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# Legal Committee – Topic 1

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# FAIR COMPETITION' IN INTERNATIONAL AIR TRANSPORT

## 1. Introduction – definition of terms

In international air law, international trade law, competition law and international law generally various terms are used when identifying competition. Legal acts may refer to:

- fair competition;
- unfair competition;
- open competition;
- global competition;
- free competition;
- effective competition;
- genuine competition
- reasonable competition.

However, these terms are not or rarely defined in the acts referring to them.

It is not easy to define 'fair competition' and even 'competition' either as its interpretation varies from one part of the globe to another. That makes the shaping of international law for aviation challenging because all of these perceptions, reflecting differences in culture, trade and policy making, must be taken into account in that process.

## 2. Economic regulation of international air services under the Chicago Convention

The Chicago Convention on international civil aviation (1944) which has been ratified by 192 States (per February 2018) is considered as the constitution of world-wide civil aviation. It starts with the unequivocal proclamation of the principle of 'complete and exclusive' sovereignty as a 'security measure'.[1] As a corollary of the sovereignty governing national airspace it was *de iure* closed for foreign aircraft and their operators, that is, international airlines.

In the economic field, this starting point is laid down in Article 6 of the Chicago Convention, which rescribes that 'special permission' must be granted for the operation of scheduled international air services. Such 'special permission' is given in so-called *Air Services Agreements* between States, opening each other's national airspace and market for the operation of international air services, and containing conditions pertaining to market access and market

[1] See, Art. 1: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."

behaviour of the designated airlines. There are at present about 5000 bilateral air agreements, regulating international air services and market access world-wide.

Due to the above principle of sovereignty, there is no transfer of national competencies in the economic field to ICAO or any other international let alone supra-national organisation, except in the special case of the EU, and certain other regional organisations including, step by step, the Association of South East Asian Nations (ASEAN). States determine *de iure* who flies in their national airspace, and, if so, under what terms and conditions.

Those terms and conditions include but are not limited to:

- designation of airlines, that is, which and how many airlines may fly;
- the routes which those designated airlines are entitled to fly;
- the capacity which those airlines may offer, that is, the size, the frequency and the configuration of the aircraft;
- the prices which the designated airlines may quote;
- a competition regime, if applicable;
- the regime for taxes and charges;
- access to infrastructure, that is, airports and airport related facilities,which are laid down in such air services agreements.

To sum up, aviation States started their air transport activities after the Second World War with reliance on the principle of sovereignty. National airspace was closed by the establishment of this principle which could be opened up by engaging into bilateral agreements or multilateral Air Services Agreements. This is then what happened in the decades following the conclusion of the Chicago Convention, to begin with under the Bermuda I agreement concluded between the United States (US) and the United Kingdom in 1946.

## 3. Towards deregulation and liberalisation of international air services

Following deregulation in the US and liberalisation in the EU, such air services agreements granted designated airlines more freedom to offer and operate the agreed international air services. Restrictions on the economic parameters of the air services, including routes to be followed, points to be served, frequencies of the operations, the capacity in terms of passenger seats and cargo volume to be used, and prices to be set for these services were left to decisions made by the airlines rather than regulated under the traditional air services.

Moreover, in certain cases, such as the EU-US agreement on air transport of 2007/2010, and the EU-Canada agreement on air transport of 2009, bilateral air services agreements became multilateral agreements. They also included provisions on how to deal with competition in regimes which proceed from a more market oriented approach and how competition authorities should work together in other to solve anti-competitive conduct of airlines which are subject to these agreements, reckoning with, for instance, the ‘positive comity principle.

## 4. Questions

- A principal term currently used by policymakers is 'fair competition'; how would you define it?
- Does the Chicago Convention address competition between airlines in any way?
- How would you assess the relationship between Air Services Agreements and competition law regimes in terms of 'fair competition'?
- Do you envisage a role for ICAO to give policy directions for or regulate 'fair competition'?
- Would you support the establishment of a global convention providing rules for
- 'fair competition' between airlines, and/or
- Remedies designed to combat anti-competitive conduct of airlines, and/or
- cooperation between competition authorities, and or
- Standards for the harmonising of competition law regimes?
- Please explain your standpoints by referring to legal acts, policy documents and case law.

## 5. Bibliography

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