in order to facilitate international agreement, ICAO needs to establish Working Group for discussing airline alliances or implement measures for exchanging information between countries. ICAO may also consider providing guidelines in the relevant matter.

## 6. RECOMMENDATION

6.1 The following recommendation is proposed for adoption by the Conference:

- a) ICAO should establish a Working Group and information exchanges tools with a view to adopting guidelines (proposals) on the questions whether a State's national airline should be included in an airline alliance in order for antitrust immunity to be granted, and whether an Open Skies Agreement must have been entered by a foreign alliance partner's government in order for antitrust immunity to be granted.

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