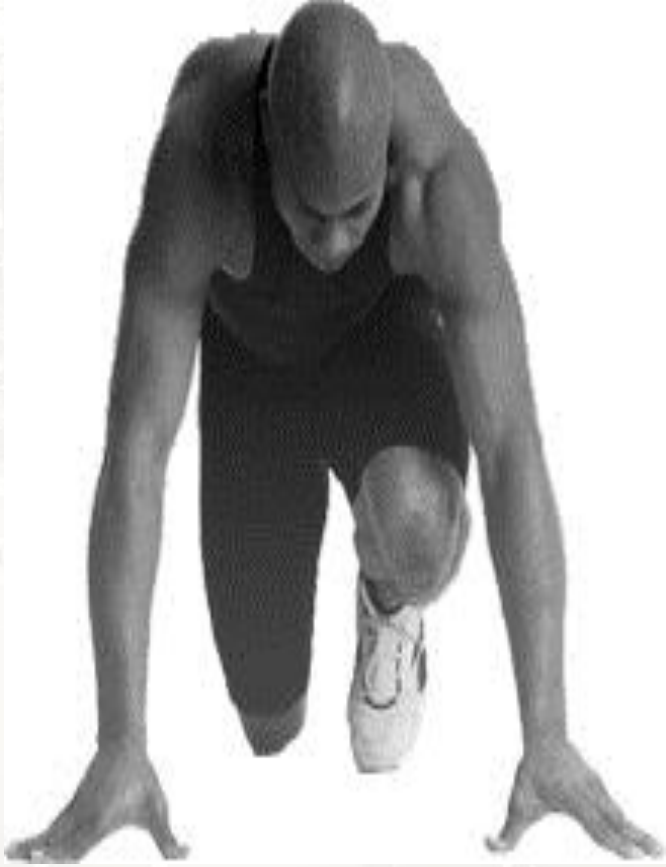
Universiteit Leiden



ICAO IAST/4
Seoul, 9 May 2019

Session 6
Convergence of competition laws

presentation by
Pablo Mendes de Leon
International Institute of Air and Space Law
Leiden University, The Netherlands

Convergence of competition laws

Until 1978: air transport outside competition laws see: bilateral Air Services Agreements (ASAs), containing *a priori* restrictions

<u>Subsequent developments:</u>

- US Airline Deregulation Act (1978)
- International Air Transportation Competition Act (1979)
- Laker case (1982-1985)
- EU Treaties containing competiton law regime
- ECJ Nouvelles Frontières (1986) and Saeed (1989) cases
- Many other cases that followed.

Convergence of competition laws

Competition law regimes:

- Three areas:
  - Concerted action/ 'cartel' behaviour (I)
  - Unilateral conduct/ predatory behaviour (II)
  - Merger/ take overs (III)

- Related area:
  - State aid (EU) and 'Chapter 11' (US) - Competition in international air transport

- Tendency:
  - Increased application of competition laws to international transport in jurisdictions worldwide

Convergence of competition laws

AIRLINE PRACTICES IN RELATION TO COMPETITION

I. Unilateral conduct (*not so frequent*):
- ✓ monopoly behaviour
- ✓ predatory behaviour
- ✓ dumping of capacity

I. Cooperative agreements (*among others*):
- ✓ consultation and coordination of tariffs
- ✓ interline agreements
- ✓ code sharing and blocked-space agreements
- ✓ coordination of schedules

Convergence of competition laws

III. Mergers (A):

- At first, only between airlines within *one* State:
  - BA/Bcal (1988)
  - Delta/PanAm (1991) – and many others in the US;
  - Air France/UTA (1990)
  - KLM/Transavia (1991)

Reason: nationality requirements in ASA's

- 'Mixed' nationalities not allowed, or at least they provoked air complicating policy discussions

Competition law regimes

III. Mergers (B):

➢Followed by mergers *within one jurisdiction*:

- KLM/AirUK (1997)
- British Airways/TAT (1992/1998);
- Swissair/Sabena (1995)
- AF/KLM (2003)
- Lufthansa/Swiss/Austrian (2005/9)

Made possible thanks to acceptance of the EU air carrier clause internationally

Convergence of competition laws

Similarity as to competition rules in jurisdictions all over the world, as they are based on the US or EU approach:

- Concerted actions, however named (cartel, collusion, conspiracy, etc.)
- Abuse of dominant position
- Mergers/take-overs

Differences exist as to:

- Their enforcement by the competition authorities
- Analysis of relevant market and other concepts (consumer protection)
- Whether or not State aid rules is/should be included/applied
- Applicability to the operation of domestic/international air services
- Immunity from jurisdiction for defined practices

Universiteit Leiden

Convergence of competition laws

The world-wide approach to competition in air transport

- Absence of competition rules in the Chicago Convention (1944)
- Inapplicability of WTO rules and enforcement mechanisms
- No or a limited mandate for ICAO – as yet
- ASAs proceed from *a priori* rules – while *open skies* move on to a more market oriented approach but without 'converged' competition rules

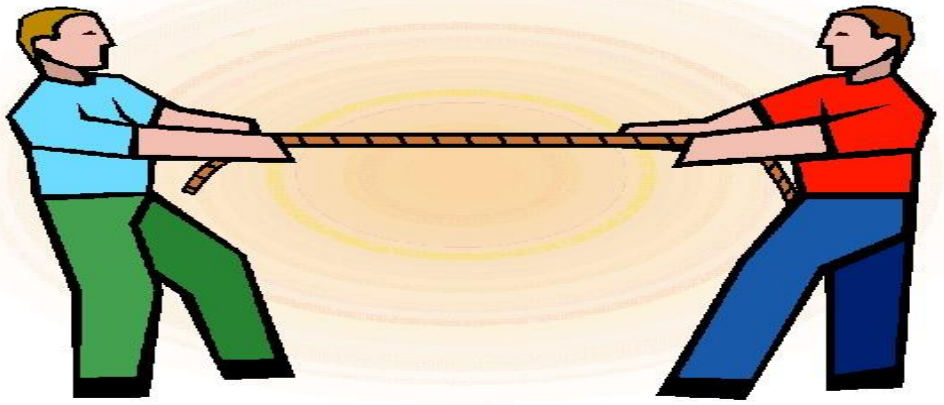
Convergence of competition laws

Hence, **the dilemma**:

1) Absent a global competition law regime, whereas
2) Air transport is an *international* activity,

where different competition rules are applied by various competition authorities to the same behavioural practice as to which see the Fuel Surcharge cases in cargo operations, running from 2009 till now ….

in a *conflict between jurisdictions* and *cumbersome procedures* in the process of restructuring the airline industry



Convergence of competition laws

How to solve this dilemma?

A. Unilaterally: application of the 'effects' doctrine adopted by many jurisdictions world wide

B. Application of 'positive comity' between jurisdictions worldwide, for references as to the enforcement of competition rules, without convergence of such rules (see *the EC-US agreement regarding the application of their competition laws* (1991/1995));

- See also the role of the Joint Committee in the EU/US and EU/Canada Agreements on air transport

Problems (*among others*):

- competition authority belonging to sovereign powers claiming jurisdiction on the basis of sovereignty;
- sensitivity of confidential business information which may have to be exchanged.

Universiteit Leiden

Convergence of competition laws

How to solve this dilemma?

C. Regulation of applicability of respective competition rules in an ASA (see EU/US (2007/10 and EU/Canada (2010));

D. Mandatory adoption of EU competition rules by the other party (Jordan, Morocco and other Mediterranean Agreements) in return for market access

E. Agreement on standards on 'fair competition' (Qatar-EU Agreement of 2019)

<u>In the future:</u>

Role for ICAO?

Time for discussion!

Universiteit Leiden

Thank You!