



Committee on Economic Development of Air Transport – Topic 1

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¹ This paper reflects the author's personal views and cannot be considered as the views of ICAO.

THE QUESTION OF FAIR COMPETITION

A. Global Context

Following decades of discussions, the ICAO Assembly adopted a Long-Term Vision on the Liberalization of International Air Transport. However, ICAO work on multilateral instruments to support liberalization has been hindered by a lack of common understanding of fair competition in international air transport. Fair competition issues have been behind important discussions and debates regarding liberalization or even the application of current regulatory frameworks.

This briefing paper provides a background on how fair competition issues have been raised, discussed and shaped policies in the ICAO context and at regional/national levels. It will refer to a few important aeropolitical discussions and debates around the issue, while briefly presenting the positions of key stakeholders in relation to fair competition.

B. Fair competition in international air transport

The Preamble of the Chicago Convention states that “international air transport services may be established on the basis of equality of opportunity, and operated soundly and economically.” Article 44 of the Convention provides for every contracting State “a fair opportunity to operate international airlines” and “avoid discrimination between contracting States”. Despite extensive discussions about these principles and the adoption of related policies and guidance material (see below), ICAO Contracting States have not been able to achieve a common understanding among themselves on these issues. While ICAO work is still ongoing, it is questionable if such common understanding will ever emerge. This may have serious consequences on the further development of the economic framework for international air transport in general and further liberalization in particular. All this in a more and more global economy where air transport is a key enabler, with the estimated global economic impact of 2.7 trillion USD; but which is still regulated by a fragmented system of bilateral air services agreements (ASAs).

As mentioned above, the global air transport community has never been able to agree on the exact scope, let alone the definition of fair competition. ICAO, through the work of its Air Transport Regulation Panel (ATRP), has examined fair competition and related issues under different areas of economic regulation and through different instruments. No other global forum has managed to come up with any meaningful and widely recognized definition of fair competition. Adaptation of WTO concepts, for example, would probably be difficult to air transport. Even terminology tends to be misleading with terms “fair competition”, “unfair practices”, “level playing field”, “safeguards”, “reassurances” etc. used (or not) as synonyms without clear explanations of the concepts behind. Related but equally undefined terms such as “flag of convenience” just add to this ambiguity.

Going back in time and comparing the regulatory framework before and following the liberalization process, it is arguable that in restricted markets fair competition was less of an issue because competition was rather restricted by ASAs.³ When liberalization spread and airlines became more and more exposed to competition, concerns, especially in relation to state support, emerged.

Indeed, concerns about fair competition have played an important role in shaping some recent aeropolitical discussions and debates. A few cases which may have significance on future discussions are explained below:

1. Authorisation of Norwegian Airlines International

Under the EU-US Air Transport Agreement (ATA), any EU airline has the right to provide air services between any point in the EU and any point in the US. The application by Norwegian Airlines International (NAI - the Irish subsidiary of Norwegian Airlines, an airline licensed by Norway) encountered unexpected difficulties in obtaining an operating permit from the US Department of Transport (DoT). The administrative procedure took three years and involved a wide range of stakeholders expressing sometimes diametrically opposite views.

The debate focussed on NAI’s practice of hiring cabin crew through an intermediary and on the basis of work contracts governed by Singaporean law. Opponents viewed this as an example of ‘flag of convenience’ that was against Article 17bis of the EU-US ATA which provides that the ATA should not be used to undermine the labour standards of the Parties. Others argued that refusing the application would go against the ATA and long-standing US air transport liberalism. Before the permit was granted, the case had been subject to long and painful debates between the US and the EU.

³ Traditional ASAs do not generally include specific provisions on fair competition, rather than a “fair and equal opportunity” article which may, and have been, interpreted in very different ways.

2. US-Gulf debate on state support

A few years ago the three major US airlines, Delta, American and United, supported by labour unions, raised concerns about the possible expansion of Gulf airlines (Emirates, Etihad and Qatar Airways) to provide Trans-Atlantic 5th freedom services. They even suggested that the US should renegotiate or denounce Open Skies agreements with the Gulf States. The US majors accused the Gulf airlines of having been unfairly subsidised by their governments. They established “Partnership for Open & Fair Skies” which prepared a study to show alleged state subsidies granted to the Gulf airlines in the range of 50 billion USD. The Gulf airlines denied any unfair subsidies and claimed that such accusations were fuelled by mere protectionism. It is notable that some other US airlines voiced support for the Open Skies regime to be maintained as a central instrument for the competitiveness of the US airline industry.

Following government level consultations, in January 2018 the US and Qatar signed an agreement in which the two sides agreed to maintain the Open Skies Agreement and Qatar agreed to take measures to alleviate US concerns as regards alleged state subsidies to its state-owned airline, Qatar Airways. Such measures are reported to include applying commercial terms to all transactions that involve the national airline and to operating in a transparent manner by using international accounting and auditing standards. Qatar also committed to a freeze additional 5th freedom passenger services to the US. In May 2018 this was followed by a similar agreement between the US and the UAE in relation the latter’s state owned airlines, Etihad and Emirates. This case is a reminder that the lack of internationally agreed standards on state subsidies and other fair competition issues may lead to serious situations in which liberalization in general and the underlying air transport agreements in particular may be put at risk.

3. Review of EU Regulation 868/2004 and the fair competition template

The European Union (EU) has achieved a high level of market liberalization combined with gradual, deep and comprehensive regulatory convergence since it started air transport liberalization in 1992. This process had been more an internal one until 2003 when the EU opened air transport negotiations with key partners such as the US. Concerned by state support to US airlines in the aftermath of 9/11, the EU adopted a defence instrument against subsidisation and unfair pricing practices by foreign air carriers⁴. With the conclusion of the EU-US ATA, the relevance of the Regulation has diminished as far as EU-US air transport relations are concerned. At the same time, new concerns regarding alleged discriminatory practices and subsidies originating from third countries were raised in Europe and the Regulation was found not well suited to address such concerns. In 2017 the European Commission put forward a proposal

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0868&from=EN>

to replace the current Regulation with a more effective one⁵. As regards air transport agreements, the EU has developed a template fair competition clause to be used in ASAs negotiated between the EU and/or its Member States and partner countries.⁶

It is interesting to note that since 1974 the US has had in place its unilateral defence instrument, the International Air Transportation Fair Competitive Practices Act (IATFPCA).⁷ Under the Act, the DoT may take action in response to anti-competitive, discriminatory, predatory or unjustifiable activities by a foreign government or foreign airlines against a US airline. It seems the Act has served as an effective deterrent so much that practically no redressive measures had to be taken to resolve fair competition complaints by US airlines. As regards the scope of unfair practices, US legislation provides for examples, rather than a straightforward definition.

Based on the above cases and the policies and practices behind them, the main distinctive policy approaches towards fair competition can be summarised as follows:

- The US considers fair competition concerns essentially as bilateral issues which can and should be discussed and sorted out through bilateral discussions with the partner country concerned. If necessary, the IATFPCA is available as a credible threat that will most probably bring the partner to the table but it allows for redressive measures to be taken ultimately if necessary. In terms of scope, the US approach may be described as flexible i.e. any practice by foreign states and their air carriers may raise fair competition concerns as long as it can be viewed unfair and detrimental to US air carriers.
- The EU approach is more rules- and instrument-based, relying on and trying to export long established principles (transparency, non-discrimination, competition etc.) and practices which have been applied within the EU internal market. Regulatory convergence is generally considered as the best way to ensure fair competition. From the European perspective, effective procedures and institutional mechanisms are key to establish and maintain a level playing field. In terms of instruments, the EU tries to use joint committee procedures under air transport agreements which should be complemented by a new, more effective EU regulation as a defence instrument that can be used as last resort. The EU position goes further as regards the scope of what fair competition should cover: the application of competition laws to air transport, state aid rules, basic standards

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017PC0289&from=EN>

⁶ <https://www.icao.int/sustainability/Compendium/Lists/BilateralAirServicesAgreements/Bilateral%20Cooperation.aspx>

⁷ <https://www.transportation.gov/policy/aviation-policy/iatfcpa-complaints>

in safety, security etc. as well as transparency and non-discrimination.⁸ Under this approach, establishing fair competition should accompany the liberalization process.

- The position of Gulf States and their airlines seems to ignore or downplay fair competition concerns and arguments and focuses instead on the benefits that unhindered competition can bring in terms of connectivity, economic development, growth, jobs etc. While they do not seem to have a fully shared view on state subsidies, they all deny either the very existence of state subsidies as such, or their impact on competition, or them being unfair. They insist that full liberalization should remain the objective without the need to develop a common understanding of fair competition at international level.

C. ICAO work on fair competition

In response to a recommendation by the Fourth Worldwide Air Transport Conference in 1994, the ICAO Council assigned specific tasks, including the development of a “safeguard mechanism”, to the ATRP. In 1997, the ATRP developed three recommendations dealing respectively with safeguards, dispute settlement and participation measures. Subsequently, the Fifth (2003) and the Sixth (2013) Worldwide Air Transport Conferences produced conclusions and recommendations on these issues.⁹ The latest Assembly Resolution (2022) containing the consolidated statement of continuing ICAO policies in the air transport field states, among others, that “fair competition is an important general principle in the operation of international air transport services”, that (ICAO) “Member States [should] develop competition laws and policies that apply to air transport” and recalls the basic principle of fair and equal opportunity to compete.

Besides conclusions and recommendations, ICAO has produced guidance material¹⁰ focusing on the application of competition laws to air transport, the effects of state aids and subsidies and predatory pricing. The ICAO Template Air Services Agreement provides for template articles on fair competition, safeguards and competition laws which States can use when negotiating ASAs.

The ICAO Secretariat has also put together a compendium of competition policies¹¹ which provides information on competition policies (cooperation agreements, abuse of dominance and monopoly, merger control and state aid) including aviation related competition laws, on competition practices (bilateral and multilateral cooperation, international organisations) and on competition government agencies. Examples

⁸ https://www.icao.int/Meetings/a38/Documents/WP/wp063_en.pdf

⁹ ICAO Doc 9587, Policy and Guidance Material on the Economic Regulation of International Air Transport, 3.6 and 7.2, A1 and A2

¹⁰ ICAO Doc 9626, Manual on the regulation of international air transport, 2.3-5 and 4.3-10

¹¹ <https://www.icao.int/sustainability/Compendium/Pages/0-default.aspx>

of fair competition clauses are also included in the compendium. Furthermore, the ICAO Secretariat has published an information paper on existing ICAO policy and guidance material on competition.¹²

However, competition legislation deals with actions market participants (companies) can take to impede the development of other participants in the same market (barriers to entry, predatory pricing, abuse of dominant position etc.) The focus of the ATRP discussions was on actions *States* can take to distort competition in the air transport sector and not on actions by market participants. This is because air transport is a capital-intensive industry with high fixed costs and high commercial risks for air carriers, which tend to trigger State intervention, for example, in the form of State ownership or air carriers.

Since 2014, the ATRP has been working on international agreements/instruments to liberalize market access, air cargo and airline ownership and control. While some progress has been made, views have been divided from the outset on a few fundamental issues, fair competition being one of the most critical ones. It is too early to see if the ATRP can deliver on its tasks to move forward the ICAO liberalization agenda, but the lack of a common understanding of fair competition may hinder further progress.

In November 2018, ICAO issued State Letter SP 38/1-18/93 with a Survey on liberalization of air transport with regard to air cargo services, air carrier ownership and control and market access. The Survey seeks to obtain the views of ICAO Member States regarding their experience with liberalization and to support the ongoing work of the ATRP. In the context of liberalization of market access through a comprehensive, multilateral agreement being developed by the ATRP, the Survey asks States the question *“Should the comprehensive agreement have specific provisions on safeguards against unfair practices?”* In fact, this is the same, long-debated question if ICAO should develop a comprehensive policy on fair competition as part of its objective to liberalize international air transport.

It remains to be seen if ICAO can achieve a level of common understanding of fair competition in international air transport. Progress on this key issue may have a strong positive impact on liberalization efforts worldwide, thus contributing to the implementation of ICAO’s Long-Term Vision on the Liberalization of International Air Transport. For the time being, ICAO is assessing the role it can play to further advance the economic development of air transport and is focusing efforts on a future multilateral instrument on the liberalization of air carrier ownership and control.

¹² https://www.icao.int/sustainability/Documents/Competition_Existing%20Guidance.pdf

Non-exhaustive list of potential questions to be addressed by the delegates

1. How could fair competition in international air transport be defined? Is it substantially different from similar concepts in other economic sectors?
2. ICAO is currently working on multilateral agreements/instruments to liberalize market access, airline ownership and control and air cargo. Do you think that safeguards on fair competition should be part of such instruments?
3. In general, what is the relation between liberalization and fair competition?
4. Is ICAO the right forum to address fair competition in international air transport or this issue should be left for States to address regionally or bilaterally?
5. If ICAO should develop a common policy on fair competition, what should be the scope of its work? Should it focus on equal opportunities, unfair practices or even on the harmonization of different areas of economic regulation such as competition rules, labour and environmental standards etc.?
6. If ICAO should develop a common policy on fair competition, what should be the form of that? Detailed guidance or a binding instrument? How should such a common policy be reflected in multilateral agreements/instruments to liberalize international air transport?
7. If ICAO should not or cannot develop a common policy on fair competition, how could States address concerns over fair competition, equal opportunities, participation etc.? Could the WTO or the OECD, for example, play a role?

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