



**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**

**BASIC PRINCIPLES OF FAIR COMPETITION**

(Presented by Ireland on behalf of the European Union (EU) and its Member States<sup>1</sup> and other Member States of the European Civil Aviation Conference<sup>2</sup> (ECAC))

**EXECUTIVE SUMMARY**

This working paper intends to highlight the importance of developing, with the leadership of ICAO, a global approach towards ensuring "fair competition" in international air transport. Fair competition should play a key role in developing the economic regulation of international air transport including the further liberalisation of market access. Fair competition is considered as a key objective by EU and ECAC Member States.

**Action:** The Conference is invited to agree to the recommendations presented in paragraph 5.

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

**1. INTRODUCTION**

1.1 International air transport competes as a service industry in an increasingly open global market, so sustainable competitiveness depends upon open and fair conditions of competition. Indeed, open and fair competition provides choice and value for money for consumers, supports quality, productivity, efficiency and innovation in the air transport sector.

1.2 Fair competition issues such as State subsidies, safeguards, anti-competitive practices, etc. have been raised and discussed in ICAO, however, without reaching so far a common understanding of this important matter. At the Eleventh Meeting of the ICAO Air Transport Regulation Panel

<sup>1</sup> Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

<sup>2</sup> Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Iceland, the Republic of Moldova, Monaco, Montenegro, Norway, San Marino, Serbia, Switzerland, The former Yugoslav Republic of Macedonia, Turkey and Ukraine.

(ATRP/11) in June 2012, this was identified as an important issue that the Sixth Worldwide Air Transport Conference (ATConf/6) should discuss in view of further possible actions by ICAO, such as developing basic principles of fair competition.

## 2. EUROPEAN EXPERIENCE WITH OPEN AND FAIR COMPETITION

2.1 Over time, air transport has been fully liberalised within the European Union (EU). Liberalisation has been progressing in parallel with regulatory harmonisation in all areas of civil aviation, which together has created a completely open, deeply integrated single air transport market where competition and State aid rules, as well as economic and technical requirements, are enforced by independent authorities at national and/or EU level. By supporting 5.1 million jobs and contributing €365 billion or 2.4% to European GDP<sup>3</sup>, the EU aviation sector makes a vital contribution to economic growth, employment, tourism, people-to-people contacts, as well as to regional and social cohesion. These significant benefits would not have been possible to gain within a framework which heavily restricts competition such as restricted bilateral air services agreements.

2.2 The EU air transport market has been the basis for further integration at a wider pan-European level. The "Common Aviation Area" being established through comprehensive aviation agreements between the EU and its neighbours<sup>4</sup> is based on the same principles of open markets, regulatory harmonisation and the application of compatible competition rules to ensure fair competition.

2.3 Furthermore, the EU has negotiated comprehensive aviation agreements with further key aviation partners beyond Europe. The agreements with the United States (US) and Canada respectively include clauses that provide legal safeguards for fair competition. The relevant authorities of the parties to the respective agreements cooperate with each other to apply effectively the commonly agreed fair competition principles.

2.4 As the global air transport market is becoming more and more open and competitive, it is more important to ensure that competition is not distorted by unfair practices. And where fair competition conditions exist, it is best to repeal or reduce market access restrictions e.g. in bilateral air service agreements so that airlines can compete freely. Indeed, fair competition is an important principle to achieve the objective of full liberalisation of market access and to reap its benefits. Furthermore, the existence of fair competition is also likely to encourage States to make further progress on liberalising airline ownership and control.

## 3. DISCUSSION

3.1 **What are the conditions to reach a fair competition environment?** In order to develop basic principles of fair competition, it is appropriate to set conditions to help determine whether there exists (or not) fair competition on a given air transport market. The following conditions are suggested:

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<sup>3</sup> "Aviation: Benefits Beyond Borders", Report prepared by Oxford Economics for ATAG, March 2012. It should be noted that these figures include considerable indirect and induced effects which multiply the impact of aviation on the economy.

<sup>4</sup> "Common Aviation Area" Agreements are in place between the EU and the following: the Republic of Albania, Bosnia and Herzegovina, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Montenegro, the Republic of Serbia, Kosovo under UN Security Council Resolution 1244, the Kingdom of Morocco, Georgia, the Hashemite Kingdom of Jordan, the Republic of Moldova, and the State of Israel.

### ***Regulatory conditions***

- a) the existence of efficient competition law at national or regional level covering the abuse of market power, merger control, anti-competitive agreements and concerted practices, which is applicable to international air transport, as well as clear, transparent and strict state aid rules applicable to undertakings under the jurisdiction of the State concerned<sup>5</sup> and ensuring the achievement of the objectives associated with open and fair competition; and
- b) transparent and non-discriminatory minimum rules, based on applicable ICAO Standards and Recommended Practices if any, covering the areas of aviation safety, security, air traffic management, ground handling, slots, air passenger rights, environmental protection, social rights of aviation personnel, taxes/user charges.

### ***Institutional conditions***

- a) separation of institutions: an independent civil aviation authority (independent from airlines, air navigation services providers, airports etc.), an independent competition authority, and an independent judiciary to review decisions by authorities in air transport matters; and
- b) such independent authorities must have clear regulatory/judicial responsibilities and powers as well as the necessary administrative capacities (including resources) to effectively carry out their responsibilities.

### ***Economic conditions***

- a) when public entities provide - under specific conditions and respecting the applicable strict state aid rules - state aid, subsidies or support to their air carriers, they should act as a rational private investor would do, without distorting competition in the market. In case the market cannot provide air services serving public interest (e.g. to/from remote areas of the country), state aid may be provided subject to transparent and non-discriminatory rules enshrined in strict legal requirements;
- b) transparent structures and relations between the State and economic entities throughout the whole aviation value chain should be in place including as regards financial flows; and
- c) Non-discriminatory and transparent treatment of foreign airlines: this would involve, for example, no royalties or mandatory commercial agreements between national and foreign airlines, but commercial freedom of foreign airlines regarding pricing, ticket selling etc., non-discriminatory taxes, refunds, charges and access to airport facilities and services.

3.2 **Possible instruments to establish and maintain fair competition.** On the basis of a global understanding of fair competition, instruments should be developed and used by ICAO Member States to establish and maintain conditions of fair competition in international air transport. These instruments may include *inter alia* national or regional legal and institutional frameworks, comprehensive aviation agreements, fair competition clauses in bilateral air services agreements, and a dispute resolution

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<sup>5</sup> See EU Information Paper on competition and state aid policies and laws applied to the air transport sector.

mechanism preferably through ICAO to resolve fair competition concerns between States, without prejudice to the application of competition law.

#### 4. **CONCLUSIONS**

4.1 In light of the discussions above, the following may be concluded:

- a) the European experience shows that market opening on a level playing field is beneficial but also requires measures by regulators to ensure fair competition. These measures aim at putting in place and maintaining the aforementioned regulatory, institutional and economic conditions;
- b) fair competition is a key principle to achieve the benefits of liberalisation of market access in international air transport at worldwide level;
- c) States should take measures to ensure fair competition, for example, through laying down efficient competition laws applicable to international air transport, as well as clear, transparent and strict state aid rules, developing and inserting fair competition clauses in their bilateral air services agreements, and through closer cooperation between their respective authorities including, where appropriate, in competition investigations; and
- d) ICAO should discuss this important issue with a view to developing and adopting basic principles of fair competition and instruments (such as a fair competition clause to be included in bilateral air services agreements) to establish and maintain it at global level. ICAO is invited to take as the basis for such discussions the aforementioned conditions of fair competition.

#### 5. **RECOMMENDATIONS**

5.1 The Conference is invited to:

- a) recognise that fair competition is an important principle for the further liberalisation of international air transport which allows for the sustainable generation of benefits; and
- b) urge ICAO to develop and promulgate basic principles of fair competition in the international air transport sector at global level as well as instruments to establish and maintain it.

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