



WORLDWIDE AIR TRANSPORT CONFERENCE (ATCONF)

SIXTH MEETING

Montréal, 18 to 22 March 2013

Agenda Item 2: Examination of key issues and related regulatory framework
2.4: Fair competition

DRAFT REPORT

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2.4.1 DOCUMENTATION

2.4.1.1 The Conference considered Agenda Item 2.4. based on the following working papers: WP/4 (Secretariat), WP/32 (The United Arab Emirates), WP/39 (Egypt), WP/48 (Member States of African Civil Aviation Commission (AFCAC)), WP/51 (Presented by Ireland, on behalf of the European Union (EU), its Member States and other Member States of European Civil Aviation Conference (ECAC)), WP/62 (United States), WP/85 (Korea), WP/86 (Korea), WP/90 (Airports Council International (ACI)), WP/99 (The International Transport Workers Federation (ITF)).

2.4.1.2 The following information papers were also noted by the Conference: IP/4 (Ireland) and IP/14 (Korea).

2.4.2 DISCUSSION

2.4.2.1 The principle of fair and equal opportunity is enshrined in the Convention on International Civil Aviation (the Chicago Convention) where States have agreed that international air transport services “may be established on the basis of equality of opportunity” and every State “has a fair opportunity to operate international airlines”.

2.4.2.2 A broad range of issues were raised under the topic of fair competition. A number of States focused on the challenges faced by smaller airlines, especially those from developing countries, when competing against much larger carriers, a challenge made more difficult in some cases by airline mergers and alliances as well as by unilateral or discriminatory measures that deny equitable opportunities. Others focused on issues linked to the inconsistent application of competition laws and policies, including standards for granting antitrust immunity. Some States noted the negative effects on competition caused by barriers to market access. Other States stressed that market liberalization must go hand-in-hand with concrete measures to ensure fair competition.

2.4.2.3 A number of States supported work by ICAO to establish core principles on fair competition, both to provide a clearer understanding of what is fair and unfair and to indicate appropriate measures to address problems. Among the measures identified were the establishment and effective enforcement of competition laws applicable to international air transport, clear and strong rules on state aids, and the inclusion of appropriate fair competition clauses in air services agreements based on ICAO templates. Other States mentioned principles of fair competition aimed at blocking control of markets by dominant carriers, ensuring all carriers equitable access, prohibiting discrimination and barring abusive practices. However, a number of other States disagreed with the proposal to establish core principles citing a) that attempts to reach consensus on core principles would prove impossible given the major differences in State views and practices; b) that issues of fairness can be effectively handled in existing bilateral channels and through use of ICAO template language; c) that many airlines and airports are State-owned (hence core principles that challenge this fact would be contrary to the principle of State sovereignty in the Chicago Convention); and d) that core principles on fair competition might be misinterpreted or misused as a barrier to competition.

2.4.2.4 Notwithstanding these differences, there was broad agreement that fair competition is an important general principle in the operation of international air services, and that States should give due consideration to the concerns of other States when applying competition laws to international air transport. There was disagreement over whether all States should adopt specific competition laws relating to international air transport. There was agreement, however, that cooperation among existing competition authorities should be encouraged in order to foster more compatible approaches and that ICAO could play a leading role in facilitating this process. In this regard, States voiced support for the further development of ICAO guidance on competition issues, for the development by ICAO of a compendium of competition policies and practices, and for the organization by ICAO of an exchange forum of competition authorities to enhance cooperation, dialogue and exchange of information (possibly on the lines of, or in conjunction with, ICAO Air Services Negotiations Conference (ICAN)).

2.4.2.5 On a different issue, it was noted that competition among airports has increased, and it was suggested that this should allow a “lighter regulatory touch” under which the commercial partners would consult the outcome on matters such as charges. This suggestion was opposed by a number of States, who stressed that regulatory authorities must continue to supervise, although it was noted that different levels of regulatory oversight could be considered.

2.4.3 CONCLUSIONS

2.4.3.1 As a result of the documentation and ensuing discussion on fair competition under Agenda Item 2.4, the Conference concluded that:

- a) In accordance with the Chicago Convention, fair competition is an important general principle in the operation of international air services;
- b) ICAO policies on competition are still valid, based on observed practices, such as the inclusion of ICAO model clauses on competition in air services agreements. ICAO should continue to monitor developments and update its policies and guidance in response to changes in the industry and State practice;
- c) there is a recognized need for States to give due consideration to the concerns of other States in the application of national or regional competition laws and policies to international air transport as well as a need for cooperation among competition authorities, including in the context of approval of alliances and mergers; and
- d) in this regard, ICAO should play a leadership role in identifying and developing tools to promote dialogue and the exchange of information among interested authorities with the goal of fostering more compatible regulatory approaches. Such tools could include the development by ICAO of a detailed compendium of national and regional competition policies and practices as well as the development of a facility that would serve as a forum for the enhancement of cooperation, dialogue and exchange of information.

2.4.4 RECOMMENDATIONS

Recommendation 2.4/1 — Fair Competition

The Conference Recommends that:

- a) States should take into consideration that fair competition is an important general principle in the operation of international air services;
- b) States, taking into account national sovereignty, should develop competition laws and policies that apply to air transport. In doing so, States should consider ICAO guidance on competition;
- c) States should give due consideration to the concerns of other States in the application of national and/or regional competition laws or policies to international air transport;
- d) States should give due regard to ICAO guidance in Air Services Agreements (ASAs) and national or regional competition rules;
- e) States should encourage cooperation among national and/or regional competition authorities, including in the context of approval of alliances and mergers;
- f) ICAO should develop tools such as an exchange forum to enhance cooperation, dialogue and exchange of information between Member States to promote more compatible regulatory approaches toward international air transport;
- g) ICAO should develop a compendium of competition policies and practices in force nationally or regionally; and
- h) ICAO should continue to monitor developments in the area of competition in international air transport and update, as necessary, its policies and guidance on fair competition through the Air Transport Regulation Panel (ATRP).

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