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The Law of Subsidies in Air Transport Services

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The debate on subsidies in air transport has been closely associated with State aid that is allegedly calculated to enable carriers – in particular carriers such as Emirates, Etihad and Qatar – to distort markets and engage in anticompetitive conduct. Some carriers in competition with these three carriers have alleged that the two carriers of the United Arab Emirates and Qatar are unfairly depriving the carriers of the West of their “market share” by moving into the American and the European markets with undue and unfair advantages granted to them by their States. A lobby group representing the three major airlines that brought the complaint against the Gulf carriers – American Airlines, Delta and United Airlines – has said that the three carriers of the United Arab Emirates and Qatar have received $42 billion in subsidies and other benefits. The claim further alleges that, over the past decade, the three Middle East carriers have spent more than $100 billion on acquiring bloated fleets of modern wide-body aircraft. The request of the three American carriers was that the “open skies” agreements between the United States and the United Arab Emirates and between the United States and Qatar be “renegotiated” and modified, as the alleged subsidies had distorted international trade. This article discusses the legal regime pertaining to subsidies in air transport against the backdrop of this debate and evaluates the positions of the key players, including the International Civil Aviation Organization, the World Trade Organization and the airlines concerned.

Keywords: American Airlines, Chicago Convention, Delta Airlines, Emirates, Etihad, European Union, ICAO, SCM Agreement, State aid, Qatar Airways, United Airlines, WTO

1. Introduction

Subsidies have been a contentious area in international trade. A subsidy is defined by the Agreement on Subsidies and Countervailing Measures (SCM Agreement) of the World Trade Organization[2] as the conferring of a benefit by way of a financial contribution by the government or any public body.[3] This would include the transfer of funds, such as grants, loans, equity infusion and potential transfer of loan guarantees; forgone government revenue, such as tax credits or any other form of fiscal incentives; government provided goods and services excluding infrastructure or purchases of goods; government sponsored payments to a funding mechanism, or if a government entrusts or directs private bodies to carry out the same functions and practices mentioned in the above three categories; and any form of income or price support. The SCM Agreement, which only applies to goods, does not address nor does it define a subsidy in air transport.

In general terms a subsidy can take many forms and is therefore amorphous in nature. One commentator says that a subsidy is a synonym for government transfer of money to an entity in the private sector, and it could also mean the provision of a service or product at a price below the market price that the entity receiving the subsidy would usually have to pay. In other instances, subsidies could even mean governmental policy that acts to the advantage of entities in other commercial practices. However, any of the above measures may not amount to a subsidy at all.[4]

To make matters worse, there is no mention of subsidies in the Convention on International Civil Aviation (Chicago Convention),[5] which is the preeminent multilateral international treaty that sets out principles of conduct for States in international aviation. A remote and indirect reference is found in the Preamble to the convention, which provides that the signatory States agree on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically. One could take it that “equality of opportunity” would encompass the rejection of unfair use of subsidies by States to give their national carriers an undue advantage over their competitors. Slightly more to the point, Article 44 f) of the convention has, as one of the aims and objectives of the International Civil Aviation Organization (ICAO),[6] to foster the planning and development of air transport by ensuring that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines. One way of ensuring that this objective is reached is found in Article 54 i) of the Chicago Convention, which imposes on the Council of the ICAO the mandatory duty and obligation of requesting, collecting, examining and publishing information about international air services, including information about the costs of operation and particulars of subsidies paid to airlines from public funds. According to one commentator, there is no evidence of the Council having published information pertaining to subsidies as required in Article 54 i).[7]

It is interesting to note that Tim Clark, President of Emirates has said that a common set of transparent financial reporting metrics to measure and apply against all international carriers should be determined by the International Air Transport Association (IATA) and ICAO on what defines a subsidy. One can certainly agree with this proposition as, if the ICAO Council met its obligation of carrying out its mandatory duty imposed upon it by Article 54 i), the natural corollary would have been for the Council to firstly define what a subsidy is (not merely give examples of subsidies in its guidance material), as well as the many forms it can take, and seek to establish at least a code of conduct with defined rules that would not erode the preambular concept of the Chicago Convention (as well as subsequent provisions already mentioned) of equality of opportunity for all carriers. Furthermore, in pursuance of Article 54 i) the Council can require States to report financial assistance given to their carriers for purposes of publication. States should be encouraged to use the dispute resolution provisions[8] of ICAO to come before the Council for its decision where restrictive subsidies granted by other States to their carriers adversely affect the carriers of the complaining State.

The ICAO *Manual on the Regulation of International Air Transport* recognizes that State aids/subsidies to air carriers by governments have existed since the beginning of commercial air transport and that they have been provided at all stages of national or aviation development and have taken a wide variety of forms.[9] The manual goes on to say that "[S]tate aids/subsidies which confer financial benefits on national air carriers that are not available to competitors in the same international markets could distort trade in international air services and can constitute or support unfair competitive practices."[10] Some of the undesirable subsidies identified in the ICAO manual as distorting competition are: the provision of State funds for the purposes of covering operating losses, avoiding insolvency, financing of restructuring or expansion; partial or full cancellation of air carrier debt to the government; the guarantee of loans; the giving of "soft" loans (i.e., at below-market rates of interest or with insufficient collateral); and the assumption of air carrier debt owed to other parties.

The manual also identifies indirect subsidies that may affect fair and equal competition: preferential tax treatment; funding of unemployment benefits to national air carrier workers whose services are declared redundant; measures in bankruptcy laws which, after a declaration of insolvency, grant legal relief from certain financial obligations for extended periods in order to permit the air carrier to continue operations while attempting to reorganize; and cross-subsidization measures, for example, charging higher airport fees for international than domestic flights, thereby benefiting national air carriers which operate both types of flights.[11] It must be mentioned that the manual is mere guidance material issued by ICAO and does not carry with it compelling obligation to States to adhere to its recommendations, nor does it carry any consequences if States do not follow its guidelines.

Sovereign States are entitled to enact their own laws pertaining to fiscal and competition policy and therefore, under the aforementioned parameters, bankruptcy laws that provide solace to companies that are failing and seek protection are not subsidies; nor are employment environments that are free of labour unions. Similarly, an airline that uses an airport as a hub that is subsidized, and derives some benefits therefrom, cannot be identified as being subsidized.[12]

There have been several instances where airlines have been found to have enjoyed a subsidy to the detriment of their competitors,[13] with one significant instance of blatant subsidizing.[14] There have also been instances where States have been found guilty of providing anticompetitive subsidies to aircraft manufacturers.[15] In the latter instance, WTO, in its judgment rendered in March 2012, found that Boeing received between $3 billion and $4 billion in U.S. subsidies, and by contrast the WTO had said in December 2011 that Airbus received $18 billion in subsidies from European governments.[16] The operative provision under WTO in this context is Article XVI.4, which provides that as of 1 January 1958 or the earliest practicable date thereafter, contracting parties are required not to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product[17] which subsidy would result in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 contracting parties could not extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.

2. The U.S. Carriers vs. the Middle East Carriers

At the centre of the subsidies debate are the “super connected” Middle East (Gulf) carriers,[18] which have robustly followed a business model capitalizing both on the advantages brought to bear by their geographic locations as well as generous government support and understanding of the inherent advantages that accrue to the economic well-being of their States. The passengers of these carriers merely switch planes at hubs in their cities on their way to their ultimate destinations. These carriers – Emirates Airways (hereafter Emirates), Etihad Airways (hereafter, Etihad) and Qatar Airways – along with Turkish Airlines, carried 115 million passengers in 2014 as against 50 million in 2008[19] on more than 700 aircraft.[20] These carriers, with Emirates at the helm, are threatening the market share of the U.S. carriers as well as those of European carriers, particularly to the East. One of the complaints of the allegedly affected carriers of the West is that States in the Middle East are building super airports to encourage hubbing[21] by their carriers to the detriment of the carriers of the West, and that, additionally, the airports concerned are applying drastically reduced landing charges for their carriers, which is an anticompetitive practice. Other practices, it is claimed, which act to the unfair advantage of the Middle East carriers are low wage structures and low tax bases in their countries, which the writer believes to be not strictly within the parameters of anticompetitive practices.

By far the largest allegation aimed at the Gulf carriers is that these carriers receive State aid in the nature of subsidies which, together with the advantages mentioned above, are robbing the carriers of the West of their “market share” by moving into the American and the European markets with undue and unfair advantages granted to them by their States. A lobby group[22] representing the three major airlines that brought the complaint against the Gulf carriers – American Airlines, Delta and United Airlines – has said that the three carriers of the United Arab Emirates and Qatar have received $42 billion in subsidies and other benefits.[23] The claim goes on to say that, over the past decade, the three Middle East carriers have spent more than $100 billion on acquiring bloated fleets of modern wide-body aircraft.[24] The request of the three American carriers was that the “open skies” agreements between the United States and the United Arab Emirates and between the United States and Qatar be “renegotiated” and modified, as the alleged subsidies had distorted international trade.[25] It was also claimed that the Gulf carriers have grown their seat capacity (combined) over that of the U.S. carriers by 1500 percent and that their daily departures had shot up by 32 percent from the daily departures of the U.S carriers in 2014.[26] The same lobby group stated that “[t]he systematic subsidization of Qatar, Etihad and Emirates is part of a closely managed effort by the governments of Qatar and the UAE to direct the flow of international traffic through their own hubs and grow their economies. Qatar, Etihad and Emirates operate as arms of the State carrying out the will of their respective governments – not as independent companies” … and that “the massive government subsidies provided to Qatar, Etihad and Emirates are not only a clear violation of Open Skies policy, but they also pose a direct threat to the U.S. airline industry and thousands of American jobs. These State-owned carriers are using their huge, artificial advantage to rapidly expand their fleets and take over international routes, unfairly capturing U.S. airline market share and shifting U.S. aviation jobs overseas."[27]

The U.S. airlines claimed that they are the backbone of the country's infrastructure and a critical component of the entire infrastructure system, and that the $42 billion in subsidies the Gulf carriers were favoured with would critically impair the ability of the U.S. carriers to service American communities. Another allegation aimed at the Gulf carriers is that the subsidies they receive would drive the U.S. carriers to reduce their fleets, thus threatening the security of the United States, where commercial carriers in the country are to stand ready to be deployed for military operations.

It is not only subsidies to the tune of $42 billion that the Gulf carriers have apparently enjoyed, the complaint goes on to say. In addition, the U.S. carriers claim that the Gulf airlines' States made good losses associated with the airlines' hedging fuel contracts and gave them interest free loans. These same governments, the U.S. carriers claim, are the main shareholders of the Gulf carriers. Furthermore, it is alleged that the carriers enjoyed benefits from the use of land at no cost, partial airport revenues and loans guaranteed by the government. Although admittedly, these benefits may be perceived as anticompetitive anomalies calculated to reflect a subsidy,[28] one could only match these measures with the definition of a subsidy as presented at the outset of this article and draw one's own conclusions.

The Europeans have had the same complaint against the Gulf carriers, alleging that Emirates has had €1.9 billion in unquantified subsidies of purchases of goods and services from other companies owned by the Government of the United Arab Emirates, as well as €2.1 billion in government assumption of fuel hedging losses and another €2.1 billion in subsidized airport infrastructure at Dubai International Airport.[29] As for Etihad, the Europeans claim that the airline benefited from €5.9 billion in government "loans" with no repayment obligation. The other figures submitted against Etihad are that the airline received €5.6 billion in capital injections by the United Arab Emirates; €3.1 billion additional undisclosed government funding in 2014; €630 million in government grants; and €450 million in airport fee exemptions at Abu Dhabi International Airport. Against Qatar Airways, the European figures are that the airline received €7.5 billion+ in "loans" and "shareholder advances" from the State of Qatar with no obligation for repayment; €6.1 billion in government loan guarantees; €550 million in airport fee exemptions and rebates at Doha International Airport; and €403 million in free land.[30] These figures differ substantially from those provided by the three United States carriers.[31]

One commentator claims that at least one airline – Etihad – has shown a clear case of subsidies, in the nature of €14.3 billion in capital from the government, comprised of €9.1 billion in equity and €5.2 billion in loans; the commentator called Etihad a "State funded boondoggle".[32] American Airlines, which has a code share agreement with Etihad, has added that it has no objection to Gulf carriers flying into the United States, but the subsidies issue has meant that airlines of the United States compete with governments and not with airlines.[33] The threat to the U.S. carriers from the Gulf carriers is a relatively new phenomenon, as one commentator has said: "for a while the Gulf carriers' expansion drew only modest complaints from US airlines (they were busy going through massive restructuring after the 9-11 terrorist attacks and a series of deep, long economic upheavals that followed). For the first decade of the 21st century the Gulf carriers were viewed almost like experiments in the Petri dish of global airline competition. Emirates was a very small operation when the U.S. and the U.A.E agreed to an open skies treaty in 1999 and Etihad didn't even exist."[34]

The U.S. carriers allege in specific terms that two provisions of the open skies agreement between the United States and the United Arab Emirates are being violated by the conduct of Emirates and Etihad. Article 11 Sections 1 & 2 on Fair Competition is the first provision cited. Section 1 grants each party the right to allow a fair and equal opportunity for the designated airlines of both parties to compete in providing the international air transportation governed by the agreement. Section 2 allows each designated airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the marketplace. Consistent with this right, neither party can unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated airlines of the other party, except as may be required for customs, technical, operational or environmental reasons under uniform conditions consistent with Article 15 of the Chicago Convention.[35]

Article 12 Section 1 provides that each party is obligated to allow prices for air transportation to be established by each designated airline based upon commercial considerations in the marketplace. Intervention by the parties shall be limited to: prevention of unreasonably discriminatory prices or practices; protection of consumers from prices that are unreasonably high or restrictive due to the abuse of a dominant position; and protection of airlines from prices that are artificially low due to direct or indirect governmental subsidy or support.

It is submitted that none of these provisions is linked to the issue of subsidies, and there has been no indication that the carriers of the United Arab Emirates prevented the three American carriers (or any other carrier for that matter) from having fair and equal opportunity to compete, nor had they resorted to "unreasonably discriminatory prices or practices". Prior to addressing the position of the Gulf carriers, which has been documented in response to the complaints of the American and European carriers, it is relevant to discuss a report released by Oxford Economics in June 2011, according to which the success of Emirates is the result of strategy formulation and decisions jointly taken by the Dubai government and the airline along with the entire aviation sector of the Dubai government recognizing the importance of developing aviation in Dubai; transparency and openness; consensus in investment policy; and a focus on servicing underserved markets, the last of which is now identified as "disruptive innovation".[36] One commentator, analyzing the European situation vis à vis competition with the Gulf carriers opines that, "All in all, the unlevel playing field is primarily caused by Ricardian comparative advantages of States in the Gulf region. The playing field is further tilted by EU policy measures to the detriment of the European network carriers. The third and least important category of factors that also tilt the playing field emerges from the economic and institutional conditions in the Gulf States. In contrast with the European approach these conditions work in the Gulf carriers' favour. Protectionist measures in Europe are primarily justified by this third and least important category."[37]

Emirates responded to the allegations of the American carriers by saying that the subsidy claim was a "smoke and mirrors" attempt to cover a "professional bid to restrict consumer choice",[38] and that, in the words of Tim Clark, President of Emirates, "all governments should pursue liberalization and open skies with the objective to end the greatest subsidy of all – aero-political protectionism."[39] Emirates further claimed that the world's largest airline group – Star Alliance – composed of 15 carriers, has had nearly half its member airlines receiving subsidies from their governments totaling €6.8 billion,[40] citing inter alia Lufthansa and KLM, which had received cash injections from their governments during hard times or prior to privatization.[41] Having said that, Emirates categorically denied that the airline was subsidized, emphasizing that it was completely financially independent of the Government of Dubai and had no access to cheap or free fuel.

Emirates supported its claims that in 1985 the airline started with US$10 million received from the Dubai government as startup capital along with US$88 million for infrastructure development, which paid for two Boeing 727 aircraft and a training school. These amounts, Emirates claimed, had since been repaid through dividend payments to the government of Dubai, which had amounted to US$2.5 billion up to 2015. Emirates has also stated that the aviation policy of the Government of Dubai is that the airline should be self-sufficient, self-sustaining and profitable.

Qatar Airways, in its response to the American carriers' claim, has said that the United States is one of the few countries in the world that allows bankrupt companies to continue in business, and the U.S. carriers have received up to $30 billion in cost savings related to Chapter 11 bankruptcy proceedings. Asserting that the claim against Qatar Airways is a thinly veiled "subsidy" argument against true competition, Qatar Airways claims that American carriers have received several benefits from their government in the nature of access to government funded traffic under the Fly America Scheme and subsidies through the Essential Air Service program for the provision of air services to small communities within the United States, along with fuel tax exemptions and rebates.

In a 400-page document, Emirates responded to the allegations of the American carriers, claiming that the latter's arguments against Emirates were rife with errors, misstatements and legal distortions. The first legal distortion identified by Emirates was that the WTO Agreement on Subsidies and Countervailing Measures did not apply to air services and that rules against subsidies did not even form part of the agreement.[42]

As for subsidies, Emirates pointed out in its rebuttal to the United States carriers' charges that what it received from the United Arab Emirates government could not be categorized as subsidies as they were only loans and equity infusions, and, in any case, the only connection between subsidies and the US/UAE open skies agreement was that subsidies (if at all subsidies had been granted to Emirates by its government) should not be linked to price reduction, which was not a practice of Emirates in the United States market. It was also pointed out that United States carriers have had huge U.S. government support of their own at the federal, state and local government levels.

Etihad, in its response to the United States carriers' allegations regarding subsidies pointed out that, as against the latter's claim that Etihad received US$750 million cash grants from the Abu Dhabi government, the United States carriers had received $70 billion in government benefits.[43]

The Department of Justice of the United States rejected the claims made by the United States carriers against the Gulf carriers, calling their allegations "a call for protectionism that hurts U.S consumers" and holding that the open skies agreements signed by and between the United States and the United Arab Emirates and Qatar do not preclude financial assistance received by the Gulf carriers inasmuch as they do not preclude financial assistance the U.S. airlines have received from the United States. Additionally, Emirates claimed that the open skies agreement between the United States and the United Arab Emirates encompasses enhanced competition, more consumer choices and connectivity as well as increased flight frequency, improved service and innovation.[44]

In a meeting convened in July 2016 with the Gulf carriers that discussed the open skies agreement and the complaints of the three American carriers, the U.S. government decided to take no action against the Gulf carriers. The U.S. government recognized that any action to curb or freeze operations of the Gulf carriers into the United States would put an end to the open skies agreement and that there was no need to do so in the absence of any unfair competitive conduct on the part of the Gulf carriers. It was said that "of the 1,700 routes flown by the Big Three and the Gulf carriers, they compete head-to-head on exactly two … [and] furthermore, according to a comprehensive study by Oxford Economics, only 0.7 per cent of passengers who flew on a Big Three flight to the US could have flown the same route on a Gulf carrier."[45]

3. The Law of Subsidies in Air Transport Services

The underlying principle that would determine the law of subsidies in air transport is that State aid in the nature of a subsidy would be unacceptable if it would erode the principle of equality of opportunity for carriers to compete with each other on a level playing field, as required by the Chicago Convention's Preamble and the subsequent provisions – that the operation of international air transport services should meet the needs of the people of the world inter alia for economical *and* efficient air services; unreasonable competition through economic waste be obviated; and every State have a fair opportunity to operate international airlines, as reflected in Article 44 of the convention. The American carriers failed to prove that any of these principles was eroded by the business practices of the carriers of the United Arab Emirates.

Given the absence of an overarching WTO umbrella on subsidies for air transport services, the laws that would apply in any given jurisdiction would hinge upon anticompetitive conduct of a commercial entity. In the United States the Sherman Act of 1890[46] (a law to protect trade and commerce against unlawful restraints and monopolies) starts off in Article 1 by providing that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is illegal. Furthermore, any legal person who conducts business in the United States (which includes foreign carriers operating air services to the United States) is prohibited from monopolizing, or attempting to monopolize, or combining or conspiring with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations.

Section 2 of the Clayton Act of 1914[47] makes it unlawful for any commercial entity or other person to discriminate on pricing or fix prices that would put a competitor out of the market. There are well established anticompetitive policies, both in the United States and Europe, which are calculated to prevent and punish anticompetitive conduct. However, the measures taken against anticompetitive conduct in Europe differ from those of the United States in that while in Europe there is an administrative system for enforcement, where fines are imposed on the offenders, in the United States remedies lie in criminal law, with financial penalties as well as custodial measures imposed on those transgressing the law, where private compensation is offered to victims at rates disproportionate to the actual damage suffered.

The fundamental principle of anticompetitive conduct in European trade was introduced in the Paris Treaty of 1951, which provided inter alia that measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or transport rates and conditions, and measures or practices which interfere with the purchaser's free choice of supplier were prohibited under the treaty and that subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever were also prohibited.[48] The Treaty of Rome of 1957 establishing the European Common Market has specific anticompetitive provisions. Article 85 of the treaty prohibits and deems null and void the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract. Any agreements or classes of agreements between enterprises, or any decisions or classes of decisions by associations of enterprises, and any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives, nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned, are, however, exempted from the aforementioned restrictions.

Article 86 of the treaty considers inconsistent with the principles of the treaty, which lays down policy for the Common Market, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it. Such action shall be deemed to be incompatible with the

Common Market to the extent to which trade between any member States may be affected, and shall thereby be prohibited. Some practices that are deemed unacceptable by the prohibition in Article 86 are: (a) direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions; (b) limitation of production, markets or technical development to the prejudice of consumers; (c) application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or (d) subjecting the conclusion of a contract to the acceptance, by a party, of additional obligations which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

Article 92 of the Treaty of Rome explicitly prohibits State aid in certain circumstances by saying that, except where otherwise provided for in the treaty, any aid granted by a member State or granted by means of State resources, in any manner whatsoever, which distorts or threatens to distort competition by favouring certain enterprises or certain productions shall, to the extent to which it adversely affects trade between member States, be deemed to be incompatible with the Common Market. There are of course certain practices that are acceptable to Europe. They are aids of a social character granted to individual consumers, provided that such aids are granted without any discrimination based on the origin of the products concerned; aids intended to remedy damage caused by natural calamities or other extraordinary events; and aids granted to the economy of certain regions of the Federal Republic of Germany affected by the division of Germany, to the extent that such aids are necessary in order to compensate for the economic disadvantages caused by such division.

Also compatible with the principles of the treaty are aids intended to promote the economic development of regions where the standard of living is abnormally low or where there exists serious underemployment; aids intended to promote the execution of important projects of common European interest or to remedy a serious disturbance of the economy of a member State; and aids intended to facilitate the development of certain activities or of certain economic regions, provided that such aids do not change trading conditions to such a degree as would be contrary to the common interest; and any other practices of State aid as are permitted on a case by case basis by the European Commission, which could submit such practices for approval of the European Council.

Enforcement of the EU competition laws is the purview of national competition authorities by virtue of Regulation 1/2003 (which came into force on 1 May 2004). The Treaty on the Functioning of the European Union (TFEU) also contains provisions on anticompetitive practices within the European Union. Article 101 inclusively prohibits certain agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Some of the prohibited commercial practices under the TFEU which are rendered *null and void ab initio* are those which directly or indirectly fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 102 of the TFEU follows through with a provision on the abuse of dominant position by stating that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it is prohibited as incompatible with the internal market in so far as it may affect trade between member States. Again, this is an inclusive provision which particularly mentions such practices as those that directly or indirectly impose unfair purchase or selling prices or other unfair trading conditions; limit production, markets or technical development to the prejudice of consumers; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Under a special agreement signed between the United States and the European Communities, both parties have agreed to cooperate in combating anticompetitive practices. The agreement[49] states that the parties agree to establish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each party will normally avoid allocating enforcement resources to deal with anticompetitive activities that occur principally in and are directed principally towards the other party’s territory, where the competition authorities of the other party are able and prepared to examine and take effective sanctions under their law to deal with those activities.

The legal justification for prohibiting State aid in certain circumstances where markets are distorted and competitors face dire circumstances as a result of not having access to equality of opportunity to compete with each other is based on the simple theory that if a government subsidizes only a particular entity or company and not its competitors, that entity would gain an undue advantage and an automatic dominant position over its competitors, which could lead to abuse of dominant position, monopoly and inequity. Furthermore, the entity at an advantage as a result of receiving exclusive subsidies would be complacent and would not compete on merit, thus creating an imbalance in the competition process. Although this problem could be overcome by competitors in an expanding market by aggressively and robustly competing with the subsidy recipient, it would not be possible in a depleting market. Another danger would be the monotonous reliance of the subsidy recipient on State aid, which would decrease the efforts of that entity to be more competitive, resulting in a depletion of consumer choices for a product and also a minimizing of quality of the product.

In order to obviate the dangers of subsidies distorting the market, there have to be strict rules of transparency. Justification that subsidies are granted to obviate market failure requires demonstration that aid is targeted at market failure and that there was no other alternative for the State to prevent such market failure. Furthermore, subsidies cannot be provided ad infinitum but must be for a limited time, sufficient to rectify a situation of failure in the market. Also, the subsidy recipient must adhere to proactive conditions imposed by the State to enhance availability and quality of service.

4. Conclusion

Although there is a great degree of ambivalence on the subject of subsidies for services, coupled with the inherent drawback that such subsidies do not come under the WTO umbrella, many WTO members grant subsidies for services in such sectors as construction services, education and audio visual services, as well as for air transport services. One commentator mentions that the airline industry receives State support amounting on average to more than US$7 billion a year.[50] There is implied reference to subsidies in the service sector under the General Agreement on Trade in Services (GATS) in Article XV, which provides that members of the WTO are cognizant of the fact that, in certain circumstances, subsidies may have distortive effects on trade in services and that members should enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects. Special mention has been made in the provision of the role of subsidies in relation to the development programs of developing countries, which should take into account the relevant needs of the member countries with flexibility and fluidity.

This could be a cue to ICAO, which has several provisions in the Chicago Convention that impel the organization to achieve a level playing field through its Council, as discussed in the introduction to this article. The Council is mandated to request, collect, examine and publish details pertaining to subsidies paid to airlines from public funds. Following the premise and rationale of the Most Favored Nations Treatment clause contained in GATS, the level playing field could be considered on the basis of Article II (1) of the GATS, which States, "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country."

Anchoring itself in this philosophy the Council could, as per Article 55 d) of the Chicago Convention, which details the permissive functions of the Council, submit to the ICAO Assembly details of a study on subsidies conducted by ICAO with the assistance of its member States with plans to introduce global principles of conduct on the application of subsidies only in instances where fair competition and equality of opportunity to compete are not eroded by the grant of such subsidies. The study should engage all ICAO member States to arrive at a consensus on what constitutes fair subsidies under the meaning, purpose and spirit of the Chicago Convention. States should report on all subsidies granted to their carriers under the already existing requirement for the Council of ICAO in Article 54 i) of the convention, which mandatorily imposes an obligation on the Council to publish details of subsidies. Finally, a dispute settlement process under Articles 84 and 85 of the Chicago Convention should enable the Council to decide on any disagreement or complaint arising out of subsidies that may distort competition, and to adopt a resolution that would at the least impose a moral obligation on an offending State to make reparation to a victim State that has suffered economically as a result of unfair subsidies that disrupt and adversely affect its air transport obligations.

Endnotes

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[2] The World Trade Organization, headquartered in Geneva, is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading

nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business. The WTO is run by its member governments. All major decisions are made by the membership as a whole, either by ministers (who usually meet at least once every two years) or by their ambassadors or delegates (who meet regularly in Geneva). The WTO has a Dispute Settlement Body which compellingly pronounces on trade disputes, including those related to subsidies. See R.I.R. Abeyratne, The Settlement of International Aviation Disputes under the GATS and the ICAO Council – A Comparative Analysis, in *International Trade Law, The GATT/WTO Dispute Settlement System, Studies in Transnational Economic Law*, Ernst-Ulrich Petersman, ed., part 11 at 397. Kluwer Law International, 1997.

[3] See https://www.wto.org/english/tratop_e/scm_e/subs_e.htm

[4] Alan O. Sykes, The Economics of WTO Rules on Subsidies and Countervailing Measures. *John M. Olin Program in Law and Economics Working Paper No. 186 (2D Series)*, 2-3. University of Chicago Law School, 2003.

[5] Convention on International Civil Aviation, signed at Chicago on 7 December 1944. See Doc 7300/9 Ninth Edition, 2006.

[6] The formation and purpose of The International Civil Aviation Organization (ICAO) is given in the Proceedings of the International Civil Aviation Conference (Chicago, Illinois, November1-December 7, 1944) as follows:
"On 1 November 1944, representatives of 52 nations came together at Chicago, to create a framework for the growth anticipated in world civil aviation. The Convention on International Civil Aviation, also known as the Chicago Convention, provided the establishment of the International Civil Aviation Organization (ICAO) – an international body to guide and regulate international civil aviation. ICAO came into existence on 4 April 1947, after 26 States had ratified the convention. Between 1944 and 1947 a provisional organization (PICAO) operated, the purpose of which was to be of a technical and advisory nature of sovereign States for the purpose of collaboration in the field of international civil aviation and to lay down the foundation for a new international organization to be headquartered in Montreal, Canada." Today, ICAO has 191 member States.

[7] Michael Milde, *International Air Law and ICAO*. Essential Air Law Series, 153. Utrecht: Eleven International Publishing, 2008.

[8] Article 84 of the Chicago Convention provides that if any disagreement between two or more contracting States relating to the interpretation or application of the convention and its annexes cannot be settled by negotiation, the Council can and indeed shall decide on the issue on the application of any State concerned in the disagreement. No member of the Council is entitled to vote in the consideration by the Council of any dispute to which it is a party. Any contracting State has the option of, subject to Article 85, appealing the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute, or to the Permanent Court of International Justice. Within 60 days of receipt of notification of the decision of the Council, an appeal will be notified to the Council. Article 85 provides for an arbitration process if the Article 84 process fails to bring about resolution of the issue under dispute.

[9] *Manual on the Regulation of International Air Transport*, Effects of State Aids and Subsidies, Doc 9626, at 2.3.6. 2nd edition, 2004.
[10] *Ibid*.
[11] *Ibid*.
[12] Alain Lumbroso, Subsidies in Aviation: The Elusive Flight Towards Fair Competition. *OECD Insights: Debate the Issues* 14 August 2015, at http://oecdinsights.org/2015/08/24/subsidies-in-aviation-the-elusive-flight-towards-fair-competition/
[13] See Ruwantissa Abeyratne, *Competition and Investment in Air Transport*, 119-121. Heidelberg: Springer, 2015.
[14] Ruwantissa Abeyratne, The Decision in the Ryanair Case – The Low Cost Carrier Phenomenon. *European Transport Law* Vol. XXXIX, No. 5, 2004: 585-601.
[15] Ruwantissa Abeyratne, The Airbus-Boeing Subsidies Dispute – Some Legal Issues. *Air & Sp. L* Vol. XXX/6 (November 2005): 379-398.
[16] Ben Rooney, U.S. and EU claim victory in Boeing subsidy case. *CNN Money* 12 March 2012, http://money.cnn.com/2012/03/12/markets/boeing-airbus-wto/
[17] A primary product has been defined in The Havana Charter of 1948, Article 56 (1) (which the WTO adopted), which states that a primary product is a product of a farm, forest or fishery or mineral in its natural form.
[18] For purposes of this article, the terms "Middle East" and "Gulf" will be used interchangeably.
[19] Super Connecting the World. *The Economist* 25 April 2015, http://www.economist.com/news/business/21649509-advance-emirates-etihad-and-qatar-latterly-joined-turkish-airlines-looks-set
[20] Benjamin Zhang, The Middle East's 3 Best Airlines Have Infuriated Their US Competitors. *Business Insider* 28 July 2015, http://ca.finance.ret1p.global.media.yahoo.com/news/middle-eastern-us-airlines-having-massive-dispute-future-133000846.html
[21] Hubbing is a practice by some airlines where airline hubs or hub airports are used by one or more carriers to concentrate passenger traffic and flight operations at a given airport – in the context of the Middle East, airports such as Dubai for Emirates, Abu Dhabi for Etihad Airways and Doha (Qatar) for Qatar Airways. They serve as transfer (or stop-over) points to get passengers to their final destination.
[22] Partnership for Fair and Open Skies. See The Deck is Stacked, http://www.openandfairskies.com/subsidies/
[23] See Zhang, *supra*, note 20, *ibid*.
[24] *Ibid*.
[25] See Susan Carey, U.S. Airlines Detail Claims of Subsidies to Persian Gulf Rivals. *The Wall Street Journal* 5 March 2015; see also Susan Carey and Rory Jones, DJ – U.S. Airlines Claim to Document Subsidies at Gulf Rivals, IFX – International Foreign Exchange, https://www.internationalfx.com/uk/news/2015042014963/u-s-airlines-claim-to-document-subsidies-at-gulf-rivals
[26] Rob Britton, The Big Three: U.S. Airlines Versus Persian Gulf Carriers. *Forbes Magazine* 15 May 2015, http://www.forbes.com/forbes/welcome/. The author states that Emirates alone links The United States via Dubai with 17 cities in the Middle East; 21 cities in Africa; 86 cities in South, South East and East Asia; and 7 in

Australia and New Zealand. India is the largest connecting market, where the Gulf carriers have quadrupled capacity from 2008 to 2014, *ibid.*

[27] Partnership for Fair and Open Skies *supra,* note 21, *ibid*.

[28] Jeremy Kingsley, Open Skies No More. *Middle East Insights* 22 February 2016, at 2. Middle East Institute, National University of Singapore. See https://mei.nus.edu.sg/themes/site_themes/agile_records/images/uploads/Download_Insight_140_Kingsley.pdf

[29] It's Time for Europe to Stand Up for Fair Competition. European Commission Executive Summary at http://e4fc.eu/executive-summary/

[30] *Ibid.*

[31] Jason Clampet and Dennis Schaal, U.S. Airlines Reveal Evidence They Say Proves Gulf Carriers Get Unfair Subsidies. *Skift* 5 March 2015, https://skift.com/2015/03/05/u-s-airlines-reveal-evidence-they-say-proves-gulf-carriers-get-unfair-aid/

[32] Adam Levine-Weinberg, At Least One Middle Eastern Airline Giant is Fuelled by Subsidies. *The Motley Fool,* http://www.fool.com/investing/general/2015/08/30/at-least-one-middle-eastern-airline-giant-is-fuele.aspx

[33] Dennis Schaal, Future of Open Skies Hinges on the Definition of the word: Subsidy. *Skift,* at https://skift.com/2015/04/28/future-of-open-skies-hinges-on-the-definition-of-one-word-subsidy/

[34] Dan Reed, In Debate Vs. Persian Gulf Carriers, U.S.'s Big Three Airlines Can't Win – Even if They Win. *Forbes Magazine*, http://www.forbes.com/sites/danielreed/2015/03/18/in-debate-vs-persian-gulf-carriers-u-s-s-big-three-airlines-cant-win-even-if-they-win/#89cdb6e35f11

[35] Article 15 of the Chicago Convention provides *inter alia* that every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. Uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation. Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting installations shall not be higher, as to aircraft not engaged in scheduled international air services, than those that would be paid its national aircraft of the same class engaged in similar operations, and, as to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

[36] Explaining Dubai's Aviation Model, A Report for Emirates and Dubai Airports, 11 June, at 5. See http://www.dubaiairports.ae/docs/default-source/Publications/oxford-economics_explaining-dubai's-aviation-model_june-2011.pdf?sfvrsn=4. An article on disruptive innovation in the Harvard Business Review says that disruptive innovation originates in low-end or new-market footholds: "'Disruption' describes a process whereby a smaller company with fewer resources is able to successfully challenge established incumbent businesses. Specifically, as incumbents focus on improving their products and services for their most demanding (and usually most profitable) customers, they exceed the needs of some segments and ignore the needs of others.

Entrants that prove disruptive begin by successfully targeting those overlooked segments, gaining a foothold by delivering more-suitable functionality – frequently at a lower price." See Clayton M. Christensen, Michael E. Raynor, and Rory McDonald, What is Disruptive Innovation? *Harvard Business Review* December 2015, https://hbr.org/2015/12/what-is-disruptive-innovation

[37] Jaap de Wit, Unlevel Playing Field? Ah Yes, You Mean Protectionism? *Journal of Air Transport Management* December 2013, Abstract. See https://www.researchgate.net/publication/259519730

[38] Gregory Carp, Emirates Airline Lashes Back at U.S. Carriers. *Chicago Tribune* 30 June 2015, http://www.chicagotribune.com/business/ct-emirates-rebuttal-0701-biz-20150630-story.html

[39] Airlines Subsidy: Our Position, preface, at 1. Emirates, 2015. See http://www.emirates.com/english/images/Airlines%20and%20subsidy%20-%20our%20position%20new_tcm233-845771.pdf

[40] *Id*. Introduction, at 4.

[41] *Id.* At 9. Emirates also cites Air France, which was given three capital injections between 1991 and 1994 totaling €5.8 billion.

[42] The WTO Agreement on Subsidies and Countervailing Measures applies to goods and not services. The only WTO agreement that apples to air transport is the General Agreement of Trade in Services (GATS), which again does not apply to market access and the provision of air transport services.

[43] Etihad: US carriers got $70B in government aid. Reuters, 14 May 2015. http://www.cnbc.com/2015/05/14/

[44] For a detailed discussion on the debate see Ruwantissa Abeyratne, *Competition and Innovation in Air Transport*, Chapter 6, Market Access and Subsidies in Air Transport: The US UAE Debate and WTO, 113-130. Heidelberg: Springer, 2016.

[45] Anthony McAuley, Victory for Gulf airlines as US government ends Open Skies row with no further action. *The National* 27 July 2016, at http://www.thenational.ae/business/aviation/victory-for-gulf-airlines-as-us-government-ends-open-skies-row-with-no-further-action#page1

[46] *Sherman Act*, 26 Stat. 209, 15 U.S.C.

[47] *Clayton Act*, 15 U.S.C. Section 13.

[48] *Treaty Establishing the European Coal and Steel Community And Annexes I-Iii.* Paris, 18 April 1951, Article 4 (b) and (c).

[49] *Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws*, signed on 04/06/1998.

[50] Marc Benitah, *Subsidies, Services and Sustainable Development*. International Centre for Trade and Sustainable Development, Issue Paper No 1:2004, at 3.