

## Recommended

### Fair Competition Clause

1. The Contracting Parties acknowledge that it is their joint objective to have a fair and competitive environment and fair and equal opportunity for the airlines of both Contracting Parties to compete in operating the agreed services on the specified routes. Therefore, the Contracting Parties shall take all appropriate measures to ensure the full enforcement of this objective.
2. The Contracting Parties assert that free, fair and undistorted competition is important to promote the objectives of this Agreement and note that the existence of comprehensive competition laws and of an independent competition authority as well as the sound and effective enforcement of their respective competition laws are important for the efficient provision of air transport services. The competition laws of each Contracting Party addressing the issues covered by this Article, as amended from time to time, shall apply to the operation of the air carriers within the jurisdiction of the respective Contracting Party. The Contracting Parties share the objectives of compatibility and convergence of Competition law and of its effective application. They will cooperate as appropriate and where relevant on the effective application of competition law, including by allowing the disclosure, in accordance with their respective rules and jurisprudence, by their respective airline(s) or other nationals of information pertinent to a competition law action by the competition authorities of each other<sup>1</sup>.
3. Nothing in this Agreement shall affect, limit or jeopardise in any way the authority and powers of the relevant competition authorities and courts of either Contracting Party (and of the European Commission), and all matters relating to the enforcement of competition law shall continue to fall under the exclusive competence of those authorities and courts. Therefore, any action taken pursuant to this Article by a Contracting Party shall be without prejudice to any possible actions taken by those authorities and courts.
4. Any action taken pursuant to this Article shall fall under the exclusive responsibility of the Contracting Parties and shall be exclusively directed towards the other Contracting Party and/or to airline(s) providing air transport services to/from the Contracting Parties. Such action shall not be subject to the dispute settlement procedure foreseen in *[refer to the relevant Article of the ASA]*

### Unfair competition

5. Each Contracting Party shall eliminate all forms of discrimination or unfair practices which would adversely affect the fair and equal opportunity of the airlines of the other Contracting Party to compete in providing air transport services.

### Public subsidies and support

6. Neither Contracting Party shall provide or permit public subsidies or support to their respective airlines if these subsidies or support would significantly and adversely affect, in an unjustified way, the fair and equal opportunity of the airlines of the other Contracting Party to compete in providing air transport services. Such public subsidies

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<sup>1</sup> This paragraph may be inserted in the Preamble to the ASA or in the MoU/Agreed Minutes.

or support may include, but are not limited to: cross-subsidisation; the setting-off of operational losses; the provision of capital; grants; guarantees; loans or insurance on privileged terms; protection from bankruptcy; foregoing the recovery of amounts due; foregoing a normal return on public funds invested; tax relief or tax exemptions; compensation for financial burdens imposed by public authorities; and access on a discriminatory or non-commercial basis to air navigation or airport facilities and services, fuel, ground handling, security, computer reservation systems, slot allocation or other related facilities and services necessary for the operation of air services<sup>2</sup>.

7. When a Contracting Party provides public subsidies or support in the sense of paragraph 6 above to an airline, it shall ensure the transparency of such measure through any appropriate means, which may include requiring that the airline identifies the subsidy or support clearly and separately in its accounts.
8. Each Contracting Party shall, at the request of the other Contracting Party, provide to the other Contracting Party within a reasonable time financial reports relating to the entities under the jurisdiction of the first Contracting Party, and any other such information that may be reasonably requested by the other Contracting Party to ensure that the provisions of this Article are being complied with. This may include detailed information relating to subsidies or support in the sense of paragraph 6 above. The submission of such information may be subject to its confidential treatment by the Contracting Party requesting access to the information<sup>3</sup>.
9. Without prejudice to any action undertaken by the relevant competition authority and/or court for the enforcement of the rules referred to in paragraphs 5 and 6,
  - a) if one Contracting Party finds that an airline is being subject to discrimination or unfair practices in the sense of paragraphs 5 or 6 above and that this can be substantiated, it may submit observations in writing to the other Contracting Party. After informing the other Contracting Party, a Contracting Party may also approach responsible government entities in the territory of the other Contracting Party, including entities at the central, regional, provincial or local level to discuss matters relating to this Article. Moreover, a Contracting Party may request consultations on this matter with the other Contracting Party with a view to solving the problem. Such consultations shall start within a period of thirty (30) days of the receipt of the request. In the meantime, the Contracting Parties shall exchange sufficient information to enable a full examination of the concern expressed by one of the Contracting Parties.
  - b) if the Contracting Parties fail to reach a resolution of the matter through consultations within thirty (30) days from the start of consultations or consultations do not start within a period of thirty (30) days of the receipt of the request concerning an alleged violation of paragraphs 5 or 6 above, the Contracting Party which requested the consultation shall have the right to suspend the exercise of the rights specified in this Agreement by the airline(s) of the other Contracting Party by refusing, withholding, revoking or suspending the operating authorisation/permit, or to impose such conditions as it may deem necessary on the exercise of such rights<sup>4</sup>, or impose

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<sup>2</sup> The definition of state subsidy may be included in the Article on definitions (in the ASA).

<sup>3</sup> If the partner country is more willing to accept it, this paragraph could also be included in a MoU/Agreed Minutes.

<sup>4</sup> The Article in the ASA on Revocation, Suspension or Limitation of Authorisation should refer to this paragraph as basis for action.

duties or take other actions. Any action taken pursuant to this paragraph shall be appropriate, proportionate and restricted with regard to scope and duration to what is strictly necessary.

### **Antitrust**

10. Each Contracting Party shall effectively apply antitrust laws in accordance with paragraph 2, and shall prohibit airline(s):

a) in conjunction with any other airline(s) to enter into agreements, take decisions or engage in concerted practices which may affect air transport services to/from that Contracting Party and which have as their object or effect the prevention, restriction or distortion of competition. This prohibition may be declared inapplicable where such agreements, decisions or practices contribute to improving the production or distribution of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and do not: (a) impose on the airlines concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such airlines the possibility of eliminating competition in respect of a substantial part of the services in question, and

b) to abuse a dominant position in a way which may affect air transport services to/from that Contracting Party.

11. Each Contracting Party shall entrust the enforcement of the antitrust rules referred to in paragraph 10 above exclusively to its relevant and independent competition authority and/or court.

12. Without prejudice to any action undertaken by the relevant competition authority and/or court for the enforcement of the rules referred to in paragraph 10, if one Contracting Party finds that an airline suffers from an alleged violation of paragraph 10 above and that this can be substantiated, it may submit observations in writing to the other Contracting Party. After informing the other Contracting Party, a Contracting Party may also approach responsible government entities in the territory of the other Contracting Party, including entities at the central, regional, provincial or local level to discuss matters relating to this Article. Moreover, a Contracting Party may request consultations on this matter with the other Contracting Party with a view to solving the problem. Such consultations shall start within a period of thirty (30) days of the receipt of the request. In the meantime, the Contracting Parties shall exchange sufficient information to enable a full examination of the concern expressed by one of the Contracting Parties.

13. If the Contracting Parties fail to reach a resolution of the matter through consultations within thirty (30) days from the start of consultations or consultations do not start within a period of thirty (30) days of the receipt of the request concerning an alleged violation of paragraph 10, and provided the relevant competent competition authority or court has found an antitrust violation, the Contracting Party which requested the

consultation shall have the right to suspend the exercise of the rights specified in this Agreement by the airline(s) of the other Contracting Party by refusing, withholding, revoking or suspending the operating authorisation/permit, or to impose such conditions as it may deem necessary on the exercise of such rights<sup>5</sup>, or impose duties or take other actions. Any action taken pursuant to this paragraph shall be appropriate, proportionate and restricted with regard to scope and duration to what is strictly necessary.

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<sup>5</sup> The Article in the ASA on Revocation, Suspension or Limitation of Authorisation should refer to this paragraph as basis for action.