

Airneth Workshop

Demystifying the level playing field

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Demystifying the level playing field

A. Definition of a level playing field:

“ an environment in which all competitors in a given market must follow the same rules and are given an equal opportunity to compete in that market.”

- Link between level playing field and competition: competition becomes ‘fair’ when:
- There is a level playing field, and,
- Players are subject to the governance of the same or similar rules,
 - Which rules are enforced in a coherent manner
 - While taking into account the international character of the operation of air services

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B. 'Governance' of the international level playing field

- A very marginal role for the WTO in air transport
- No explicit mandate for ICAO
- EU, US: internal/domestic markets only
- Links between 'domestic markets' via bilateral or plurilateral (cf. EU-US) air services agreements, defining both the level playing field and 'fair competition'
- Traditional, cartel like bilateral agreements: limited competition, high 'price' for market entry and market exit because of government, rather than market regulated trade in air services; cf. the unamended Bermuda II agreement, US-UK, 1977
- Relevance of principle of 'equal opportunity'



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C. 'Fair' Competition

- No legal definition (cf. 'level playing field')
- Depends on environment and market conditions
- Is different from 'free', or 'cut throat' competition
- States require a 'legitimate share' of the market for their carriers in accordance with their policies – see however, US and EU approaches
- How far can you go with relatively unprotected and unregulated market entry and exit policies?
- Part of larger picture: trade and industrial policies; relevance of the role of air transport for the development of the domestic, including EU, economy as a whole



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D. Market access and market exit criteria



- Market entry criteria: defined by international (bilateral or plurilateral) and national law and policies: nationality requirements, frequencies, number of carriers, capacity, provision of facilities for operations, etc.
- Market exit criteria: defined by national law and policies; see US Chapter 11; State subsidies, in principle but not necessarily in practice outside EU

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E. International level playing field from an EU, and non-EU perspective:

- Application of EU competition law to the operation of *international* air services, including Regulation '868' (2004), but see standpoint of third States:

Factors liable to affect the level playing field:

- EU ETS – because of steeper growth curves of non-EU carriers;
- Black listing influencing (EU) consumer choices;
- Night curfew affecting flexibility of non-EU carriers
- Congestion at EU airports benefiting EU carriers possessing grandfather rights at congested airports
- Passenger protection and security measures infringing globally agreed standards created for the sake of enhancing uniformity
- EU price leadership on intra-EU, fifth Freedom routes



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F. Demystifying the level playing field

- Define 'fair competition'
- Apply competition laws to the internationally agreed level playing field
- Seek convergence of competition policies through international understanding
- Turn unilateral measures into globally agreed standards, *en route* via 'regulatory convergence';
- " Liberalizing only 320 bilateral agreements of the existing thousands would create 24.1 million full time jobs and generate an additional \$ 490 billion in Gross Domestic Product. This corresponds to an economy almost the size of Brazil." (Intervistas Report, 2007)
- Adopt a holistic approach towards the operation of air services and the use of infrastructure, taking into account not only the direct air transport interest but also the interest of the economy as a whole, including labor and tax factors, human resources, role of the environment and the need for air links with the domestic market for trade, tourism and other reasons

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G. Demystifying liberalisation

