INTERNATIONAL CONFERENCE

Skyward Bound: Innovating the FUTURE OF AVIATION

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The external dimension of EU enforcement of competition rules in air transport

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Summary

1 EU competition law and its extraterritorial dimension

2 Fair competition clauses in CATAs. Unilateral instruments: sectoral vs horizontal regimes

3 Conclusions and key take-aways

1 Enforcing EU competition rules

Competition law is a matter of EU's **exclusive competence**, with **different players** and **enforcement characteristics**:

- **National level**: National Competition Authorities (ECN Network)
- **EU level**: European Commission
- **Damage claims** are decided at national level (private enforcement of competition law) and, in case of multiple jurisdictions affected, the individuation of the competent court is subject to further issues of conflict of laws and jurisdiction (see e.g. CJEU, C-27/17, *FlyLAL II*, 2018)

When enforcement takes place on conducts carried out (also) outside the EU, **extra-territorial issues** arise.

1 Extra-territorial enforcement of EU competition rules

According to the CJEU case-law, enforcement of jurisdiction is based on three doctrines:

- **Single economic unit doctrine**

  jurisdiction over non-EU entities so long as **they form a single undertaking with EU–domiciled entities** (due to parent-subsidiary connections, see C-48/69, *Imperial Chemical*, 1972, paras 130 ff.)

- **Implementation doctrine**

  jurisdiction over non EU-domiciled entities whose anti-competitive act has been **implemented in the internal market** (see C-89/85, *Ahlström (Wood Pulp)*, 1988, paras 13 ff.)

- **Qualified effects doctrine**

  jurisdiction is assumed insofar as the **effects** of an unfair practice external to the EU are **foreseeable, immediate and substantial** on the internal market (C-413/14 P, *Intel*, 2017, paras 43-47, but see below for air transport cartels).

1 EU competition rules as applied to aviation: the external dimension

- **Inherent cross-border nature** of the operation of air services

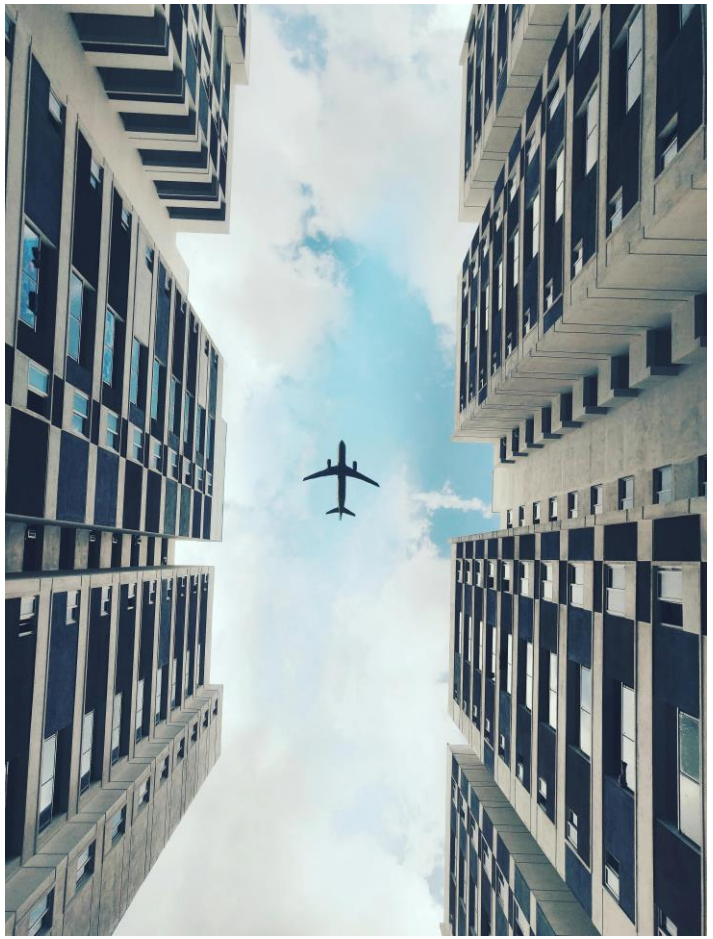
  In fact, extra-territorial issues may also arise outside the realm of competition law (e.g., **environmental** law, cf. C-366/10, *ATAA and others*, 2011).

- **Effects doctrine**

  EU competition rules may be applied extraterritorially as the operation of **international air services may have an effect on the functioning of the internal market** (see ECJ, 66/86, *Ahmed Saeed Flugreisen*, 1989)

- **Regulation (EC) 1/2003 as amended by Regulation (EC) 411/2004**

  EU competition rules are **extended** to air transport between the EU and third countries.



1 Applying the qualified effects test: the *Airfreight Cartel* case

General Court, T-340/17, *Japan Airlines Co. Ltd v Commission (Airfreight cartel)*, 2022, paras 97 and 99:

[The qualified effects] test does not require it to be established that the conduct at issue 'in fact had any anticompetitive effect' in the internal market or within the EEA. On the contrary, according to the case-law, ***it is sufficient to take account of the probable effects of that conduct on competition*** *[…].*

Where conduct has been found by the Commission, as in the present case, to reveal a degree of harmfulness to competition in the internal market or within the EEA such that it could be classified as ***a restriction of competition by 'object'*** *within the meaning of Article 101 TFEU and Article 53 of the EEA Agreement,* ***the application of the qualified effects test also cannot require the demonstration of the actual effects*** *which classification of conduct as a restriction of competition by 'effect' within the meaning of those provisions presupposes.*

2 Enforcing competition via bilateral agreements: fair competition clauses

Air transport regime shifted **from regulation to liberalization** of market access and competition among carriers.

at international level

no multilateral regime exists addressing airline competition (neither ICAO nor WTO)

bilateral Air Service Agreements between States evolved from:

- traditional **protectionist** approach
- **Open Skies** agreements: liberalization
- **Comprehensive Air Transport Agreements** (CATAs): **fair competition clauses**

What's the aim?
Create a **level playing field**: focus on non-discrimination and subsidies restrictions.

2 EU competition rules and bilateral agreements

Establishing a regime mirroring the EU one

- Agreement between the **European Community** and the **Swiss Confederation on Air Transport**, 2002 (Article 13)
- **Multilateral agreement** establishing the European Common Aviation Area (Article 14 and Annex III)
- **European Economic Area Agreement** (EEA, Annex XIV and XV): all sectors
- **Stabilization and Association Agreements** (e.g. Ukraine, Articles 253 ff.): all sectors
- **EU-UK Trade and Cooperation Agreement** (TCA, Art. 358 ff. and 363 ff.: all sectors; on aviation, see Art. 364.8 and Art. 427-428)

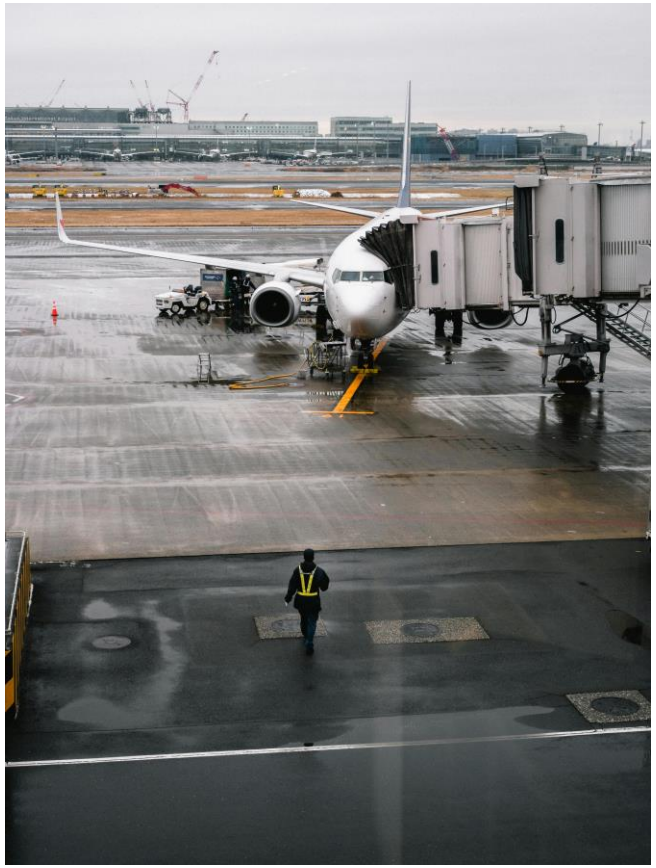
Fair competition clauses

- EU-Qatar CATA (Article 7)
- EU-ASEAN CATA (Article 8)

Enforcement issues may be settled through **consultations** or **dispute settlement mechanisms**.

Issues exist with UAE (rejected by UAE) and Turkey (suspended negotiations)

2 | Main features of fair competition clauses in CATAs



- **No discrimination and unfair practices** (but interpretative/definitory issues remain)
- **No subsidies** to airlines affecting fair and equal opportunities to compete, without prejudice to **limited exemptions**
- **Transparency**: annual publication of airline financial reports and disclosure of information to NCA
- Obligation to **effectively enforce competition rules against their respective national airlines**
- **Consultation** and dispute settlement mechanisms
- No prejudice to the **jurisdiction of the respective NCA and Courts**.

2 | Unilateral instruments to ensure a level playing field: the US International Air Transportation Fair Competitive Practices Act (IATFCPA)

IATFCPA (1974, as amended in 1979) represents the landmark

- **Two-phase** procedure:
  1) Phase 1: investigation to determine the extent of the discrimination or unfair competitive practices, requesting to all interested parties to **show cause why the tentative findings and conclusions set forth above should not be made final** (rationale: start **consultation** with the foreign jurisdiction);
  2) Phase 2 (only if consultations failed): take all **appropriate** (i.e., unilateral) measures, including setting **compensatory charges** (rationale: leverage and **deterrence**).
- Case practice shows that proceedings usually end after Phase 1 (e.g., 2023 JetBlue complaint concerning **Amsterdam Airport slot reduction**; 2013 Imposition of Unjust **User Charges at Italian Airports**);
- See also **US airlines vs Gulf carriers dispute**: the study commissioned by American Airlines, Delta Air Lines and United Airlines and presented to US government in 2015 (so-called 'Big 3' White Paper).

2 | … and the EU sectoral regime (Regulation 712/2019)

Regulation (EU) no. 712/2019

1. Provides for a **regime of investigations** and possible **redressive measures** (fines or operational measures) in case of proven threat of injury to EU air carriers due to measures distorting competition adopted by third countries or third country entities (including non-EU carriers) and detrimental to «*Union interests*», provided these measures cannot infringe air transport agreements between Member States/the EU and the third country concerned

2. Modelled after **antidumping/anti-subsidies measures** (in particular those concerning shipbuilding and maritime industries (regulation (EU) no. 1035/2016 and (EC) no. 4057/86) and repealing Regulation (EC) no. 868/2004 (never applied)

3. A **bugbear** or a true **weapon**?

2 | Unilateral instruments to ensure a level playing field: horizontal regimes

Regulation (EU) no. 2560/2022 (‘**Foreign Subsidies Regulation**’ or ‘**FSR**’)

- As a general rule, sectoral regimes prevail, as ***lex specialis***, on the FSR (see Article 44.7 FSR).

- Nevertheless, FSR is **applicable** to State-backed foreign investments:
  - in **EU carriers** (beyond the ownership and control threshold, see Qatar Airways investments in IAG and Air Italy; those of Etihad in AirBerlin and Alitalia; Greek-Chinese negotiations for Astra airlines during the pandemic)
  - in **other EU sector operators** (not subject to Reg. 712/2019: ground handling, airports, etc.).

- Without prejudice to:
  - **EU rules** on antitrust, merger control and State aid (Article 44.1 FSR);
  - **International agreements** with third countries already addressing foreign subsidies (see safeguard clause in Article 44.9 FSR).

3 Conclusions

The EU has (correctly) endorsed a **multi-faceted approach**:

1) Extending the territorial reach of EU **antitrust rules** through case-law and enforcement practice;

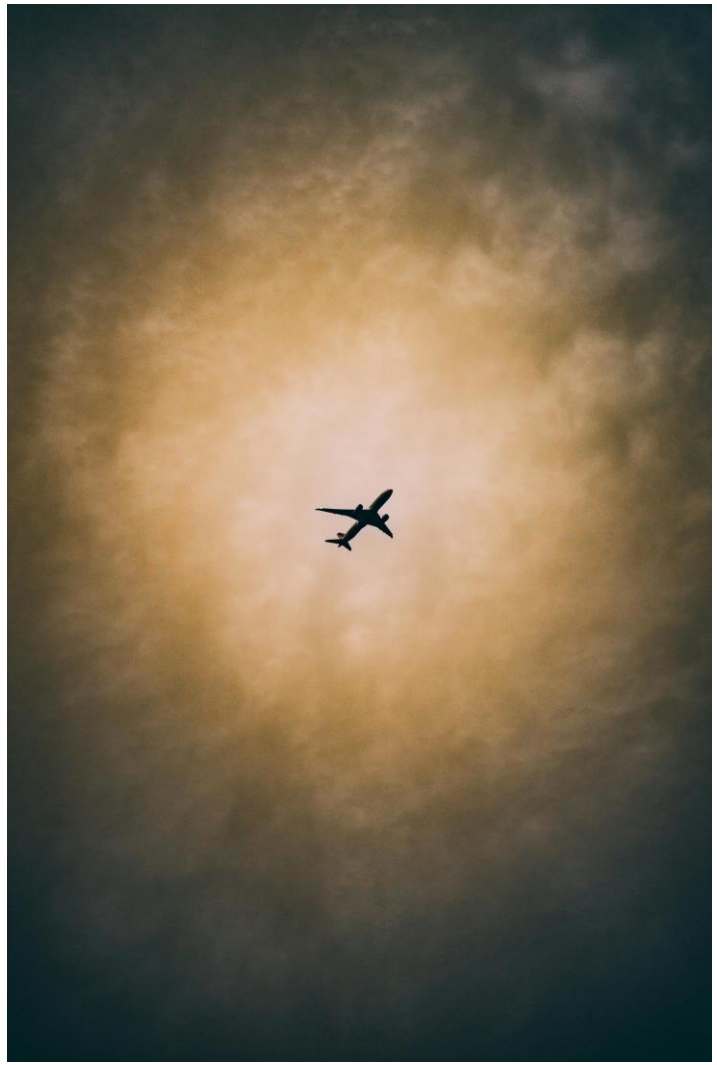
2) Introducing **fair competition clauses** in CATAs

   ↳ difficulties in:

   - **defining** the relevant conduct; and
   - ensuring **effective compliance** by third countries (**transparency** seems crucial).

3) **Unilateral instruments: only as a last resort**. However, lacking an international consensus on establishing a multilateral framework, these instruments work as **deterrent and tool for negotiations** (Brussels effect).

4) Aside of this: what is the effective level playing field? Does a need exist to consider **also other areas of EU external aviation policy** (environment, labor, etc.)?

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