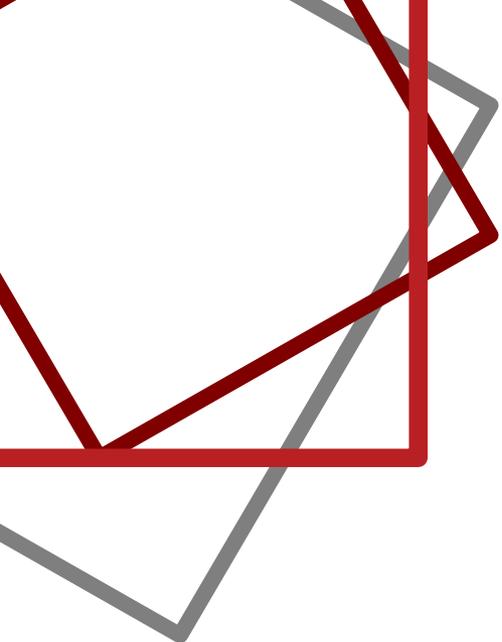


2018
ICAO Legal Seminar
Asia-Pacific Region

Airline Subsidies: Can the Law Play a Role in Regulating Them?

25 May 2018
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Overview

- All airlines are or have been beneficiaries of **broad** subsidies in one way or another as governments generally support their national airlines.
- Airline subsidies have recently received special attention.
- The claims by relevant parties focus on questions of fact.
- But, more fundamental questions are:
whether airline subsidies can ground a legal action for unfair competition and
whether the law can play a role in regulating airline subsidies.

Overview

- There are three obstacles to answering these questions.
 - 1) There is the problem of defining airline subsidies.
 - 2) It is not clear what law applies to the subject matter.
 - 3) There is a question as to which international organization should be responsible for regulating airline subsidies.

Definition of Airline Subsidies

- “Domestic subsidies” vs. “Export subsidies”
- Most subsidies are perfectly justifiable as exercises of sovereignty within a country.
- But, export subsidies distort the flow of goods and services that would exist without government intervention
→ an adverse impact on particular sectors in other states.
- The WTO Agreement on Subsidies & Countervailing Measures (SCM) disciplines the use of subsidies.
- But, SCM applies only subsidies on trade in goods and **does not apply to subsidies to service (including airlines for their air services)**.

The SCM provides lessons for the definition of airline subsidies

Category	Examples
Actual direct transfers	Grants, loans/credits, interest rate support, capital/equity infusions, corporate bond purchases, debt-to-equity swaps, investments, corporate debt forgiveness
Potential direct transfers of funds or liabilities	Loan guarantees, insurance
Forgoing or not collecting government revenue that is otherwise due	Tax or duty incentives and exemptions
Providing goods or services other than general infrastructure	governmental provision of goods or services other than general infrastructure governmental purchases of goods which artificially increase the beneficiary's sales of those goods

Subsidies in Air Services Agreements (ASA)

- From “fair and equal opportunity” (since 1960s) to “fair and equal opportunity to compete” (since 1990s)
→ From a balanced operation under equal circumstances to opportunity to compete.
- Since the early 2000s, the EU has openly criticized that the current ASAs are not capable of dealing with the concerns over subsidies.
- The EU response to the airline subsidies was twofold:
 - 1) Regulation 868/2004
 - 2) Amending ASA by inserting a specific subsidy provision

Subsidies in Air Services Agreements (ASA)

- The EU-US Air Transport Agreement (2007)
 - recognizes the adverse effects of government subsidies on international air transport competition and authorizes parties to submit observations to one another
 - but, no measure was provided for redress.
- The EU-Canada Air Services Agreement (2009)
 - If one party has concerns about the effects of a subsidy, it can refer those to the Joint Committee that is to be established under the air services agreement.
 - If no consensus is reached in the Joint Committee, the aggrieved party may take unilateral action.

Subsidies in Air Services Agreements (ASA)

- The ASEAN-China Air Transport Agreement (2010)

Article 10 (Safeguards)

“2. The grant of state aid and/or subsidy shall be transparent among the Contracting Parties, and shall not distort competition among the designated airlines of the Contracting Parties. The Contracting Parties concerned shall furnish other interested Contracting Parties, upon their requests, with complete information on such grants and any revision to or extension of such grants.”

Airline Subsidies in the Chicago Convention

- The ICAO has developed extensive rules for international law as it relates to aviation.
- However, as far as the economic aspects of international air transport (that is, air services) are concerned, the ICAO's role has been limited.



Airline Subsidies in the Chicago Convention

- Article 54 (Mandatory functions of Council)

The Council shall:

...

(i) Request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air services, including information about the costs of operation and particulars of subsidies paid to airlines from public funds;

Transparency

- Even if subsidies are found, adverse effects (i.e. injury) are required to furnish grounds for a lawsuit or other legal action.
- Proving “injury” is extremely difficult. (lessons from WTO)
- From a practical perspective, airline subsidies can hardly provide grounds for a legal action.
- But, the main purpose of the subsidy regulation should be maintaining fair competition in the international aviation market rather than providing compensation.
-> reason to appreciate the value of transparency



The Role of Transparency

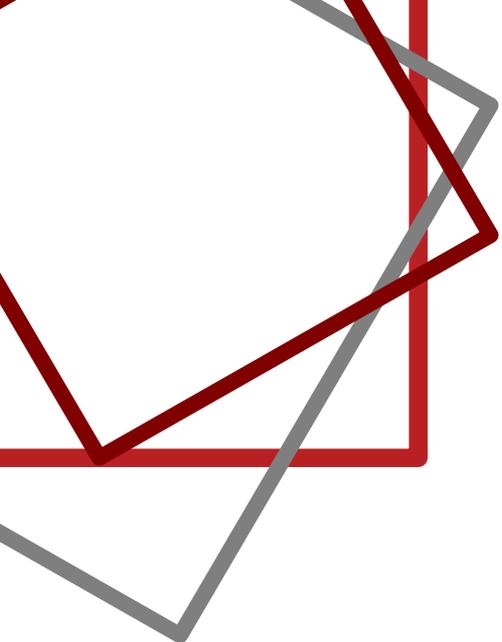
- If a system of transparency is established for airline subsidies,
 - 1) This would reduce disputes about the facts
 - 2) The deterrent effects of “naming and shaming” are expected.
- Naming and shaming is publicly exposing and condemning the behavior of governments.
- The transparency mechanism will make states more cautious about airline subsidies, thereby deterring them.

Summary

- Airline subsidies can be a form of unfair competition.
- Airlines that do not receive subsidies struggle to overcome the distortion caused by this unfair competition.
- The core of the airline subsidy debate should be how to regulate airline subsidies.
- Regulating airline subsidies through formally binding rules is challenging.
- However, a rule-based approach should be taken with regulating airline subsidies as much as possible.

Suggestions

- First, states should consider including a subsidy-specific provision in their air services agreements.
→ This provision should focus on the transparency of information as reflected in the ASEAN-China Air Transport Agreement (2010).
- Second, member states of the ICAO should revisit Article 54 paragraph (i) of the Chicago Convention.
- Transparency based on the law can play a significant role in disciplining unfair subsidies.



THANK YOU
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