'FAIR COMPETITION' ON A LEVEL PLAYING FIELD IN A GLOBALISING AIR TRANSPORT ENVIRONMENT

1. Definition

A level playing field can be defined as an environment in which all competitors, for instance, airlines, in a given market, for instance the air transport market, must follow the same rules and are given an equal ability to compete. The term was first used in the 1970's and probably launched by the OECD or the World Bank.

At first sight the concept may be regarded as paying tribute to free trade and open market principles. However, this paper will show that it is now used to protect markets, especially so the EU, Canadian and US air transport markets, from free entry in order to guarantee *fair* competition, as opposed to free, or undistorted, or 'cut throat' competition.

Thus, competition becomes 'fair' when it is governed by competition rules which are applied to players on a level field. The word 'level' takes care of this approach towards competition.

2. The basics of a level playing field

We live in an era in which liberalisation of air services is called for. That period has been marked by the deregulation process of the internal US market in the late 1970's, the completion of the internal EU air transport market in 1993, and, internationally, by the conclusion of an increasing number of 'Open Skies' agreements. Rules on market entry have been relaxed but certainly not abolished. Carriers still have to meet nationality requirements, safety, security environmental and liability standards before they can start flying. Those standards are intended to be as uniform as possible on a global level, as the Chicago Convention dictates in its Preamble that international air transport services should be stabilised "*on the basis of equality of opportunity*".

However, jurisdictions in the world give different interpretations to the principle of "equality of opportunity" which could be seen as the principal tool for guaranteeing the maintenance of a level playing field internationally. The EU blacklisting, the EU ETS and the EU passenger protection rules come to mind when saying that global standards designed to create uniformity are affected by local standards, impacting on the 'level playing field'.

3. Responsibility for the maintenance of a level playing field

The operation of international air services does not fall under the WTO regime. The WTO Appellate Bodies are empowered to condemn a party, that is, States and the EU, when such a party grants subsidies which are incompatible with WTO to enterprises falling under the jurisdiction of that party. The WTO decision of March 2012 in a case

involving illegal subsidies in the form of funding for research and development aid and expert subsidies granted by the US and its state bodies, including NASA and the Department of Defence to Boeing was praised as a victory by the EU Commission.

What is more, a global competition regime for any sector is absent. The WTO does not know a competition regime either. ICAO does not have a mandate in this field. It follows that in air transport, governments, and in certain cases the EU Commission, are responsible for the maintenance of the level playing field guaranteeing 'fair competition'.

4. The goal: 'fair competition' between the players

A level playing field should underpin 'fair competition'. There may be strong and weak carriers, including national or 'flag' carriers, well to do and less to do carriers, experienced and inexperienced carriers in the marketplace. To leave the battle for market shares to free market forces would ignore the legitimate desire of States to participate in and share the benefits of international air transport, as confirmed by the Chicago Convention and as explained in and implemented by international, mostly bilateral, agreements between States. The real problem is not the liberalisation of air transport regimes, but the maintenance of fair competition between unequal competitors, or competitors in unequal situations. Not the difference in the size of the markets but unequal access to those markets underlies the inequality.

Inequality is also created when it comes to different treatment with respect to *market exit*. In the US Chapter 11 air carriers may be able to quote lower air fairs as the discharge of their debts has been frozen. In the EU there are, as said, prohibitions of State aid but are they applied in a consistent manner? Will the 'supranational' Commissioner for competition be able to resist the political pressure from Italian and French government leaders when the Commission intends to take a decision which are liable to put an end to an enterprise in one of these EU States which they consider as a 'vital industry'?

Hence, governments, or supranational bodies such as the EU Commission are responsible for the creation of a level playing field for the carriers incorporated under their laws and having a principal place of business on their territory. However, the rules of the game, and the enforcement thereof, may give rise to differentiated treatment.

5. Policies and law on the maintenance of a level playing field

5.1 The EU internal market

The EU has worked hard to achieve the above goal. EU Regulation 1008/2008 is designed to achieve just this, at least on paper. Once an air carrier fulfils the requirements laid down in that regulation for safety, liability, EU ownership and control, and administration of the business it can enter the internal EU market and operate services between any two points in that market. This is a true, but perhaps not perfect internal market as variations still exists.

I already signalled differentiated treatment of the so called 'legacy' carriers in the context of State aid. At certain airports, and London Heathrow comes to mind, new entrants face difficulties in obtaining access as incumbent carriers are sitting on slots through the 'grand fathering' process and the 'use it or lose it' rule. Low cost carriers complain that they have to pay the same amounts of compensation as the traditional, network carriers to passengers whose flights are cancelled or delayed. Leaving those special subjects apart, I believe that it is correct to say that the EU internal market, as governed by a single, supranational competition regime, creates a level playing field while monitoring 'fair competition'.

5.2 Equal opportunities and balances of benefits in international relations

The picture is more complex in the field of international aviation relations. This is in no small part due to the different cultures, policies, traditions and approaches which countries adopt in relation to their 'national carriers' and the air transport sector generally. A level playing field is determined in accordance with the policy objectives of those countries: do we perceive airlines as commercial undertakings (cf. the EU) or do they also perform a public service for the benefit of the country in which they are established? And do we want to expose our airlines to the competition from carriers of the other side – as is the case in so called Open Skies agreements – or do we, on the contrary, want to protect them from such competition?

These policy objectives marking the level of the playing field are laid down, not in the Chicago Convention or in WTO related agreements but in international, mostly bilateral agreements. Restricted, now outdated bilateral agreements, such as the – unamended – Bermuda 2 Agreement between the US and the UK, did not intend to create open market access and to promote fair competition. The idea was to give carriers of each State an 'equitable share' of the transport market created by the agreement between the two States. To determine the 'equitable share' was left to the clauses of the agreement. Predetermined access to the market by the establishment of equal capacity limited competition in those markets. Predetermined economic regulation drastically levelled up the playing field, prohibiting market entry, and market exit. One could also speak of an 'incontestable market'.

5.3 'Fair competition' in international relations

Open Skies agreements, and in particular the EU internal market regime, do cater for 'fair competition' supervised by competition authorities. As said, competition is fair on a 'level playing field'. The level playing field, and thus fair competition in international markets, can be affected by a number of factors.

Third countries accuse the EU for damaging fair competition on the internationally agreed level playing field by the following measures:

- The EU ETS, the imposition of which especially affects the profitability of non-EU air carriers having much steeper growing curves than the average growth curves of EU carriers;

- EU rules on passenger protection which infringe international standards on the subject designed to maintain uniformity;
- Black listing of carriers; for instance, African carriers argue that the impression is conveyed that it is safer to fly on European carriers to points in Africa than on African carriers;
- Nigh curfews imposed by EU States and airports preventing non-EU air carriers to fly from and into EU airports at their convenience, and obliging them to adapt their schedules at the non-EU airports which are open 24 hours/day.
- Congestion at EU airports limiting access by the adherence to the traditional slot allocation rules;
- Tariff restrictions for non-EU air carriers on intra-EU flights, impeding fair, or at least free competition;
- Application of security measures which are stricter than those agreed internationally.

Indeed, the EU side has developed a sophisticated, and, in some cases, unilateral regime in the non-economic areas, including but not limited to measures designed to protect and enhance safety, security, and environment and consumer protection. While the provisions of that regime are presented, in law, that is, in the relevant EU Regulations, as non-discriminatory measures, they may in practice be liable to discriminate against non-EU carriers, affecting the globally or bilaterally agreed level playing field.

5.4 Unilateral measures designed to restore the level playing field

The EU and the Canada argue that policies by non-EU States negatively impact on the level playing field. Reference is made to the perceived state support in the broadest meaning of the term as Middle East States are said to not only own and control – as mandated by international agreements and national laws – but to also support and facilitate their airlines and infrastructure. While this is not the place to judge those allegations, the EU, the EU States, and Canada try to strike back for the sake of maintaining a level playing field. Instruments for combating these perceived state aid practices consist of limitations to market entry, restriction of services and capacity provisions in the relevant bilateral air services agreements, or to freeze frequencies and capacity. These practices are sometimes regarded as protectionist measures.

Middle East carriers opine that consumers prefer the services operated by them. Do they, including the EU consumers, get 'subsidised' tickets for their air travel? The EU must formulate its thoughts on the significance of its (EU) air transport sector for the conduct of trade and industrial polices. It must also determine whether it can afford market exits from the perspective of those policies.

The EU has yet another tool: its Regulation 868/2004 ('868'), protecting EU operators against subsidisation and unfair pricing causing injury. This Regulation is narrow in scope as it applies to possible price dumping and subsidy issues as opposed to wider problems of discriminatory and unfair treatment. However, during its eight years of existence, not a single case has been brought under its terms.

A similar, but not very well known regulation has been made in the US, that is, the International Air Transportation Competition Act of 1979 ('IATCA'). US air transport companies including airlines and operators of computerised reservations systems can seek remedies if they experience 'unreasonable discrimination' made by a foreign government or entity. If the US Secretary of the Department of Transportation finds such activity to be taking place, the Secretary is empowered to revoke or condition the foreign air carrier's permit to operate in the United States and to impose 'compensating charges' whose revenues are to be deposited in an account for the benefit of the US entities suffering injury. '868' does not provide such a remedy. So far, the US government has not relied on this regulation or has at least been reluctant to do so.

The US, Canadian and EU ought to consider yet other measures for the maintenance of 'fair competition' on a level playing field (see below). Policymakers and airlines of those jurisdictions regard neither bilateral provisions nor the above unilateral measures ('868' and IATCA) as being efficient for redressing the perceived 'misconduct' by the foreign government or foreign airlines, or other operators. Again, it appears that unilateral standards do not suffice; they cannot be enforced, and may even infringe provisions of international agreements which provide the exclusive vehicle for the operation of the internal agreed air services. Moreover, it is virtually impossible to prove subsidies in the aviation sector as there are no mandatory rules for transparency on the subject. State ownership and control of an airline does not necessarily imply State subsidy of an airline.

6. The need for internationally agreed standards

The maintenance of a level playing field is well chosen as it is topical, delicate and complex. Airneth should be congratulated with this excellent choice the more as research on this subject is limited.

It would seem that the required equality of the playing field is best and most efficiently guaranteed by the adoption of standards which are respected, and can be enforced, in the entire market which they are supposed to regulate. The EU internal market gives evidence of this thesis. The unilateral introduction of competition, safety, security, environmental or consumer protection standards which apply to, or have an effect on, operations which are carried out beyond the territory of the enacting jurisdiction provoke, in the words of the Preamble of the Chicago Convention, "friction" as it is desirable "to promote that cooperation between nations and peoples upon which the peace of the world depends."

However, the past decades have not only been built on equality of opportunities and benefits but have moved into the direction of freedom of operators to offer and perform their services. Again this is where that second dominant aspect of the level playing field comes in: *fair competition*. The EU appears to realise that fair competition can only be guaranteed in a world which is governed by similar, if possible identical, uniform standards. That is how the concept of *regulatory convergence* is being introduced in international aviation relations conducted by the EU and its Member States.

7. Towards a holistic approach towards the operation of air services

Moving from there to yet another stage we may witness an environment in which the operation of air transport services is increasingly affected by non-aviation specific interests and events: choices for operations, airports and establishments are made not so much on the basis of nationality of the operator but on criteria which are similar to those prevailing in other industries: the availability of infrastructure and markets, political stability, tax regimes, labour conditions and human resources. That step will yet again colour the concepts which have been examined above, and encourage us to attend another workshop of Airneth.