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Competition in Air Transport and Equality of Opportunity

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Air transport, unlike any other mode of transport, has been plagued with teleological anomalies. On the one hand, The Convention on International Civil Aviation (Chicago Convention) – the multilateral treaty applicable to air transport – says in its Preamble that air transport should be operated *inter alia* with “equality of opportunity” for all, without defining what the word “opportunity” means. Taken literally, this phrase grants every air carrier the opportunity to compete with each other without let or hindrance. On the other hand, the convention states that states have sovereignty over the air space above their territories and that no scheduled international air service may be operated over or into the territory of a state except with the agreement or special authorization of that state. This has rendered air carriers destitute of the liberty to operate internationally scheduled air services and the opportunity to compete fairly and equally with each other. In response, air carriers have devised various commercial measures to bypass this anomaly, such as code sharing, airline alliances and other forms of market access including the use of computer reservation systems. Another anomaly in air transport is that airlines are required to have the nationality of the state in which they are registered, with a requirement that an airline should be owned and effectively controlled by a majority of nationals in that state. This article draws on the genesis of the Chicago Convention through the conference which led to the treaty and analyses the original views of the delegates on competition, liberalization and the evolution of the phrase “equality of opportunity” in air transport.

Keywords: Air transport, Chicago Conference; Chicago Convention;
Competition; ICAO; Liberalization

1. Introduction

It has become a platitude to say that the genesis of the Chicago Convention² lay in the Chicago Conference of 1944. The conference was convened through a letter of invitation dated 11 September 1944 sent from the Government of the United States to 53 sovereign states³ and two ministers.⁴ The letter said *inter alia* that, pursuant to bilateral exploratory discussions that the United States had had with several states and in view of the imminent defeat of Germany and the potential liberation of parts of Europe and Africa from military interruption of traffic, there was an urgent need for the establishment of an international air service “pattern” [my emphasis] so that all important trade population areas of the world may obtain the benefits accrued through air transportation. A pattern denotes a regular, intelligible form that reflects a regular and repeated way in which something is done. Accordingly, the letter called for a conference to discuss relevant issues, among which was the formation of principles of a “permanent international structure for civil aviation and air transport”,⁵ to be developed through various committees set up during the conference. Foremost in the philosophy of the United States’ proposal was the setting up of provisional world route arrangements to be arrived at by general agreement so that international air transport services could be promptly established. The overall philosophy of the conference was seemingly structured both on air transport and on the technical principles of air navigation, which can be brought under the rubric of international civil aviation. The direction set for the conference was therefore both economic and technical, at least as a preliminary issue.⁶

It must be mentioned that, coupled with the acute awareness of the world – that the outmoded concept of national sovereignty within territorial borders conferring unlimited powers to states, which effectively precluded international cooperation, and which World War II perpetuated, must be revisited – an important precursor to the American thinking had existed in 1932 when, at the first conference for the reduction and limitation of weapons, held in Geneva, the French delegation had submitted to the conference a draft suggesting that air routes be internationalized. The United States’ view was that at the core of this philosophy was the fact that air transport must be commercialized and the parochial “separate skies” practice should be obviated. The pervasive animosity of the war had to give way to friendship and understanding, projected through an international organization with “auxiliary and consultative functions”.⁷

The initiator of the conference process was President Franklin D. Roosevelt who, by the time the war was tilting in favour of the allied forces, showed a distinct interest

in air transport. He was the first president in office to choose to fly on official work (to Casablanca), preferring air travel to surface transport (by sea), saying he had less knowledge of terrain than of the oceans. President Roosevelt baffled, and even terrified, his top aides, as flying to Morocco would have presented many ominous threats and risks.⁸ It was President Roosevelt who formulated the idea of the United Nations that would end the era of colonialism and usher in an era of connectivity and globalization. His thought, as recorded by his biographer Nigel Hamilton, was that “certain trusteeships would be exercised by the United Nations where the stability of government for one reason or another cannot at once be assured.”⁹

President Roosevelt’s thinking is epitomized in the statement of Adolf A. Berle, president of the Chicago Conference and head of the American delegation: “The use of the air has this in common with the use of the sea: it is a highway given by nature to all men. It differs in this from the sea: that it is subject to the sovereignty of the nations over which it moves. Nations ought therefore to arrange among themselves for its use in that manner which will be of the greatest benefit to all humanity, wherever situated. The United States believes in and asserts the rule that each country has the right to maintain sovereignty of the air which is over its lands and its territorial waters. There can be no question of alienating or qualifying this sovereignty.”¹⁰ It was emphasized by the American delegation that there should be friendly intercourse between nations within the umbrella of sovereignty and that air navigation, communication and commerce should be fostered between all peaceful states.

Explicit in this philosophy were the dual factors of routes and air navigation, which could be determined through the establishment of an international organization designed on the principle of cooperation among states that would obviate the parochial use of aircraft within state boundaries. In the context of routes, the twin issues of commerce and economics surfaced at the conference, bringing to bear the importance of competition between routes and transit lines. Also addressed was the issue of technical aspects of air navigation that would keep aircraft within safe distance of each other. The basic tenets of these philosophical principles were enshrined in the finalized Chicago Convention within the parameters of its Preamble, which looked to the future development of international civil aviation as helping to preserve friendship and understanding among the peoples of the world and the importance of avoiding the abuse of this development which, if not averted, would adversely affect general security. The corollary to this approach is outlined further in the Preamble, which says that states should avoid conflict and cooperate so that the safe and orderly conduct of the industry could be carried out soundly and economically with equality of opportunity. The key words here are “friendship” and “understanding” as well as “safe”, “orderly”,

“economically” and “equality of opportunity”; in other words, connectivity in an orderly and regular manner.

This article will critically evaluate the words “equality of opportunity” against the backdrop of 70 years of the International Civil Aviation Organization (ICAO), which was established with aims and objectives to drive the evolution of air transport as well as to foster the development of civil aviation. To do this, one has to first look at the process of the five-week-long conference and arrive at a conclusion as to the real meaning and purpose of the convention and then consider whether the aviation community is being guided in the direction that was envisioned.

2. Philosophy of the Conference in 1944

The conference process reveals the underlying philosophy that led to the adoption of the 96 provisions of the Chicago Convention. The Chinese delegate summed it up well when he said that the intent of the conference (as he saw it) was to transform the air – which had been used as a medium of aggression – into a highway serving all people of the world. The delegate for Mexico – who identified Mexico as a vast land – held the view that the conference could enable Mexico ultimately to connect various points in the land, thereby benefitting his people socially and economically. These sentiments echoed the fundamental premise posited by the United States – that the new mechanism being discussed could bring about the greatest benefit to humanity, wherever situated. A note of caution was sounded by Lord Swinton – the British delegate – who said, “[W]e want to encourage enterprise and initiative and the development and application of all that science, design and craftsmanship and industry can give us. But we want to avoid disorderly competition with the waste of effort and money and loss of good will which such competition involves.”¹¹ As a modality that would achieve this objective, the British delegate opined that there should be a correlation between the number of services and the traffic demand. In other words, the availability or demand for traffic should be predetermined before air services are operated between points in states.

Interestingly, Lord Swinton went on to emphasize the need to avoid economic waste and obviate subsidies.¹² A solution to this conundrum – in the eyes of the British delegate – was to establish minimum rates. It was also suggested that until the Chicago Convention entered into force, any bilateral air services agreement should have entered into force in accordance with the principles included and embodied in the convention. The Canadian delegate followed Lord Swinton, with a strong recommendation that an international air authority which promoted competition, and consisting of an assembly or board and a number of regional councils, must be established along the lines of the Civil Aeronautics Board of the United States. C.D. Howe, the Canadian delegate,

stressed the fact that consultations Canada had had in the preceding years with other states had brought to bear a consensus that the international authority should be able to require of states on which routes their airlines could fly and on which routes they were prohibited to fly. It was also mentioned that the regional councils should have the authority to issue licences and certificates of airworthiness.

The strongest argument for coalescing all air traffic rights in one international authority lay in the words of Mr. Howe:

Nations can exercise, in an anti social way, their present right to refuse foreign airlines air transit over their territories. Nations can likewise exercise, in an anti social way, their present right to prevent foreign airlines from landing on their territories to pick up and discharge traffic. The obstructionist use of the one right can be an outrageous exploitation of geography for purely negative and destructive purposes by nations which are situated athwart the great airways of the world¹³

The delegate for France submitted to the conference that states should have a reasonable share of air transportation and that the international organization proposed was the only conduit to facilitate this objective. Australia and New Zealand, as already mentioned, went a step further by recommending that for the sake of future peace in the world and with a view to developing the world's air commerce rationally, an international air transport authority should be established through an international organization that would own aircraft and operate air services on behalf of the states. In pursuance of this objective the two countries suggested further that this international authority should be given every flexibility by the states to carry out its mandate so that air commerce could develop without let or hindrance. Additionally, it was submitted that such an authority should comprise the best technical and research expertise and other aviation resources.

Accordingly, signatory states to the Interim Agreement on International Civil Aviation – the precursor to the Chicago Convention – agreed in Article 1 of the finalized Provisional Agreement to establish a provisional international organization – the precursor to ICAO – and that such organization would be of a “technical and advisory” nature [my emphasis] of sovereign states for the purpose of collaboration in the field of international civil aviation.¹⁴

A surprising shortcoming in the discussions – one of omission rather than commission – was the insouciant ignoring of the dimensions of air space. If air commerce was to be rationally apportioned or shared, and sovereignty was to be liberally interpreted, it is curious that the term “sovereignty” over airspace was nonchalantly ignored by the delegates. It still remains ignored, presumably because some states would like to keep the issue open for reasons of military strategy. However,

this military concern need not have been a factor at the Chicago Conference because it was then all about establishing peaceful commerce and connectivity, away from military considerations. Besides, if the states were finally entitled to exercise total and exclusive sovereignty over the airspace above their territory, the term “airspace” needed to be definitively identified. A logical and sensible measurement in this respect would be to consider airspace as reaching a height in the atmosphere where the atmosphere would not be able to offer an aircraft its aerodynamic lift. Called the Von Karman line, the altitude where the atmosphere cannot offer aerodynamic lift has been identified as 80,000 meters or 50 miles, which is about 110 kilometres high.¹⁵

3. Philosophy of the Convention

All the above views went into the making of the Chicago Convention through a series of compromises that kept the concept of the suggested international organization in the form of ICAO *albeit* without the power and authority to ascribe route structures or to own aircraft. The overall philosophy of the convention is couched in two areas: specific provisions on air transport and air navigation; and the aims and objectives of ICAO as well as the functions of the ICAO Assembly and ICAO Council. It is not the intent of this article to analyse and comment upon the provisions of the Chicago Convention or the overall functions of the ICAO Assembly and Council, as that has already been done elsewhere.¹⁶ This article does not offer an exposé of the technicalities of air navigation, which has also been addressed.¹⁷ ICAO has performed well in the technical field and continues to do so. What this article discusses is how the original intent of the Chicago Conference of the establishment of an international air service “pattern” so that all important trade population areas of the world may obtain the benefits accrued through air transportation is translated into the philosophy of the Chicago Convention, as reflected in its Preamble in ensuring “equality of opportunity” for carriers to compete in operating air services, against the backdrop of the principles of competition and their legal ramifications and how all factors mesh with ICAO’s aim of “meeting the needs of the people of the world for safe, regular, efficient and economical air transport” as required by Article 44 e) of the convention.

To begin with, ICAO has not strictly adhered to its aim as stipulated in Article 44 e) of the convention but has opted to stay within the “advisory” role as mentioned in Article 1 of the Provisional Agreement to establish a provisional international organization. Even as an advisor, ICAO has been ambivalent, merely choosing to advocate the overarching principle of “liberalization” of air transport. It has not given any advice to its member states on how to achieve liberalization.¹⁸ The closest ICAO has come is to publish a study on competition and air connectivity¹⁹ which contains

some statistics that are called “efficiency diagnosis in the context of air carriers’ network²⁰ competition”. Some useful information can also be gleaned from ICAO’s Competition Compendium of 2017,²¹ which gives the results of a competition survey carried out by ICAO of its member states. This having been said, one must hasten to add that ICAO has not been idle through the years and has published numerous guidelines through its manuals and other documents.²² It therefore behoves both the ICAO Council and ICAO member states to interpret what “equality of opportunity” means in the philosophy of the convention and apply their understanding to relations with other states.

At the sixth Air Transport Conference convened by ICAO in 2013, it was agreed that

States should pursue liberalization at their own pace and apply approaches suitable to their needs and national situation. At the same time, there was general agreement on the need to modernize the global regulatory framework on market access so as to adapt to the changes of a globalized business environment. Also recognized was the need for ICAO to play a leadership role in facilitating regulatory evolution. In this regard support was voiced for the proposal that ICAO develop a long-term vision for global liberalization of air transport, including multilateral solutions, bearing in mind the interests of all States and aviation stakeholders.²³

The 38th session of the ICAO Assembly, which followed the conference, adopted Resolution A38-14, which requested the ICAO Council, *inter alia*, “to develop and adopt a long-term vision for international air transport liberalization, including examination of an international agreement by which States could liberalize market access...’, ‘to develop a specific international agreement to facilitate further liberalization of air cargo services,’ and ‘to initiate work on the development of an international agreement to liberalize air carrier ownership and control’.”²⁴

It is clear, when one goes back to the statements made by the delegates at the Chicago Conference, that “equality of opportunity” did not mean equal opportunity to operate air services. This would amount to the misnomer attached to the bilateral “open skies” concept, where the equal right to operate air services would give one carrier with more resources an undue advantage over another carrier which is disadvantaged. The British delegate at the conference clearly said that disorderly competition should be avoided, and unrestricted competition should be the goal of future air transport.²⁵ By this the British delegate meant that all states should have the opportunity to have a fair share of traffic by fair competition. The preeminent objective is, as the United States delegate said at the conference, to give the benefits accrued through air transportation to all important trade population areas of the world. When translated to more recent times, the United States’ position at ICAO’s sixth Worldwide Air Transport Conference

held in 2013 is worthy of note, where the United States said that cooperation in the aviation industry is needed to ensure fair competition, and for that to attain fruition what was needed was “constructive engagement with the aviation industry, which must operate in many jurisdictions to compete effectively. Constructive engagement allows regulators to understand how the airline business is affected by regulatory, geographic, and technological factors, and to exercise more responsible oversight, with a view towards adopting approaches that are compatible with those of other jurisdictions, to the extent possible.”²⁶ These views would bring one to the ineluctable conclusion that the Preamble to the Chicago Convention embodies the practice of equality of opportunity to compete.

In an unusual break from its economic indolence, ICAO became unobtrusively creative when it suggested that airlines, particularly of a developing state at a disadvantage when competing with other, stronger airlines, should have access to “preferential measures” such as the opportunity to serve more cities; market access to fifth freedom sectors not otherwise granted; ability to change capacity in routes included in a bilateral air services agreement in a flexible manner; unilateral operations on a given route for a certain period of time; opportunities to enter into code sharing agreements on attractive routes; and the unrestricted change of aircraft type. ICAO also suggested that air carriers with a competitive disadvantage should be allowed trial periods to operate in certain routes liberally, which could also turn into the gradual introduction of more liberal market access agreements with developed states. Other preferential treatment measures were the use of liberalized arrangements at a quick pace by developing countries’ carriers; a waiver of the nationality requirement for disadvantaged carriers; preferential treatment in ground handling at airports and slot clearance; and flexibility in currency conversions.²⁷

Although these suggested measures were both well intended and practical and were calculated to alleviate the disadvantageous position some carriers of the developing world might have been in, they remain mere suggestions that are not followed across the board.

4. Equality of Opportunity to Compete

Arguably, the founding fathers of the Chicago Convention deliberately made ICAO a toothless tiger in the context of air transport, deprived it of the vast powers called for by the Australian and New Zealand delegations and allowed what the Canadian delegation feared – that states should not be allowed to arbitrarily and capriciously close their air space and stultify connectivity – which is the antithesis of the meaning and purpose of the Preambular text of the Convention. Article 6 of the convention, which

provides that no scheduled international air service may be operated over or into the territory of a contracting state, except with the special permission or other authorization of that state and in accordance with the terms of such permission or authorization, essentially established an absolute prerogative of a state to dictate which air services operated into its territory and further seemingly shackled ICAO's role, which was relegated in Article 44 to "fostering" air transport. However, paradoxically and as already stated, the same provision identifies one of the aims and objectives of ICAO as being "to meet the needs of the peoples of the world for safe, regular, efficient and economical air transport".

The ICAO Council, still, after 70 years, does not seem to know what to make of this paradox and has conveniently left the issue unaddressed, with only a Strategic Objective (whatever that means) of *Economic Development of Air Transport* aimed at fostering the development of a sound and economically viable civil aviation system. Also included in the Strategic Objective is the recognition of the need for ICAO's leadership in harmonizing the air transport framework focused on economic policies and supporting activities. Again, this is confusion worse confounded, as ICAO could not limit itself to "fostering" the development of air transport while at the same time leading the harmonization of the air transport framework that is run on competition.

This fundamental flaw in the Chicago Convention's paradoxical statements on ICAO's role as well as ICAO's insouciant view of its admitted "leadership" role have given rise to market forces taking over the "equality of opportunity" concept of the Chicago Convention. Antithetically, this has given rise to protectionism across the board, where states are accusing other states of aiding their carriers in engaging in anticompetitive practices. Therefore, it becomes necessary to go into greater detail on the extent to which the principles and attendant ramifications of competition in air transport can be viewed.

a. Competition

i. State involvement

In air transport, as in any other commercial activity, competition is a balance between maximising profits and ensuring consumer welfare. In both these factors one of the key drivers is location of the enterprise, and the ability of such enterprises to coordinate their regional and area activities across borders and global networks. Another driver is government policy, which can either effectively facilitate the development of an industry or run it to the ground with regulations. A forward looking, dynamic local environment can deeply facilitate advancement. Michael Porter says, "in a world of

increasingly global competition, nations have become more, not less important ... competitive advantage is created and sustained through a highly localized process ... ultimately, nations succeed because their home environment is the most forward looking, dynamic, and challenging.”²⁸ In the context of the air transport industry, the active involvement of the government of the United Arab Emirates (UAE) in the development of its airlines Emirates and Etihad, along with the exponential growth of the Dubai and Abu Dhabi airports as hubs, show the importance of both location and governmental commitment. Emirates is owned by the Investment Corporation of Dubai (ICD), the commercial investment arm of the Dubai government. In 1985 Emirates was given US\$10 million as a start-up for the lease of two Boeing 737 aircraft and an additional US\$88 million for infrastructure building. Oxford Economics cites the Emirates’ business model as “consensus-based, highly-competitive and consumer-centric; generating significant economic benefits for Dubai and the countries it connects”.²⁹ In the report, HH Sheikh Ahmed Bin Saeed Al Maktoum, Chairman and Chief Executive of Emirates Airline and Group, Chairman of Dubai Airports and President of Dubai Civil Aviation Authority, has said, “[T]hat is why we have created a business and regulatory environment that supports its growth by encouraging open competition between all airlines, efficient operations and customer satisfaction. There is no magic here. It’s just good business.”³⁰ Using its strategic location of fast-growing Dubai, Emirates has paired growth with an aggressive business strategy that addresses its competitors squarely in their faces. A substantial investment to buttress its operations on long-haul services has enabled the airline to quote cheaper rates on such services than its competitors. Additionally, the airline approaches its mission as a whole, diversifying to other, related aspects of the air transport product, investing in airports, airport services and even taxi services. This diversification enables the airline to offer a product with a difference and compete in a new market, relying on their brand or promise of superior service.

Emirates uses its strategic location to encourage competition through the UAE government’s open sky policy. This in turn generates activity in the market forces that enables Emirates to forge ahead with its creative and innovative initiatives calculated to overtake its competitors, which are allowed to operate air services to Dubai untrammled. One of the strategies of Emirates is to optimize its competitive advantage by relentless innovation and creativity in marketing. Etihad – the airline operating with Abu Dhabi as its hub – also concentrates heavily on innovation. As an example, one can cite the Etihad Innovation Centre, where the walk-through of the centre features business class cabins on the A380 and B787, with the airline’s new Business Studio, as well as economy class cabins with the Economy Smart Seat. This state of the art facility

has been built for forward thinking and the exchange of innovative ideas that could take the airline into the next decade.

The success stories of the Middle East carriers (including Etihad, Qatar Airways and Turkish Airlines) do not so much turn on the fact that their constant innovation is the sole factor that gives them their competitive advantage, but rather on the fact that their competitors have stopped improving. This fact alone underscores the significance of the “equality of opportunity” to compete clause in the Chicago Convention. Every state has the opportunity to develop its location, encourage and support its airline(s) and create an investment environment that would energize market forces.

In many states, there is no policy for national competitiveness through the aviation sector, whether in air transport or the airport industries. Entrepreneurial principles are not pursued with enthusiasm. Commercial entities are often lumped together and are not given separate-entity status. Singapore is another example where the state does show entrepreneurial interest in its separate entities, through which both Singapore Airlines and Changi International Airport have thrived over their competitors.

ii. Corporate strategy

As the above discussion indicates, the advantages brought about by location have to be matched with a corporate strategy, and it is imperative that such a strategy be carried out through global networks and platforms. A business enterprise achieves equality in competition by creating opportunities such as conceptualizing change in an unprecedented manner based on conceptual and strategic thinking, taking into consideration global technical, political, economic, legal and demographic trends. Corporate strategy in competing with others requires exposure to new forms of intellectual openness and curiosity and, above all, an enduring capacity to identify and analyze the effects of emergent trends on aviation. “Strategy” is defined in The Harvard Business Review as “the creation of a unique and valuable position, involving a different set of activities from your competitors”. A strategic plan is a dynamic process, not a one-time event, and this process will become an integral part of the way a competitor seeking to create equal opportunity does business and leads the company.

The “different set of activities” for a progressive airline would involve incisive analysis of megatrends as they impact on aviation. However, strategy should not only be about competition nor should it be about planning. Neither should it be only about tactics or achieving goals. It should also be based on uplifting the company’s profile as a specialist in the area. The strategic plan should have three key drivers. The first of these is *the company’s look at the world* – this initiative may entail a fresh look at the world that is an extension of the company’s current focus on innovation and marketing.

This would be followed by an in-depth look at the playing field, meaning a comprehensive look at what is out there. The second key driver is *redefining the company's ambition* – the company's purpose explains why it exists. A process of redefining would bring to bear the nature of the company and whether its approach should change with the involvement in emergent trends. This could involve transcending best practices and going into strategic analysis and innovation. The third key driver is *reshaping the business model* – this would entail a look at what the company wants to achieve in its involvement in the competitive world. This may involve either elevation of profile or profit making or both.

Reshaping the business model is a key element in contemporary competition in air transport. Networks and platforms now form a key component in successful business planning. Airlines that use networks and platforms can connect stakeholders in air transport more efficiently than airlines that are disadvantaged in not having access to such tools. A platform is essentially a business model that links or connects groups of interrelated and mutually dependent groups, persons or bodies to exchange and create value.³¹ Virgin Atlantic's attraction to Google Glass and the platform offered by Sabre to airlines are examples of modern marketing tools. Sabre, which delivers travel data to the air transport industry, offers developers 150 application programming interfaces (APIs) and software hooks into core Sabre products. Sabre 2.0 helps in the development of smart applications. Sabre saw an average of 3,000 transactions per second using its data in the 1990s and claims, "[T]oday that number has ballooned up to 99,000 transactions per second. All of that data is a fantastic opportunity for useful tools to be created – tools that personalize and contextualize the broader travel experience – buying, planning, searching. Many of these APIs are based around intelligent searching, allowing developers to build applications that offer far more refined and granular search options."³²

Networks and platforms fit nicely into the value capture model (VCM) propounded by Michael Ryall in *The Harvard Business Review*, which involves a predictive theory using big data as well as game theory as applied to competitors and involves all parties to a transaction.³³ This is where networks and platforms come in, creating a web that weaves the entire fabric of the contract of carriage and potential transactions between the provider and client through simultaneous communications and connectivity. Ryall says,

The VCM framework replaces the firm's value chain with what I call a *value network map* – essentially, a productive social network with linkages defined by actual and potential transactions. The map has two major components . . . [T]he first is the firm's value network, which comprises the agents (typically, suppliers and customers) who conduct actual, value-

creating transactions with the firm. If no opportunities to create value exist beyond the network itself, there is no competition. Competition renders undeniable certain claims on the value produced. Without competition, the parties are left haggling among themselves, each attempting to persuade the others of the value they merit.³⁴

Data which gives the travel habits and travel history of customers, their individual travel preferences and other relevant personalized information that can be integrated in a corporate marketing strategy can immensely boost the competitive edge of an airline. Providers like Sabre offer such platforms to airlines, implicitly offering all airlines equality of opportunity to compete. Those who do not use these tools would do so at their own peril.

b. Legal Issues

i. Europe

Equality of opportunity to compete is protected by law, both to protect the consumer and to ensure fairness to the competitors in a market. While monopolies could effectively harm the consumer by degrading the quality of the product, raising prices or simply reducing production or provision, in the context of competition, disingenuous and devious competitors who have dominance in a market can employ various methods to ensure that their competitors do not have an equal opportunity to compete by simply making it impossible for the latter to enter the fray. They could do so by entering into anticompetitive agreements with others, merging with other dominant players, abusing dominant position or distorting the market. The philosophy of the Chicago Conference was that air services should connect the world by being available to consumers at a reasonable price, and they should offer value for money, all of which should be corollaries of perfect competition. One of the tools that the Chicago Convention employs to ensure this objective is to identify as one of ICAO's aims the prevention of economic waste caused by unreasonable competition.³⁵

It is incontrovertible that at the heart of the purpose of perfect competition that ensures equality of opportunity is consumer welfare. This is achieved by making competition deliver two basic products: enhanced consumer welfare and the efficient allocation of resources.³⁶ The constraints that any undertaking faces are determined by market definition, which identifies the product; the undertaking and competitors involved and their commercial practices; and the geographic location of the market. The undertaking includes every entity involved in an economic activity irrespective of the legal status or the manner in which such entity is funded.³⁷ An airline is deemed to be

offering goods and services to the consumer and by definition engages in an economic activity.³⁸

A good analogy that enables one to glean some concept of the types of anticompetitive conduct that would effectively preclude equality of opportunity of competitors is the Treaty on the Functioning of the European Union (TFEU).³⁹ Article 101(1) makes void *ab initio* all 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, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions. Also included were agreements that 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. This provision also appears in Article 85 of the Treaty of Rome,⁴⁰ which established the European Economic Community in 1957, which later became the European Union.

Abuse of dominant position is covered in Article 102 (which initially appeared in the Treaty of Rome as Article 86), which provides that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between member states. Such abuse may, in particular, consist in directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; or applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; making 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. A special responsibility devolves upon an enterprise in a dominant position not to let its business conduct distort the market. In *Michelin v. Commission*⁴¹ it was held that

For the purposes of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products. However, it must be noted that the determination of the

relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and behave to an appreciable extent independently of its competitors and customers and consumers.⁴²

Abuse of dominant position must apply to competitors who are as efficient and who offer a similar product to the market.⁴³ It has been held that the dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.⁴⁴ In *Ahmed Saeed Flugreisen and Others v. Zentrale Zur Bekämpfung Unlauteren Wettbewerbs Ahm*⁴⁵ – a case involving price fixing by dominant carriers on a route by the aeronautical authorities concerned – the European Court of Justice held that such an act was an infringement of the provisions in Article 4(3) of the Treaty of the European Union (TEU)⁴⁶ and Articles 101 and 102 of the TFEU. The court upheld the position submitted by the European Commission that “airlines authorized to serve a route which satisfies those requirements occupy, on that route, a joint dominant position, since price competition is eliminated by the concerted action with regard to tariffs, and other sorts of competition, for example with respect to capacity, frequently suffer the same fate as well under agreements concluded between the airlines.”⁴⁷

ii. United States

The Sherman Antitrust Act of 1890 stipulates in Section 1 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. Any person (including corporations and associations existing under or authorized by the laws of the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country) who contracts or conspires to restrain trade is guilty of a felony, and, on conviction thereof, punishable by fine, not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court seized of the matter. Section 2 is against the monopolization of trade, charging anyone who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, is guilty of a felony, and, on conviction thereof, is liable to be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, at the discretion of the court. In the 1945 case of *United States v. Aluminum Co. of America*⁴⁸ the court

upheld the principle of extra territoriality by saying that any state (in the United States) could legislate for its laws to apply to a foreign person outside its borders against an act committed by that person if such act affected the state concerned. This principle was later clarified by the Foreign Trade Antitrust Amendment Act 1982, which provides that the Sherman Act would only apply to trade or commerce with foreign nations if an act has a direct, substantial and foreseeable effect on trade and commerce in the United States.⁴⁹

In 1914 the United States Legislature passed the Clayton Act, which essentially prohibits any conduct that restricts trade. It must be noted that the philosophy behind these acts, particularly the Sherman Antitrust Act, as elucidated in the 1911 case of *Standard Oil Co. of New Jersey v. United States*,⁵⁰ was based on the “then existing practical conception of the law against restraint of trade, and the intent of Congress was not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which do not unduly restrain interstate or foreign commerce, but to protect that commerce from contracts or combinations by methods, whether old or new, which would constitute an interference with, or an undue restraint upon, it.”⁵¹

On August 16, 1977, an indictment was returned on Braniff Airways, charging the airline with participation in a combination and conspiracy in restraint of trade and commerce in violation of Section 1 of the Sherman Act, and with participation in a combination and conspiracy to monopolize trade and commerce in violation of Section 2 of the Sherman Act. It was claimed that, by this collusion, Braniff intended to impair its competitor – Southwest Airlines – and eliminate it from the market. Braniff alleged that its actions had been within the knowledge of the Civil Aeronautics Board (CAB) and that the CAB had acquiesced in the process. The court rejected this claim – that the CAB had acted inappropriately – and dismissed Braniff’s claim. In this context the issue of predatory pricing as an anticompetitive measure comes into focus, particularly in the context of networks, which would give carriers much flexibility in adversely affecting their competition. It must be noted that there is a balance of interest – that of competition ethics and giving the customer the optimal deal. In the 1986 case of *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*⁵² the Supreme Court suggested an approach of caution and compromise, while on the one hand warning against the effect of predatory pricing litigation on procompetitive conduct, and on the other hand imposing on the plaintiff the requirement of showing that the defendant would likely succeed in driving out competition and have the ability to recoup short-run losses after predation.

A case that would have an analogous reference to anticompetitive conduct in air transport is *Otter Tail Power Co. v. United States*,⁵³ where a power supplier used its

ownership of a network (the power lines) to foreclose retail competition. The court held that

the defendant has a monopoly in the relevant market and has consistently refused to deal with municipalities which desired to establish municipally owned systems on the alleged justification that to do so would impair its position of dominance in selling power at retail to towns in its service area. The court concludes that this conduct is prohibited by the Sherman Act. It is well established that the unilateral refusal to deal with another, motivated by a purpose to preserve a monopoly position, is illegal.⁵⁴

An interesting question arises in the use of networks by enterprises. Applying this example to air transport, could an airline that bundles the use of various networks and platforms and thereby gains cost advantages as well as sales over other airlines operating in the routes operated be guilty of anticompetitive conduct under the Sherman Act? Furthermore, could an airline make a sale of its core product conditional upon the customer purchasing a subsidiary but relevant product available in its network or through a platform used by that airline? In *United States v. Jerrold Electronics Corp.*,⁵⁵ a case involving a tie of maintenance and installation services in the sale of television antenna networks, the defendant developed a system whereby a single, large antenna would be installed at a high elevation, and then cables would carry the signal to subscribers below, which gave him a distinct advantage over the competitors in the market and enabled the defendant to connect to many more users and clients than his competitors. This additionally gave him huge cost benefits over them. The court held, “The defendant’s sales of community television antenna system equipment upon the condition that the purchaser subscribe to Jerrold engineering services and purchase their full requirements for system equipment from Jerrold, during some of the time sales on such conditions were made, constitute violations of § 1 of the Sherman Act.”⁵⁶

Another interesting decision can be seen in the 1992 case of *Eastman Kodak Co. v. Image Technical Services, Inc.*,⁵⁷ where Kodak claimed that a tie-in should be held an infringement of the Sherman Act only if such act was illegal. The court had to determine whether Kodak’s requirement of its customers – that repair services would be carried out by Kodak only if the customer purchased spare parts from Kodak – was illegal. Kodak anchored its argument – that this requirement was not illegal – on the basis that it did not have a monopoly on copiers. The Supreme Court held that the customers had been forced to a no-option aftersales situation that gave Kodak undue power. In *United States v. Microsoft Corp.*⁵⁸ a similar issue arose. In the mid-nineties the competitor to Microsoft was Netscape, which started in 1994 offering its browser, called Netscape. Microsoft came a year later with its own browser, called Internet Explorer, which was offered at a zero price and pre-installed on all Windows machines. Microsoft owns the

Windows operating system – a software program that runs the computer by assigning memory and allotting tasks – along with a number of popular software programs that run on Windows. The government’s case against Microsoft was that it was blatantly acting as a monopoly in operating systems, sustaining and advancing that monopoly through illegal exclusive contracts, incompatibilities and illegal ties that foreclose possible competition from Netscape and Java. Microsoft argued that consumers were not harmed by Microsoft’s offer and that they were free to choose between Microsoft and Netscape. Microsoft also denied that it had monopoly over the market. Finally, Microsoft argued that it included Internet Explorer in its operating system for technical functionality and efficiency.

Both the district court and later the appeals court upheld the government’s position, on the basis that Microsoft had retarded competition and implicitly warned competitors of an ominous fate if they competed against it.

5. Conclusion

The above discussions bring us back to the philosophy of the Chicago Convention 70 years on. We are on the threshold of momentous change and well into the world of networks, platforms and megatrends. In this context affording “equality of opportunity” to compete is not merely offering safety nets or preferential measures to disadvantaged carriers, but also bringing the rest of the underdeveloped world of air transport to the forefront. It is evident that there are strong anticompetitive laws and practices in place not only in Europe but also in Asia and other parts of the world. The first step is to establish the use to which the modern tools are put by airlines, whether it be economic or technical. The second step is to determine whether such use goes against the principles that have been discussed in this article. The third step is for the three watch dogs – ICAO, IATA (International Air Transport Association) and ACI (Airports Council International) – to collectively conduct a study and identify anticompetitive practices in relation to the current situation and legal regime. ICAO could address this issue under its “no country left behind” objective. IATA could address this issue under its mission to represent, lead and serve the airline industry and the Simplifying the Business programme. ACI could focus on this issue through its aim to keep airports affordable and airline prices stabilized. Interpretation of the Chicago Convention is in the hands of the council of ICAO, and if “equality of opportunity” to compete is in question with any ICAO member state against another, the council is given the authority under Article 84 of the convention to decide on any disagreement between two or more contracting states relating to the interpretation or application of the convention and its annexes that cannot be settled by negotiation. Any concerned state can apply to the

council. Furthermore, Article 84 provides that any contracting state may, subject to Article 85, appeal 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. Any such appeal has to be notified to the council within 60 days of receipt of notification of the decision of the council. *A fortiori*, and more compellingly, Article 86 provides that unless the council decides otherwise, any decision by the council on whether an international airline is operating in conformity with the provisions of the convention remains in effect unless reversed on appeal. On any other matter, decisions of the council shall, if appealed, be suspended until the appeal is decided. The decisions of the Permanent Court of International Justice and of an arbitral tribunal shall be final and binding. Finally, Article 87 puts the lid on the issue by bringing in the council strongly. It provides that each contracting state undertakes not to allow the operation of an airline of a contracting state through the airspace above its territory if the council has decided that the airline concerned is not conforming to a final decision rendered in accordance Article 86.

The first question to be addressed is whether the intent of the letter of invitation to the Chicago Convention – calling for the establishment of an international air service “pattern” so that all important trade population areas of the world may obtain the benefits accrued through air transportation – has been realized. If so, what is that pattern? If there is no such pattern, what could be done to create it?

Notwithstanding the perceived ambivalence of the convention’s provisions on the aims and objectives of ICAO in Article 44, the fact remains that ICAO has to meet the needs of the people of the world for safe, regular, economical and efficient air transport. The council can interpret the meaning and purpose of the Chicago Conference and interpret the Chicago Convention in the current context without being hung up on past constraints on this issue. It should take a more active part in air transport economics and show the “leadership” that the sixth Air Transport Conference called for and which is recognized in ICAO’s Strategic Objective on air transport. The “equality of opportunity” phrase has been misunderstood, and the Chicago Convention has been misquoted at many ICAO conferences on this point, and it is time this matter was put to rest.

Endnotes

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² Convention on International Civil Aviation, signed at Chicago on 7 December 1944. See ICAO Doc 7300/9: Ninth Edition, 2006.

³ The 53 states are listed in Proceedings of the International Civil Aviation Conference, Chicago, Illinois, November 1-December 7, 1944, Vol. I & II. Washington DC: U.S. Department of State; U.S. Government Printing Office, 1948 (State Department Publication 2820), at 13.

⁴ The Danish Minister in Washington and the Thai Minister in Washington.

⁵ Proceedings of the International Civil Aviation Conference, *supra*, note 3 at 11.

⁶ For background reading, see Ruwantissa I. R. Abeyratne, The Economic Relevance of the Chicago Convention: A Retrospective Study, *Annals of Air and Space Law*, Vol. XIX – Part II, 1994, 3-80.

⁷ Nicolas Mateesco Matte, *Treatise on Air-Aeronautical Law*. Montreal: Institute and Centre of Air and Space Law, McGill University, 1981, at 128. It is noted that Great Britain (as it was then called) opposed this characterization of the proposed international organization, and proposed considerable authority to the body. Australia and New Zealand went even further by asserting that, for the future prevention of war, international ownership of air routes must vest with such an organization vested with an international flag. Canada suggested that an international air ownership should be substituted by an international air service. See Matte., *id.*, 129-130.

⁸ See Nigel Hamilton, *Commander in Chief: FDR's Battle with Churchill, 1943*. Boston, New York: Houghton Mifflin Harcourt, 2016, at 4-5.

⁹ *Id.* 23.

¹⁰ *Id.* 55.

¹¹ *Proceedings of the International Civil Aviation Conference, supra*, note 3 at 64.

¹² The words of the British delegate were prophetic. The subject of subsidies in air transport became contentious and is currently a much debated subject among the air transport community. See Ruwantissa Abeyratne, The Law of Subsidies in Air Transport Services, *Estey Journal of International Law and Trade Policy*, Volume 18 Number 1, 2017, 31-49.

¹³ *Proceedings of the International Civil Aviation Conference, supra*, n. 3 at 73.

¹⁴ *Id.* 132.

¹⁵ John Cobb Cooper, Backgrounds of International Public Air Law, *Yearbook of Air and Space Law 1965*. Montreal: McGill University Press, 1967, at 26-27.

¹⁶ See Ruwantissa Abeyratne, *The Convention on International Civil Aviation: A Commentary*. New York: Springer, 2013.

¹⁷ Ruwantissa Abeyratne, *Air Navigation Law*. New York: Springer, 2012.

¹⁸ See Ruwantissa Abeyratne, Reinventing ICAO'S Role in Air Transport – A Compelling Need? *Issues in Aviation Law and Policy*, Volume 13, Number 1, 2013, 9-29. See also by the same author, *Regulation of International Air Transport – The Slumbering Sentinels*. New York: Springer, 2013.

¹⁹ *ICAO-ICM Study on Competition and Air Connectivity*. Montreal: ICAO HQ, 31 March 2016.

²⁰ A network is any market in which the consumption of a good by one consumer has a positive impact on the value of that good's consumption by another consumer. See

Max Schanzbach, Network Effects and Antitrust Law: Predation, Affirmative Defenses, and the Case of U.S. v. Microsoft, 2002 STAN. TECH. LAW REV. 4.

²¹[http://www.icao.int/sustainability/Compendium/Documents/ICAO%20Competition%20Compendium%20\(Jan.%202017\).pdf](http://www.icao.int/sustainability/Compendium/Documents/ICAO%20Competition%20Compendium%20(Jan.%202017).pdf)

²² *Policy and Guidance Material on the Economic Regulation of International Air Transport*, Doc 9587 (Third Edition – 2008), *Manual on the Regulation of International Air Transport* (Doc 9626), and *ICAO's Policies on Taxation in the Field of International Air Transport* (Doc 8632).

²³ ATConf/6-WP/104, 22/3/13, 2.1-3.

²⁴ Progress Report on The Development of International Agreements on The Liberalization of Market Access, Air Cargo and Air Carrier Ownership and Control, Presented by the ICAO Council, A39-WP/5 EC/3 5/7/16, at 2.

²⁵ *Proceedings of the International Civil Aviation Conference*, *supra*, note 3 at 65.

²⁶ FAIR COMPETITION AND REGULATORY COOPERATION IN THE AVIATION SECTOR, ATConf/6-WP/62 14/2/13, at 2.

²⁷ See *Study on Preferential Measures for Developing Countries*, ICAO Doc AT-WP/1789, 22/8/96 at A-7 – A-9. For a more recent revision of guidelines, see *Policy and Guidance Material on the Economic Regulation of International Air Transport*, ICAO Doc, 9587, Second Edition, 1999, Appendix 3, at A3-1 - A3-3.

²⁸ Michael Porter, *On Competition*. Boston: Harvard Business Review Book Series, 1996, at 155.

²⁹ *Oxford Economics report on why Dubai's aviation model works*, <http://theemiratesgroup.com/english/news-events/news-releases/news-details.aspx?article=680905&offset=88>

³⁰ *Ibid.*

³¹ See Alex Moazed & Nicholas L. Johnson, *Modern Monopolies*. New York: St. Martin's Press, 2016, at 5.

³² Ben Kepes, Sabre Helps to Deliver Airline 2.0, Launches a Developer Platform, *Forbes*, Aug 7, 2014, <https://www.forbes.com/sites/benkepes/2014/08/07/sabre-helps-to-deliver-airline-2-0-launches-a-developer-platform/#76bb6dc972e4>,

³³ See Michael Ryall, The New Dynamics of Competition, *Harvard Business Review*, June 2013, <https://hbr.org/2013/06/the-new-dynamics-of-competition>

³⁴ *Ibid.*

³⁵ Chicago Convention, *supra*, note 2, Article 44 e).

³⁶ See speech of European Commissioner for Competition Policy Neelie Kroes, SPEECH/05/512, 15 September 2005.

³⁷ *Hofner & Elser v. Macrotron GmbH*, Case C-41/90 [1991] ECR I -1979.

³⁸ *In re. Pavlov*, Case C-180/98 etc [2000] ECR I-6451.

³⁹ Version of the Treaty on the Functioning of the European Union, 2012/C 326/01, Official Journal C 326, 26/10/2012 P. 0001 – 0390, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

⁴⁰ The Treaty of Rome, 25 March 1957. See http://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf

⁴¹ *Michelin v. Commission*, Case 322/81 [1983] ECR 3461.

⁴² <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0322>

⁴³ *Deutsche Telekom AG v. Commission*, [2010] ECR I 000.

⁴⁴ See *Hoffmann-La Roche v. Commission* [1979] Case 85/76] ECR 461, paragraph 38, and Case C-202/07 P and *France Télécom v. Commission* [2009] ECR I-2369, paragraph 103.

⁴⁵ Case 66/86 [1989] ECR 803.

⁴⁶ Article 4(3) stipulates that, pursuant to the principle of sincere cooperation, the Union and the member states are required, in full mutual respect, to assist each other in carrying out tasks which flow from the treaties (the Treaty on European Union and the Treaty on the Functioning of the European Union). The member states are further required to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union.

⁴⁷ http://eur-lex.europa.eu/resource.html?uri=cellar:0a2ec299-1971-44b3-aca584c88b161aaa.0002.06/DOC_1&format=PDF

⁴⁸ 148 F.2d 416 (2nd Cir 1945).

⁴⁹ See *Hartford Fire Insurance Co. v. California* 509 US 764 (1993).

⁵⁰ 221 U.S. 1 (1911).

⁵¹ *Id.* 3.

⁵² 475 U.S. 574 (1986).

⁵³ 331 F. Supp. 54 (1971).

⁵⁴ *Id.* 58.

⁵⁵ 187 F. Supp. 545 (D.C. Pa. 1960).

⁵⁶ <http://law.justia.com/cases/federal/district-courts/FSupp/187/545/2095116/>

⁵⁷ 504 U.S. 451 (1992).

⁵⁸ 87 F. Supp. 2d 30 (2000), 2001 U.S. App. LEXIS 14324 (D.C. Cir. 2001).