

**WORLDWIDE AIR TRANSPORT CONFERENCE: CHALLENGES AND
OPPORTUNITIES OF LIBERALIZATION**

Montreal, 24 to 29 March 2003

Agenda Item 2: Examination of key regulatory issues in liberalization
2.2: Market access

LIBERALIZATION OF MARKET ACCESS

(Presented by the Secretariat)

SUMMARY

This paper reviews recent developments in the liberalization of market access, covering a) exchange of basic market access rights; and b) airport constraints on market access, and discusses issues, policy options and possible ICAO work.

Action by the Conference is in paragraph 5.1.

REFERENCES

Doc 9626, *Manual on the Regulation of International Air Transport*
Doc 9644, *Report on the World-wide Air Transport Conference on
International Air Transport Regulation: Present and Future*
Doc 9587, *Policy and Guidance Material on the Economic Regulation of
International Air Transport*
Circular 283-AT/119, *Regulatory Implications of the Allocation of Flight
Departure and Arrival Slots at International Airports*

1. INTRODUCTION

1.1 Market access has been fundamental in aviation relations between States and to the success of air carriers in international air transport. In the liberalization process, the role and treatment of market access continues to be the most important element in air services agreements between States and pivotal to any substantive regulatory liberalization.

1.2 Since the last Worldwide Air Transport Conference (AT Conf/4) in 1994, there has been significant progress in air transport liberalization. This paper covers two related issues in the area of market access: a) the exchange of basic market access rights; and b) airport constraints on market access. It reviews developments, discusses issues and policy options by States as well as possible areas of work that could be undertaken by ICAO to facilitate further liberalization. Two other issues under this agenda item are addressed separately in ATConf/5-WP/9 on aircraft leasing and in WP/10 on liberalization of air cargo transport. Airline alliances and codesharing are covered in WP/18.

2. EXCHANGE OF BASIC MARKET ACCESS RIGHTS

2.1 The 1994 Worldwide Air Transport Conference considered a Secretariat proposal for liberalization of market access, which included essential elements of full market access (unrestricted route, operational and traffic rights between parties, optional so-called Seventh Freedom right* and cabotage) and possible means of full or progressive introduction, together with associated safeguards and dispute resolution. After extensive discussions, the Conference concluded that there was no global commitment to full market access at that stage of air transport development, and that each State would make its own choice as to the degree and pace of liberalization, on a case-by-case basis and in light of its particular needs and objectives, using bilateral, regional and/or global avenues according to circumstances. In response to the recommendation of ATConf/4, ICAO developed some guidance for States on participation measures for regulatory liberalization, including guidance on market access (see Section F, Part 1 of Doc 9587).

2.2 **Recent developments.** Since ATConf/4, considerable progress has been made in liberalization with respect to market access, notably at the regional and subregional levels. From January 1995 to December 2001, over 600 bilateral agreements were reportedly concluded or amended. About 70 per cent of these agreements and amendments contained some form of liberalized arrangements. At the regional and subregional level, groups of States have created multilateral regulatory regimes aimed at fostering cooperation and liberalizing air transport regulation amongst member States. Before ATConf/4, there were just two such regional arrangements (the European Union (EU) and the Andean Pact). Since 1995, eight more arrangements have emerged with a worldwide dispersion (two in the Americas, one in Asia Pacific, one in the Middle East and four in Africa). Of these agreements, 7 provide for instant or phased-in liberalization leading to full market access. Several potential arrangements are also in the pipeline (in Europe, the North Atlantic, the South Pacific and the Caribbean).

2.3 One notable development in the liberalizing trend is the considerable increase in the number of bilateral agreements involving unrestricted market access provisions. By June 2002 some 85 “open skies” agreements had been concluded involving approximately 70 countries. These agreements involved not only developed countries but also an increasing number of developing countries. Two-thirds of them involve the United States as one of the partners, but the remainder do not. With respect to market access, these agreements generally provide for unrestricted route and operational rights, as well as Third to Fifth and Sixth Freedom rights; many also grant Seventh Freedom rights for all-cargo services. Some of them allow progressive or phased introduction. However, exchange of broader or full market access rights between States, while gaining acceptability, is still very country-specific. This has been reflected in the fact that most States which have concluded bilateral open skies agreements did not as a general policy reach or even contemplate these with all their aviation partners, but did so on a case-by-case basis.

* The right to carry traffic between the bilateral partner and a third State without the requirement to connect to or be an extension of any service to/from the carrier’s home State.

2.4 In addition, a plurilateral open skies agreement was signed in 2001 by five like-minded members of the Asia-Pacific Economic Cooperation (APEC) (i.e. Brunei, Chile, New Zealand, Singapore and the United States), which is open for adherence by other members of APEC as well as non-member States. Peru has since joined the agreement and some other States are reported to be interested.

2.5 At the multilateral level, the World Trade Organization (WTO-OMC) came into being on 1 January 1995 and along with it the entering into force of the General Agreement on Trade in Services (GATS). The GATS Annex on Air Transport Services applies trade rules and principles such as most-favoured nation (MFN) treatment and national treatment to three specific so-called “soft” rights, namely, aircraft repair and maintenance, selling and marketing of air transport, and computer reservation system services. It excludes from the application of the GATS “services directly related to the exercise of traffic rights”. Pursuant to an earlier ministerial decision, the WTO-OMC launched in 2000 the first review of the operation of this Annex with a view to considering possible extension of its coverage in this sector. During the review, which continued into 2002, there was some support to extend the Annex to include some additional “soft” rights (for example, ground handling) as well as some aspects of “hard rights” (for example, air cargo, non-scheduled and multi-modal transport). However, there is no global consensus at this stage on whether or how this would be pursued.

2.6 **Issues and policy options.** In considering liberalization of market access, States invariably face two basic issues: a) the extent of liberalization, i.e. how open the market access should be granted; and b) the approach to liberalization, i.e. which avenue (national, bilateral, regional, plurilateral, multilateral) and how fast should liberalization be pursued.

2.7 With regard to a), it would be up to each State to decide based on its national interest. In fact, the whole range of basic market access rights, including traffic rights beyond the Third and Fourth Freedoms, has been exchanged between and among States in air services arrangements. However, the extent of the market opening varies widely because of the disparities in size, location, and stage of development of States as well as the competitive strength of their respective carriers.

2.8 As for b), the experience of the last decade seems to suggest that States will utilize all the existing avenues in pursuing liberalization. Many States have unilaterally introduced liberal air transport policies, often based on a broader perspective of national interest including economic development and trade benefits. The bilateral approach continues to be a flexible and viable means which States can use to expand air services while retaining the control over the pace and direction of liberalization. But it may also be a constraint in achieving the same degree of liberalization on a wider scale because of the inherent difficulty in obtaining agreement from a large number of involved States.

2.9 Regional agreements amongst States with similar level of economic development (and usually members of more general economic and trade groupings) seem to have proven to be an easier and faster route to liberalization. Their establishment has led to an expansion of air services within the regions concerned, but has also evoked concerns about their effect on the national airlines of States that are not part of the regional arrangement and on the existing national and bilateral air service regulation of States parties to such regional arrangements. Such arrangements could also have the potential to act as a hindrance to further liberalization, because once the membership of such an agreement has reached a certain level, consensus on amending the agreement or removing any remaining barriers to market access becomes virtually impossible to obtain.

2.10 At the multilateral level, ICAO continues to provide a global forum in facilitating air transport liberalization, and multilateralism in commercial rights to the greatest possible extent remains an objective of the Organization. However, despite the broad yet varying acceptance of the progressive

liberalization of market access, the condition does not seem to have become ripe at this stage to pursue a global agreement for the exchange of traffic rights.

2.11 The underlying objective for liberalization, in the long run, should be to optimize efficient and economical trade and communication links among States and to promote to the fullest possible extent national and regional growth and development, while at the same time ensuring the rights of each State to a meaningful participation in international air transport in accordance with the Chicago Convention. In the meantime, States can be expected to continue to pursue liberalization in market access at their own choice and pace, taking into account the related benefits and risks, using bilateral, regional and/or multilateral avenues as appropriate. Liberalization may also be gradual with phased introduction or by blocks of market access such as air cargo (see ATConf/5-WP/10).

2.12 **Possible ICAO work.** ICAO's existing guidance with respect to market access has been found useful by States. The liberalization of market access could also be greatly assisted through the use of the proposed ICAO Template Air Services Agreements (TASAs) for bilateral or regional/plurilateral situations (see ATConf/5-WP/17). The various options with explanatory notes in the TASAs for the exchange of market access rights may be used by States at their discretion and according to their needs, objectives and circumstances. As for future work in this area, it would be desirable for ICAO to continue to monitor closely the developments, collect and disseminate information on liberalization including actual experience of States, keep current the existing guidance material (such as Doc 9587, Doc 9626) and to develop any new guidance, as necessary, for the TASAs which would facilitate liberalization and help improve harmonization.

3. AIRPORT CONSTRAINTS ON ACCESS

3.1 The ability of an air carrier to exercise the market access rights granted under relevant air service agreements is closely linked to the availability of slots (designated times for an aircraft to take off or land) at those airports for which it was granted that market access. ATConf/4 recognized that a shortage of airport slots at congested airports was an important physical constraint on market access, and called for States to increase airport capacity to resolve this problem.

3.2 **Recent developments.** Since ATConf/4, the growth in commercial air services has continued to outstrip the available capacity at more and more airports. Although many airports with congestion problems are located in Europe, a growing number of airports in other regions are reaching capacity limits. Moreover, because of the interconnected operations of the international air transport system, capacity constraints at some airports impact on other airports. This is becoming an increasing challenge to the continued growth of air transport and is having an impact on further liberalization with respect to market access.

3.3 Governments, airlines and airports have each developed measures to overcome or ameliorate situations of insufficient airport capacity. Many States have expanded existing or built new airports, runways or terminals. However, environmental, economic, political and physical constraints have, in some instances, prevented physical expansions to increase airport capacity. Many governments and some regional bodies (e.g. the EU and the European Civil Aviation Conference (ECAC)) have also taken action to improve air traffic control systems designed to increase the capacity of air traffic management and airports. Airports and air carriers have been able to enhance airport capacity by improved facilitation at existing facilities, but increased security requirements after the events of 11 September 2001 may limit capacity enhancements in this area.

3.4 In light of the growing problem, the ICAO Secretariat undertook and completed, in 2000, a study on slot allocation at international airports (Circular 283). The study analysed the regulatory

implications of the situation, the mechanisms for dealing with the problem, and suggested some possible improvements to the existing systems. The issue was also examined by the Conference on the Economics of Airports and Air Navigation Services (ANSCConf 2000) in June 2000, which recommended further work by ICAO on the procedural aspects of slot allocation.

3.5 While governments may address slot allocation problems, they have generally relied on the global Schedule Coordination Conferences operated by the International Air Transport Association (IATA) for managing the scarcity of capacity at airports, including slots for the initiation of new services. Since the IATA scheduling coordination system is neutral with respect to traffic rights accorded under bilateral air services agreements, problems involving air carriers which are unable to exercise their entitled traffic rights because they have not been allocated slots at a capacity-constrained airport have, in some instances, become the subject of bilateral negotiations. Nevertheless, most slot allocation disputes have been settled through mediation at several levels of the IATA system.

3.6 **Issues and policy options.** Among the broader issues of insufficient airport capacity are: a) whether the broad grant of market access rights associated with liberal air services agreements has made the market access problem at capacity-constrained airports worse, and b) how airport capacity constraints affect the liberalization process.

3.7 With respect to a), clearly, liberal air services agreements with multiple designation and no restriction on capacity have enabled increases in the number of air carriers and air services, thereby putting additional pressure on existing airport capacity. However, open country-to-country traffic rights in such agreements also permit air carriers to use less congested airports. The use of blocked space and code-sharing may also reduce the need for air carriers to serve capacity-constrained airports. And in some cases, liberal air services agreements have accorded traffic rights that airlines are not interested in or able to exploit at present.

3.8 Insofar as b) is concerned, it would appear that a State would be reluctant to conclude a liberal air services agreement if its air carrier(s) could not expect to operate to capacity-constrained airports in the other parties. However, the fact that 27 of the 70 States which concluded open skies agreements have one or more slot-controlled airports seems to suggest that many States have been able to liberalize in spite of this handicap. Nevertheless, the continued long-term growth in air services and the difficulties faced by more and more airports in increasing airport capacity will continue to challenge and possibly limit the liberalization of international air services.

4. CONCLUSIONS

4.1 From the above discussions, the following conclusions may be drawn:

- a) Since the 1994 Worldwide Air Transport Conference (ATConf/4), considerable progress has been made in liberalization with respect to market access, particularly at the regional and subregional levels. More importantly, States have generally become more open and receptive towards liberalization, with many adjusting their policies and practices to meet the challenges of liberalization.
- b) Experience in the past decade has confirmed that the existing bilateral, regional and multilateral regulatory regimes based on the Chicago Convention can and do coexist, and can each accommodate different approaches to air transport regulation. These regimes continue to provide a viable and flexible platform for States in pursuing liberalization according to their specific needs, objectives and circumstances.

- c) Applying the basic GATS principle of most favoured nation (MFN) treatment to traffic rights remains a complex and difficult issue. While there is some support to extend the GATS Annex on Air Transport Services to include some so-called “soft rights” as well as some aspects of “hard rights”, there is no global consensus on whether or how this would be pursued. It is also inconclusive at this stage as to whether the GATS is an effective option for air transport liberalization.
- d) While multilateralism in commercial rights to the greatest extent possible continues to be an objective of the Organization, conditions are not ripe at this stage for a global multilateral agreement for the exchange of traffic rights. States should continue to pursue liberalization in this regard at their own choice and own pace, using bilateral, regional and/or multilateral avenues as appropriate. The proposed ICAO Template Air Services Agreements (TASAs) provide detailed guidance on liberalization options and approaches.
- e) In liberalizing market access, due consideration should be given to airport capacity constraints and the long-term infrastructure needs. Problems involving air carriers which are unable to exercise their entitled traffic rights at a capacity-constrained airport may, if necessary, be addressed in the context of discussions on the relevant air services agreements.
- f) ICAO should continue to monitor closely regulatory and industry developments, develop an inventory of States’ practical experience with liberalization and disseminate relevant information to Contracting States. ICAO should also continue to keep current the existing guidance material on the economic regulation of international air transport and develop necessary new guidance to facilitate liberalization and improve harmonization, for example, through the TASAs.

5. ACTION BY THE CONFERENCE

5.1 The Conference is invited to:

- a) note the discussion of the issues and policy options in paragraphs 2 and 3; and
- b) review and adopt the conclusions in paragraph 4.

— END —