

DRAFT

Compendium of competition policies and practices

International Civil Aviation Organization

3/19/2014

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ICAO Version

As recommended by the ICAO Air Transport Regulation Panel (ATRP) during its Eleventh Meeting (Montréal, 4 to 8 June 2012) and requested during the Sixth Worldwide Air Transport Conference (ATConf/6) held in Montréal (18 to 22 March 2013) in [the working paper ATConf/6-WP/4 \(Fair competition in international air transport\)](#).

As the global air transport market is becoming increasingly open and competitive, it is more important to ensure that competition is not distorted by unfair practices. It requires the elimination or reduction of anti-competitive or predatory practices and also an effective cooperation between States and regional groupings. As agreed by ATConf/6, “cooperation among existing competition authorities should be encouraged in order to foster more compatible approaches [...]. In this regard, States voiced support for the development by ICAO of a compendium of competition policies and practices.”

The ICAO Secretariat has developed this compendium of competition policies and practices in force nationally and regionally. This is a non-exhaustive compilation in force as of 1 February 2014 and is divided in two parts:

- The first part provides an overview of competition policies applicable to international air transport in different regions groupings and States. Among the existing variety of competition policies, certain general common themes can be identified and are described separately:
 - (i) Anti-competitive behaviours, including cooperation agreements, abuse of dominance and monopoly;
 - (ii) Merger control;
 - (iii) State aid.

- The second part provides a compilation of practices used by States and regional entities. This part identifies examples of practices aimed at preventing anti-competitive behaviour and fostering more compatible regulatory approaches. Three areas are described separately:
 - (i) Bilateral cooperation;
 - (ii) Multilateral cooperation;
 - (iii) Role of international organizations.

This compendium was developed with a view to provide easy and quick access to relevant policies or practices. Whenever possible, hyperlinks have been inserted as reference. In certain cases the material is only available in a language other than English – in particular the French language with respect to the African continent.

I. POLICIES

1. ANTICOMPETITIVE BEHAVIOURS – PROHIBITIVE CONDUCT:

1.1 CO-OPERATION AGREEMENTS (horizontal/vertical and cartel agreements – anticompetitive practices/decisions/agreements)

1.1.1 Many airlines have entered into commercial relationships with foreign/domestic airlines in order to be able to expand their networks and to remain competitive. These complex arrangements may include ticketing-and-baggage agreements, joint-fare agreements, dry leases, wet leases, reciprocal airport agreements, blocked space relationships, computer reservations systems joint ventures, joint sales offices and telephone centers, e-commerce joint ventures, frequent flyer program alliances, code-sharing, coordination of pricing and scheduling, pooling of traffic and revenue, and more recently, metal neutral joint ventures.

1.1.2 Such agreements can have adverse effects on users and competition in certain conditions if no appropriate control mechanisms are put in place to prevent unfair competition practices. Anti-competitive practices, such as cartels, may also have negative impacts. Effective Competition rules and review procedures are required to preserve consumer welfare and ensure fair competition.

1.1.3 AFRICA

1.1.3.1 The [Yamoussoukro Decision](#), adopted in 1999, aims at liberalizing the air transport in Africa.

1.1.3.2 Under the leadership of the African Union (AU), the African Civil Aviation Commission (AFCAC), together with the various Regional Economic Communities (RECs), are progressively developing and implementing competition rules applicable to the air transport under the umbrella of Article 7 (competition rules) of the Yamoussoukro decision, which aims at ensuring fair competition on a non-discriminatory basis for African airlines.

1.1.3.3 The liberalization of air transport in Africa has largely relied on regional initiatives carried out by the African RECs.

1.1.3.4 More information can be found at:

- a) [Compendium of Air Transport Integration and Cooperation Initiatives in Africa](#) (Economic Commission for Africa, 2005)
- b) [ICAO/ATAG/WB Development Forum Maximizing Civil Aviation's Economic Contribution Safe, Secure and Sustainable Air Transport in Open Skies Challenges and Potential](#), Montreal, Canada 24-26 May 2006
Implementation of the Yamoussoukro Decision Progressing or stalled?

1.1.3.5 COMESA – EAC – SADC

- a) [Common Draft Regulations on Competition adopted in 2004](#) (Joint Air Transport Competition Rules)

Guidelines, Provisions and Procedures for the Implementation of Regulations for Competition in Air Transport Services within COMESA, EAC and SADC 2006
Art 4: Anti-Competitive Practices, Agreements and Decisions
Art 8: Exemptions and Safeguard Measures

1.1.3.6 WAEMU

- a) [Treaty of the West African Economic and Monetary Union](#) (WAEMU/UEMOA)
Article 88

This provision prohibits cartels that may distort competition in the common market.

- b) [Règlement N°2/2002/Cm/Uemoa Économique et Monétaire Ouest Africaine](#)

Règlement relatif aux pratiques anticoncurrentielles à l'intérieur de l'UEMOA
Art 3 : Ententes anticoncurrentielles
Article 7 : Exemptions individuelles et par catégorie.

The possibility of individual or block exemptions should be noted.

- c) [Règlement N°3/2002/Cm/Uemoa Relatif aux Procédures Applicables aux Ententes et Abus de Position Dominante à L'intérieur de l'union Économique et Monétaire Ouest Africaine](#)

1.1.3.7 CEMAC

- a) [Règlement n ° 6/99/CEMAC-003-CM-02](#)

Article 5: Égalité de traitement
Article 18: Obligations commerciales et tarifaires
Article 20 : Coopération inter-compagnies

- b) [Code de l'Aviation Civile de la Communauté économique et monétaire de l'Afrique Centrale](#) (Juillet 2012)

- c) [CEMAC Regulation No. 1/99/UEAC-CM-639](#) of 25 June 1999

CHAPITRE 1: LES ENTENTES

Articles 2 to 4

The possibility of exemption from Article 2 is provided under Article 3 (three cumulative conditions and notification).

1.1.4 NORTH AFRICAN AND ARAB STATES

1.1.4.1 ARAB CIVIL AVIATION COMMISSION (ACAC)

- a) Agreement for the Liberalization of Air Transport between the Arab States – 2004 ([Original](#) and [English-Translated](#) Versions)

Article 9: Competition And Non-Discrimination

Annex 2: Rules Of Competition

Annex 3: Guarantees

Article 44: Implementation and Follow-Up

For information, the States Parties to the agreement are the following: Jordan, United Arab Emirates, Bahrain, Tunisia, Algeria, Djibouti, Saudi Arabia, Sudan, Syrian Arab Republic, Somalia, Iraq, Oman, Palestine, Qatar, Union of the Comoros, Kuwait, Lebanon, Libya, Egypt, Morocco, Mauritania, Yemen.

The Signatory States are the following: Jordan, Bahrain, Tunisia, Sudan, Syrian Arab Republic, Somalia, Iraq, Oman, Palestine, Lebanon, Egypt, Yemen.

It should be noted that jurisdictions such as the United Arab Emirates¹ or Saudi Arabia² have recently enacted competition laws but those rules are either not applicable to air transport, or have not yet been implemented.

1.1.5 ASEAN

- a) ASEAN Multilateral Agreement on Air Services, signed in Manila, 20 May 2009

Article 12 - Fair Competition

Article 13 - Safeguards

- b) [2011 ASEAN Regional Guidelines on Competition Policy](#)

The provision prohibits anticompetitive agreements (horizontal and vertical agreements) and cartels. It also provides the possibility of exemptions or exclusions from application of competition law (see 3.5/, p.12). Key rationale for granting exemptions or exclusions from competition law provisions to specific industries or activities includes strategic and national interest, security, public, economic and/or social considerations.

¹ While the United Arab Emirates (the "UAE") has enacted a regulatory framework governing anti-competitive behavior and monopoly practices (Federal Law No. 4 of 2012 Concerning Regulating Competition, which came into effect on February 23, 2013), it excludes a range of sectors and activities, including air transport from the scope of the law. The scope of the UAE Competition Law is likely to affect commercial practices and transactions across the UAE for both local and international entities. The UAE Competition Law introduces standard international competition law principles and focuses on: (i) merger controls, (ii) restrictive agreements, and (iii) abuse of dominance.

² The [Civil Aviation Law](#) was approved in 2005, though the law did not contain any rules regarding competition. That means the Council of Competition Protection (CCP) has general authority to apply general competition law to the civil aviation sector.

1.1.6 AUSTRALIA

- a) [Competition and Consumer Act 2010 - C2013C00004](#)

Section 45 of the Competition and Consumer Act (Volume I)

The provision includes in particular cartel conduct and identifies four forms of activity: price fixing, market division, restricting outputs and bid rigging. The [immunity policy for cartel conduct](#) provides incentives for applicants to disclose cartel conduct by making a corporation or individual eligible for conditional in specified circumstances and under key requirements.

1.1.7 CHINA

- a) [Antimonopoly Law of the people's republic of China of 30 August 2007, Presidential Order No 68](#)

Chapter II Monopoly Agreement

Articles 13, 14

Article 15: provides the possibility of exemption under three cumulative conditions. (Airlines can perform a "self-assessment" to determine whether their agreement may qualify for the exemption under Article 15 removing the need to apply to the antitrust authorities).

At this stage of development of the anti-monopoly law, there is no case law or guidelines to assess how such principles will be applied to airlines alliances.

1.1.8 EUROPEAN UNION

- a) [Treaty on the Functioning of the European Union](#)

Title VII - Common Rules on Competition, Taxation and Approximation of Laws

Chapter 1 - Rules on Competition

Section 1 - Rules Applying to Undertakings

Article 101

These provisions prohibit agreements between undertakings and concerted practices which may affect trade between Member States and which prevent, restrict or distort competition within the internal market.

- b) [Council Regulation \(EC\) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty](#)

This rule introduced an a posteriori control following self-assessment of the concerned undertakings of the compliance of their co-operative agreement with EU competition rules.

Under Article 101 (3) TFEU, an agreement which may otherwise be considered as restricting competition under Article 101(1) TFEU may nonetheless be allowed if, on

balance, it creates sufficient benefits to consumers and meets the four cumulative criteria set in the Article 101(3) TFEU.

See also [General Guidelines for details on criteria and procedure.](#)

1.1.9 UNITED STATES OF AMERICA

a) [Section 1 of the Sherman Act of July 2, 1890 - 15 U.S.C. § 1](#)

The Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain interstate and foreign trade. It also outlaws agreements among competitors to fix prices, rig bids, and allocate customers, which are punishable as criminal felonies.

United States (U.S.) air carriers are required to submit cooperative service agreements that they have with each other, such as arrangements for reciprocal code sharing, joint frequent flyer and lounge access, and joint marketing, to the U.S. Department of Transportation (DOT) for review before implementation according to [49 USC 41720](#). The Department does not approve or disapprove the commercial agreements, it conducts a review to ensure that these agreements would not harm the public and are not anti-competitive. The DOT can take action under its statutory authority to preserve competition under [49 USC 41712](#).

Major U.S. and foreign air carriers may, under [49 U.S.C §§ 41308-41309](#), request a grant of immunity from the U.S. antitrust laws to operate certain commercial alliances. Immunity allows these airlines to coordinate their fares, services and capacity as if they were a single carrier in these markets, subject to certain conditions. A two-step analysis is conducted by the U.S. Department of Transportation for approval. The general criteria adopted is in the public interest [49 U.S.C §§ 40101](#).

More information is available on DOT's documentation on alliances and code sharing at: <http://www.dot.gov/policy/aviation-policy/competition-data-analysis/alliance-codeshares>.

1.1.10 LATIN AMERICA

1.1.10.1 BRAZIL – COMPETITION LAW

[Constitutional text of October 5, 1988, with the alterations introduced by Constitutional Amendments No. 1/1992 through 64/2010 and by Revision Constitutional Amendments No. 1/1994 through 6/1994.](#)

Article 173, paragraph 4

[Law nº 12.529, from 30 November 2011](#)

Article 36 – Violations

Different types of anticompetitive conduct are concerned: horizontal agreements, abuse of dominant position and mergers, acquisitions, and similar transactions.

1.2 ABUSE OF DOMINANCE AND MONOPOLY

1.2.1 Three broad categories of abusive behaviour can be identified under this category:

- a) foreclosure behaviour, whereby the dominant incumbent prevents the entry to the market of new competitors – for instance, exclusive dealing arrangements;
- b) predatory practices, whereby a dominant company attempts to force its competitors to exit the market, such as predatory pricing; and
- c) exclusionary conduct, whereby a dominant company uses its market power to discriminate between its suppliers or buyers, thus gaining an unfair advantage in order to extract abnormal advantages.

1.2.2 AFRICA

1.2.2.1 COMESA – EAC – SADC

- a) [Common Draft Regulations on Competition adopted in 2004](#) (Joint Air Transport Competition Rules)

Guidelines, Provisions and Procedures for the Implementation of Regulations for Competition in Air Transport Services within COMESA, EAC and SADC 2006 (adopted in 2007)

Art 5: Abuse of Dominant Position

1.2.2.2 WAEMU

- a) [Treaty of the West African Economic and Monetary Union](#) (WAEMU/UEMOA)
Article 88

This provision prohibits abuse of dominant position that may distort competition in the common market.

- b) [Règlement N°2/2002/Cm/Uemoa Économique et Monétaire Ouest Africaine](#)

Règlement relatif aux pratiques anticoncurrentielles à l'intérieur de l'UEMOA

Art 4 : Abus de position dominante

- c) [Règlement N°3/2002/Cm/Uemoa Relatif aux Procédures Applicables aux Ententes et Abus de Position Dominante à l'intérieur de l'union Économique et Monétaire Ouest Africaine](#)

1.2.2.3 CEMAC

- a) [CEMAC Regulation No. 1/99/UEAC-CM-639 of 25 June 1999](#)

Chapitre 3 : L'Abus de Position Dominante
Articles 15, 16

- b) [Code de l'Aviation Civile de la Communauté économique et monétaire de l'Afrique Centrale](#) (Juillet 2012)

1.2.3 **NORTH AFRICAN AND ARAB STATES**

1.2.4 **ARAB CIVIL AVIATION COMMISSION (ACAC)**

- a) Agreement for the Liberalization of Air Transport between the Arab States – 2004
([Original](#) and [English-translated](#) versions)

Article 9: Competition and Non-Discrimination
Annex 2: Rules of Competition
Annex 3: Guarantees

1.2.5 **ASEAN**

- a) [ASEAN Multilateral Agreement on Air Services Manila, 20 May 2009](#)

Article 12 - Fair Competition
Article 13 – Safeguards

- b) [2011 ASEAN Regional Guidelines on Competition Policy](#)

Prohibition of Abuse of a Dominant Position

1.2.6 **AUSTRALIA**

- a) [Competition and Consumer Act 2010 - C2013C00004](#)

Section 46 - Misuse of market power and predatory pricing

1.2.7 **CHINA**

- a) [Antimonopoly Law of the People's Republic of China of 30 August 2007, Presidential Order No 68](#)

Chapter III Abuse of Market Dominance
Articles 17 to 19

1.2.8 **EUROPEAN UNION**

- a) [Treaty on the Functioning of the European Union](#)

Title VII - Common Rules on Competition, Taxation And Approximation of Laws
Chapter 1 - Rules on Competition
Section 1 - Rules Applying to Undertakings

Article 102

A company may be tempted to restrict competition if it is in a position of strength on a given market. A dominant position is not in itself anti-competitive, but if the company exploits this position to eliminate competition, it may be considered to have abused it. An abuse of dominant position will be analyzed through a determination of the relevant market and market share enjoyed by the carrier under evaluation. It has to be matched with the pricing practices of the carrier.

- b) [Council Regulation \(EC\) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty](#)

Examples include a) charging unreasonably high prices; or b) depriving smaller competitors of customers by selling at artificially low prices they can't compete with; c) obstructing competitors in the market (or in another related market) by forcing consumers to buy a product which is artificially related to a more popular, in-demand product; d) refusing to deal with certain customers or offering special discounts to customers who buy all or most of their supplies from the dominant company; e) making the sale of one product conditional on the sale of another product.

See also http://ec.europa.eu/competition/consumers/abuse_en.html.

1.2.9

UNITED STATES OF AMERICA

- a) [Section 2 of the Sherman Act of July 2, 1890 - 15 U.S.C. § 2 :](#)

This provision makes it a crime to monopolize any part of interstate commerce. An unlawful monopoly exists when one firm controls the market for a product or service, while it has obtained that market power, not because of superior product or service, but by suppressing competition with anticompetitive conducts.

U.S. and foreign air carriers may, under [49 U.S.C §§ 41308-41309](#), request a grant of immunity based on U.S. antitrust laws to operate certain commercial alliances. Immunity allows these airlines to coordinate their fares, services and capacity as if they were a single carrier in these markets, subject to certain conditions and following a two-step analysis conducted by the U.S. Department of Transportation for approval.

Again, the general criteria adopted is in the public interest [49 U.S.C §§ 40101](#)

1.2.10

LATIN AMERICA

1.2.10.1

BRAZIL – COMPETITION LAW

- a) [Constitutional text of October 5, 1988, with the alterations introduced by Constitutional Amendments No. 1/1992 through 64/2010 and by Revision Constitutional Amendments No. 1/1994 through 6/1994.](#)

Article 173, paragraph 4

Law n° 12.529, from 30 November 2011

Article 36 – Violations

It includes all types of anticompetitive conduct: horizontal agreements (see Rio-Sao Paulo airlines cartel – box 1), abuse of dominance position - mergers, acquisitions, and similar transactions.

1.3 MERGER CONTROL

1.3.1 AFRICA

1.3.1.1 COMESA

[COMESA Draft Merger Guidelines and COMESA merger control regime](#) These provisions are fully operational since 14 January 2013. They provides for a mandatory merger control procedure applying to all concentrations having an appreciable effect on trade between Member States and which restrict competition in the Common Market.

1.3.1.2 WAEMU

UEMOA legislation, in particular Regulation No.02/2002/CM/UEMOA of May 23, 2002, does not contain any procedure for the prior control of merger transactions, [but Article 4§1 of Regulation No.02/2002](#) provides that concentrations are assimilated to abuses of dominant positions where they create or reinforce a dominant position leading to a significant hindrance of effective competition within the Common Market. When a concentration comparable to an abuse of dominant position comes to the UEMOA Commission's knowledge, the latter can order the parties involved to stop the transaction if it has not been completed or to reinstate the status they had before the transaction (i.e., equivalent of an order of "de-merger"), or to modify or to fill out the transaction or to take any necessary measure to ensure or re-establish sufficient competition.

1.3.1.3 CEMAC

- a) [CEMAC Regulation No. 1/99/UEAC-CM-639 of 25 June 1999](#)

*Chapitre 2: les Concentrations
Articles 5 to 14*

- b) [Code de l'Aviation Civile de la Communauté économique et monétaire de l'Afrique Centrale](#)

1.3.2 ASEAN

- a) [ASEAN Multilateral Agreement on Air Services Manila, 20 May 2009](#)

*Article 12 - Fair Competition
Article 13 – Safeguards*

- b) [2011 ASEAN Regional Guidelines on Competition Policy](#)

Prohibition of anticompetitive mergers

1.3.3 AUSTRALIA

- a) [Competition and Consumer Act 2010 - C2013C00004](#)

Section 50

1.3.4 CHINA

- a) [Antimonopoly Law of the People's Republic of China of 30 August 2007, Presidential Order No 68](#)

*Chapter IV Concentration of Business operators
Articles 20 to 31*

Transactions subject to merger control include the following: merger, acquisition of all the shares of another company, majority share acquisition, minority share acquisition with control rights, greenfield joint venture, acquisition of a business through the purchase of its assets.

The anti-monopoly law provides premerger notification requirements, which require transactions meeting certain thresholds to be reported to authorities and then not closed before authorities approval.

1.3.5 EUROPEAN UNION

In the European Union, important legislative texts for merger decisions include the EC Merger Regulation and the Implementing Regulation (defined below).

- a) [Council Regulation \(EC\) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings \(the "EC Merger Regulation"\)](#)

The EC merger regulation contains the main rules for the assessment of concentrations.

- b) [Commission Implementing Regulation \(EU\) No 1269/2013](#) of 5 December 2013 amending Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

Official Journal OJ L 336, 14.12.2013, p. 1-36

- c) [Commission Regulation \(EC\) No.802/2004](#) implementing Council Regulation (EC) No. 139/2004 (The "Implementing Regulation") and its annexes (Form CO, Short Form CO and Form RS) Official Journal L 133, 30.04.2004, p. 1-39. This Regulation was amended [by Commission Regulation \(EC\) No 1033/2008](#)

Official Journal L 279, 22.10.2008, p.3-12

The Implementing Regulation relates to procedural issues such as notifications, deadlines and the right to be heard.

The Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings may also be consulted.

More information on merger legislation is available at:

<http://ec.europa.eu/competition/mergers/legislation/legislation.html>

1.3.6 UNITED STATES OF AMERICA

- a) [Section 7 of the Clayton Act, 15 U.S.C. § 18 - Clayton Antitrust Act of 1914](#) (Pub.L. 63–212, 38 Stat. 730, enacted October 15, 1914, codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53).

Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect may substantially lessen competition or create a monopoly, or where the voting securities and assets threshold is met (Act Section 7a, codified at 15 U.S.C. § 18a).

The following may also be consulted: Horizontal Merger Guidelines 2010 U.S. Department of Justice and the Federal Trade Commission – August 19, 2010.

1.3.7 LATIN AMERICA

1.3.7.1 BRAZIL – COMPETITION LAW

- a) [Constitutional text of October 5, 1988, with the alterations introduced by Constitutional Amendments No. 1/1992 through 64/2010 and by Revision Constitutional Amendments No. 1/1994 through 6/1994.](#)

Article 173, paragraph 4

- b) [Law nº 12.529, from 30 November 2011](#)

Title VII - Concentration Control

Chapter I - Concentration Acts

Chapter II - Agreement On Concentration Control

Articles 88 to 92

1.4 STATE AID

1.4.1 AFRICA

1.4.1.1 COMESA – EAC – SADC

- a) [Common Draft Regulations on Competition adopted in 2004](#) (Joint Air Transport Competition Rules).

Guidelines, Provisions and Procedures for the Implementation of Regulations for Competition in Air Transport Services within COMESA, EAC and SADC 2006 (adopted in 2007)

*Article 7 - SUBSIDIES*1.4.1.2 *WAEMU*

- a) [Treaty of the West African Economic and Monetary Union](#) (WAEMU/UEMOA)

Article 88

This provision prohibits state aid that may distort competition in the common market.

- b) [Règlement n° 02/2002/CM/UEMOA du 23 mai 2002 Règlement relatif aux pratiques anticoncurrentielles à l'intérieur de l'UEMOA](#)

Article 5 : Aides d'état

- c) [Règlement N°4/2002/Cm/Uemoa Relatif aux Aides d'État à l'intérieur de l'union Économique et Monétaire Ouest Africaine et aux Modalités d'Application de L'article 88 \(C\) du Traite:](#)

This regulation provides a procedure on the oversight of state aid, and distinguishes between existing aid and new aid.

- d) [Regulation No. 24/2002 on conditions for market access by air carriers makes the exercise of traffic rights subject to competition legislation](#)

*Article 4 : Obligations de service public*1.4.2 **NORTH AFRICAN AND ARAB STATES**1.4.2.1 *ARAB CIVIL AVIATION COMMISSION (ACAC)*

- a) Agreement for the Liberalization of Air Transport between the Arab States – 2004 ([Original](#) and [English-Translated](#) Versions)

*Part VI: Governmental Subsidies to Airlines**Article 19: Governmental Subsidies to Airlines*1.4.3 **ASEAN**

- a) [ASEAN Multilateral Agreement on Air Services Manila, 20 May 2009](#)

*Article 13 (2)*1.4.4 **AUSTRALIA**

The existence of a competitive neutrality policy standard should be noted (<http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/competitive-neutrality.html>) which seeks to ensure government businesses do not enjoy competitive advantages over private sector competitors simply because of their public ownership.

1.4.5 CHINA

- a) [Antimonopoly Law of the People's Republic of China of 30 August 2007, Presidential Order No 68](#)

*Chapter V - Abuse of Administrative Power to Eliminate or Restrict Competition
Prohibition of the abuse of administrative power*

The Antimonopoly Law provides that administrative authorities or organizations authorized by law or regulation with the administration of public affairs may not abuse their powers in certain determined situations.

1.4.6 EUROPEAN UNION

The EU has been the first jurisdiction to adopt clearly defined state aid rules and principles. State aid is prohibited under the [Articles 106 and 107 of the Treaty on the Functioning of the European Union](#).

Certain exceptions exist, which allow authorized aid if it is justified by common interest objectives, as long as they do not distort competition in such a way as to be against the public interest. Such examples include the provisions governing 'public service obligations' (articles 16, 17 and 18 of Regulation (EC) No 1008/2008). The monitoring of State aid carried out by the European Commission aims at achieving a balance between positive and negative effects of aid.

- a) [Regulation \(EC\) No 1008/2008 of the European Parliament and of the Council of 24 September 2008](#) on common rules for the operation of air services in the Community.
- b) On 8 May 2012, the Commission set out an ambitious State aid reform programme in [the Communication on State aid modernisation](#) (SAM). On 17 January 2013, the European Parliament adopted a [Resolution on State Aid Modernisation](#), broadly supporting the initiative and its objectives. On 15 November 2012 the European Economic and Social Committee adopted an [opinion](#) on SAM. Likewise, on 29 November 2012, the Committee of the Regions adopted an [opinion](#) on SAM.
- c) One of the European proposal includes Aviation Guidelines ([consultation on draft guidelines](#) launched on 3 July 2013; [Guidelines](#) adopted on 20 February 2014 - Policy brief: [New State aid rules](#) for a competitive aviation industry).

More information is available on SAM at the following:

http://ec.europa.eu/competition/state_aid/modernisation/index_en.html

http://europa.eu/legislation_summaries/competition/state_aid/index_en.htm

http://ec.europa.eu/competition/state_aid/legislation/compilation/index_en.html

The following may also be consulted:

** Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (1994 Guidelines) (Official Journal C 350 of 10. 12. 1994, p. 5);*

* *Community guidelines on financing of airports and start-up aid to airlines departing from regional airports*⁷ (2005 Guidelines) (Official Journal C 312 of 9.12.2005, p. 1); and
 * *Commission Communication of 9 December 2005 "Community guidelines on financing of airports and start-up aid to airlines departing from regional airports"* [Official Journal C 312 of 09.12.2005].

1.4.7 **UNITED STATES OF AMERICA**

The United States (U.S.) does not have a system for the direct regulation of government financial aid to firms. However, courts have considered certain instances of assistance by States to violate the Commerce Clause of the U.S. Constitution.

Relevant references include: United States Constitution, Art. I, sec. 8, cl. 3. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725 (1981); *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994), *Cuno*, 386 F.3rd 738, 743 (6th Cir. 2004), rev'd in part on other grounds sub nom. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006), and *Granholt v. Heald*, 125 S. Ct. 1885, 1892 (2005).

1.4.8 **LATIN AMERICA**

1.4.8.1 *BRAZIL – COMPETITION LAW*

There are no aviation-specific rules governing financial support to air operators. However, Law 8.032 of 12 April 1990, refers to tax benefits relating to the importation of aircraft parts, overhaul and maintenance.

II. **PRACTICES**

2. **BILATERAL COOPERATION - INTER-REGIONAL/ STATE COOPERATION ON COMPETITION MATTERS**

2.1 Different mechanisms and practices have been used to prevent unlawful and anti-competitive behaviors. Bilateral co-operation has developed into an important tool by which competition authorities engage, among themselves, in a variety of enforcement and enforcement-related activities.

2.2 Bilateral co-operation in the field of competition law may be formal - on the basis of a competition-specific bilateral co-operation agreement or memoranda of understanding or informal - without the conclusion of an agreement.

2.3 Cooperation can take place between States, between regional groupings/organizations and States, and between two regional organizations.

2.4 *BILATERAL AIR SERVICES AGREEMENTS*

2.4.1 The following are examples of air service agreements including provisions related to fair competition:

- a) U.S. Open skies agreements

Current model Open Skies agreement text : Article 11 - Fair competition

More information may be found at: <http://www.state.gov/e/eb/tra/ata/>

- b) [Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand \(2007\)](#)

Article 20 - Competition

Annex 2 - Concerning cooperation with respect to competition issues in the air transportation industry.

- c) The agreement between the U.S. and the EU has led to a successful cooperation on the grounds of competition law, as described in the following report: “[Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches](#)”, issued by the European Commission and the United States Department of Transportation on 16 November 2010. More information may be found at: http://ec.europa.eu/transport/modes/air/international_aviation/country_index/united_states_en.htm

- d) [Agreement on Air transport between Canada and the European Community and its Member States \(2009\)](#)

Article 14 – Competitive environment

- e) [Agreement between the European Community and the Government of the Republic of India on certain aspects of air services \(2008\)](#)

Article 4 – Compatibility with competition rules

- f) [Agreement between the European Community and the West African Economic and Monetary Union on certain aspects of air services \(2010\)](#)

Article 6 – Compatibility with competition rules

- g) [Agreement between the government of New-Zealand and the government of Australia relating to air services \(2002\)](#)

Article 14 – Competition

- h) [Air transport agreement between the governments of the members States of the Association of Southeast Asian Nations and the Government of the people’s republic of China \(2011\)](#)

Article 10 – Safeguards

Article 11 – Fair Competition

2.4.2 Bilateral agreements dedicated to competition: EU Horizontal Agreements and Memorandum of Understandings (MOUs) on competition issues. The European Commission has engaged in cooperation with competition authorities of several States outside the EU. Cooperation with some of them is based on bilateral agreements dedicated entirely to competition. In other cases, competition

provisions are included as part of wider general agreements. More information may be found at: <http://ec.europa.eu/competition/international/bilateral/index.html>

2.4.3 Insertion of model clause in air services agreements

The ICAO model clause on “Safeguards against anti-competitive practices” in air services agreements can be used by States as an additional means to identify, prevent and eliminate anti-competitive abuse.

- a) The *Policy and Guidance Material on the Economic Regulation of International Air Transport (Doc 9587)* incorporates the model clause on “Safeguards against anti-competitive practices”.
- b) LACAC recommendation A13-3 proposes a model clause designed to prevent unlawful and anti-competitive behavior by airlines whom countries are a member of the Latin American Civil Aviation Commission (LACAC). LACAC recommends that its Member States introduce this clause in their liberal air services agreements. The model clause is currently not available on-line.

3. MULTILATERAL COOPERATION AND INTRA-REGIONAL CO-OPERATION

3.1 ESTABLISHMENT OF REGIONAL COMPETITION NETWORKS

3.1.1 EUROPEAN UNION

The European Competition Network (ECN) aims at implementing an effective, close and complementary cooperation between the European Commission and the competition authorities in the EU in order to ensure the effective application of the competition rules within the EU. More information is available at:

http://ec.europa.eu/competition/ecn/index_en.html

http://europa.eu/legislation_summaries/competition/firms/l26109_en.htm

3.1.2 AFRICA

3.1.2.1 Concerning the COMESA-EAC-SADC group, the following material can be mentioned:

- a) [Common Draft Regulations on Competition adopted in 2004](#) (Joint Air Transport Competition Rules)

Guidelines, Provisions and Procedures for the Implementation of Regulations for Competition in Air Transport Services within COMESA, EAC and SADC 2006 (adopted in 2007)

*The Joint Competition Authority (Article 9) – On going implementation
Cooperation with Member State Authorities and Access to Information (Article 15)*

- b) During the [first meeting of the Southern African Development Community of the 29 May 2008 held in Lusaka, Zambia](#), the Steering Committee noted that “COMESA, EAC and SADC Secretariats are working together with other RECs, African Civil Aviation Commission (AFCAC) and the AU to put in place the legal and institutional framework to facilitate full implementation of the Yamoussoukro Decision”.

3.1.2.2 Concerning CEMAC, the following should be noted:

- a) [CEMAC Joint Competition Regulation adopted on 25 June 1999](#)

*Titre 3 - Du contrôle des pratiques anticoncurrentielles
Chapitre 1 - L'organe de surveillance de la concurrence*

The regulation has established two specialized CEMAC monitoring bodies responsible for controlling and supervising the market and its participants with respect to the Competition Regulation.

3.1.3 **ASEAN**

3.2 ASEAN co-operation evolved in August 2007 into the official establishment of the ASEAN Experts Group on Competition (AEGC), which first met in March 2008. This intergovernmental body has the following missions:

- a) facilitate the development of competition policy that would meet the needs of AMSs at different stages of economic and institutional development.
- b) foster collaboration and networking among and between agencies concerned with competition both inside and outside ASEAN.

3.2.1 The AEGC has agreed to focus, for the next three to five years, on building up competition-related policy and institutional capabilities, and best practices in ASEAN Member States. In addition, the AEGC has been developing the “ASEAN Regional Guidelines on Competition Policy” and the “Handbook on Competition Policies and Laws in ASEAN for Businesses”.

4. **ROLE OF INTERNATIONAL ORGANIZATIONS**

4.1 Competition authorities and regulators participate and contribute to international fora, such as the Organization for Economic Cooperation and Development (OECD), International Competition National (ICN), World Tourism Organization (WTO) and United Nations Conference on Trade and Development (UNCTAD), among others.

4.2 These organizations play a leading role for convergence of competition policies and practices by stimulating debate and the exchange of experience and practices between competition authorities.

4.2.1 *INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)*

ICAO work and available tools related to competition-specific matters.

The ICAO Secretariat updated its policy and guidance material on competition, in particular in the following documents:

- a) [Report of the Worldwide Air Transport Conference, Challenges and Opportunities of Liberalization](#) (Montreal, 24-28 March) - Doc 9816, ATConf/5 2003

See 2.3.3.2 (“Safeguards against anti-competitive practices”) and 2.3.6. (Conclusions on State aids/subsidies)

- b) [Doc 9626](#), Second Edition
- c) [Doc 9587](#) updated with the incorporation of the model clause on “Safeguards against anti-competitive practices”.
- d) The [ICAO Template Air Services Agreements](#) (TASA) includes three articles on competition issues:

Article 15 of the ICAO Template Air Services Agreement (TASA) addresses “Fair Competition” and provides traditional, transitional and full liberalization versions of provisions relating to fair competition. The transitional version specifically provides that each Party can take action to eliminate all forms of discrimination or unfair competitive practices adversely affecting the competitive position of a designated airline of the other Party.

Article 18 of the TASA addresses “Safeguards” and lists various airline practices that may be regarded as possible unfair competitive practices which merit closer examination. These practices include, inter alia, charging fares which are insufficient to cover the costs of providing services and the addition of excessive capacity or frequency of services.

Article 19 of the TASA contain extensive provisions on “Competition Laws” to pave the way for their effective oversight and enforcement.

More information on the ICAO TASA may be found at:
http://www.icao.int/sustainability/pages/eap_ep_tasa.aspx

4.2.2 INTERNATIONAL COMPETITION NETWORK (ICN)

4.2.3 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

- a) Relevant information may be found on liberalization and competition intervention in regulated sectors. Country reviews of competition policy frameworks are available at: <http://www.oecd.org/regreform/sectors/countryreviewsofcompetitionpolicyframeworks.htm>
- b) [“Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation”](#).

- c) The OECD Competition Committee debated airline mergers and alliances in October 1999. An executive summary can be found at:
<http://www.oecd.org/daf/competition/mergers/2379233.pdf>

4.2.4

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

- a) The UNCTAD has developed a Model Law on Competition, which can be accessed at:
<http://unctad.org/en/Pages/DITC/CompetitionLaw/The-Model-Law-on-Competition.aspx>

4.2.5

WORLD TRADE ORGANIZATION (WTO)

- a) A working group of WTO on the interaction between trade and competition policy was established, focusing in particular on core principles, modalities for voluntary cooperation, or provision on controls.
http://www.wto.org/english/tratop_e/comp_e/comp_e.htm
- b) A plurilateral agreement in trade in civil aircraft entered into force on 1 January 1980, eliminating import duties on aircraft
http://www.wto.org/english/tratop_e/civair_e/civair_e.htm

The WTO developed a visual tool on air services agreements, called the Air services Agreements Projection (ASAP):

http://www.wto.org/english/news_e/news13_e/serv_16jan13_e.htm

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