

A large commercial airplane is shown from a rear-quarter perspective on a runway. The scene is set during sunset or sunrise, with a bright sun on the left side of the frame, creating a warm, orange glow. The background features a line of trees and a hazy horizon. The runway is illuminated with small lights, and the overall atmosphere is serene and professional.

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**FAIR COMPETITION IN  
INTERNATIONAL AIR TRANSPORT**

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# Competition in the Air Transport Sector

## I. From restricted to liberalised regimes

- No market regime in traditional air law regimes: bilateral air services agreements mandate ‘anti-competitive’ behaviour by dictating, for instance, price coordination and approval by states, and capacity restrictions
- Review of the amount of traffic *ex post facto* – through inter state consultations and adaptations of bilateral clauses
- Open market, subject to market access restrictions, achieved in the US and EU internal markets, and in international markets: EU-US; EU-Canada and US made Open Skies agreements, with, for instance, the Republic of Korea.
- See also other international ‘markets’: UK-Singapore; Australia-New Zealand; Argentina-Uruguay; Korea-Canada
- Operation of domestic services by foreign carriers mostly forbidden

# Competition in the Air Transport Sector

**II. Current industry dynamics** using opportunities of liberalised regimes and sometimes circumventing regulatory constraints:

- code sharing (among alliance partners and other airlines worldwide, for instance LOT with Singapore Airlines, Lufthansa, Swiss and Aeroflot on agreed routes)
- Mergers (AF/KL; Lufthansa/Swiss/Austrian; BA/Iberia)
- alliance building (Sky team, Star, oneworld)
- Cross border investments (Delta/Virgin Atlantic; Etihad/air berlin/Alitalia)
- Establishment of daughter companies in other countries or joint ventures with other airlines (Air Asia, based in Malaysia, in Indonesia, Japan, India); Lan Chile (in Peru, Argentina, Colombia, Ecuador, Brazil [LanTam])
- Proliferation of 'low cost' carriers worldwide
- Most if not all of these undertakings requiring attention from competition authorities

# Competition in the Air Transport Sector

## III. The management of competition on international air services

- Traditionally no role for competition and competition authorities because of the management of air services by *States*, without articulated role for the designated airlines
- This is changing in open markets and open skies environment
- Competition authorities are acquiring a role, to begin with respect to the operation of air services on domestic markets, and to a limited extent, international markets
- Question of overlapping jurisdictions as air transport is a cross-border, worldwide undertaking
- For the time being reliance on 'effects' doctrine, 'positive comity' and agreements between competition authorities
- See *Air Freight Cartel* cases

# Competition in the Air Transport Sector

## IV. Airline behaviour affecting competition

- Preliminary question: are airlines “undertakings” to which competition law regime apply or should apply?
- If so – what kind of conduct made by these undertakings?
- Concerted actions: tariff coordination, pooling of capacity, code sharing, coordination of schedules
- Abuse of a dominant position: dumping of capacity, predatory pricing, refusal to interline
- State aid – only forbidden in the EU; is not ‘airline behaviour’ and should be regarded as a trade and policy instrument affecting competition.

So what is ‘fair competition’ absent global governance of competition in a basically cross border economic activity?

# Competition in the Air Transport Sector

## V. ICAO's work in the field of competition (1)

Does ICAO have a mandate under the Chicago Convention, 1944, to deal with, or regulate competition in international air transport, whether implicitly or explicitly? Yes if its contracting States so agree as to which see:

- ICAO should “foster the development of international air transport so as to... prevent economic waste caused by unreasonable competition” (Art. 44(e)) which may occur in the event of the introduction and maintenance of excess capacity.
- ICAO should also “insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines” (Art. 44(f)).
- ICAO cautiously supports the establishment of ‘core principles’ affecting ‘fair competition – prudently because not all of its contracting States support it explicitly or implicitly.
- Avoidance of conflict between competition law regimes and Air Services Agreements (ASAs).

# Competition in the Air Transport Sector

## V. ICAO's work in the field of competition (2)

ICAO points at the 'traditional' approach under which designated airlines "shall have a fair opportunity to operate" the agreed services under ASAs.

- A step forward: ICAO has made proposals, for instance in the 'Template Air Services Agreement' in which it proposes, an Article on 'Fair Competition, a 'step by step' approach taking into account the stage of development of its Member States.
- State aid and subsidies granted to air carriers designated by one side while the same or similar subsidies are not granted to carriers designated by the other party "may distort trade in international air services and may constitute unfair practices" (Conclusion of ICAO ATConf/5);
- ICAO fosters cooperation between competition authorities on a **bilateral**, regional or multilateral level.
- ICAO's engagement with the gathering and analysis of competition laws and enforcement actions worldwide.

# Competition in the Air Transport Sector

## VI. Concluding remarks:

- More room for airlines to initiate behaviour in accordance with commercial realities and expectations, in conjunction with less State interference
- Increased role for competition authorities correcting anti-competitive behaviour
- Relationship between competition law regimes and international air transport regimes remains complicated
- Regional approaches are gaining importance, in all parts of the world: EU; Africa (COMESA, EAC and SADC); ASEAN
- State aid is a controversial subject, affecting EU and other airlines
- ICAO is examining the subject, and makes proposals to move forward liberalisation of air transport services, with no substantial role for WTO/GATT/GATS