Volume 24 Number 1 2023/pp. 12-27 www.usask.ca/esteyjournal

The Estey

Journal of International Law and Trade Policy

Platform Annexation and Multi Homing in Air Transport – Some Emerging Perspectives

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Abstract

Laws and regulations applicable to commercial air transport are based on the principle of equality of opportunity for carriers to compete when offering air transport services. As such, anti competitive practices of air carriers abusing their dominant position to gain a market advantage over their competitors and in turn distorting the market are justiciable at competition law. One of such anti competitive practices could occur when a carrier controls the tools, products, and services of another carrier by annexing the latter's platform of computer reservation display systems, which would thereby effectively preclude the consumer from multi homing and his ability to access all platforms offered by different carriers on an international route. The International Civil Aviation Organization has, since 1996 addressed policy pertaining to computer reservation systems (CRS) and the prevention of anti-competitive activities. The Council of ICAO adopted in 1996 a revised Code of Conduct for the Regulation and Operation of Computer Reservation Systems. This Code – which revised an earlier edition from 1991 - has five fundamental principles where States should: take into account developments in national and regional regulations as well as technological and commercial developments since the adoption of the previous Code in 1991; reflect transparency, accessibility and non-discriminatory application; include elements which give particular attention to booking data and display criteria; maintain particular focus on the participation of developed countries, and address the retention of Article 10 of the Code on safeguarding the interests of developing countries; and seek compatibility with the General Agreement on Trade in Services (GATS) Annex of the World Trade Organization which also covers CRS. However, no distinct link has been

established between abuse of dominant position by CRS systems and platform annexation.

This article examines and addresses the principles of platform annexation and multi homing using analogies as well as legal and regulatory principles and inquires how platform annexing and multi homing are relevant to air transport.

Keywords: airline computer reservation systems, antitrust, competition, GATS, multi homing, platform annexation

1. Introduction

The marketing and sale of air transport occurs in several digital platforms[2] making the air transport product vulnerable to annexation by a platform that takes control of tools, products, and services of other platforms and competing markets, thus effectively precluding the consumer (the user of the air transport product) from "multi homing" or exercising the ability to traverse the internet[3] in search of the best product available.

A good analogy is the non traditional "road taxi" services Uber and Lyft. Each time a person (multi homer) seeking to hire a ride on any one of these services would check the price of a ride on both Uber and Lyft. A 2019 Report said: "A user that single-homes bestows market power on the platform she uses exclusively because advertisers and other content providers *can only* get the user's attention by going through that platform. While users sometimes have the ability to employ multiple services, there is usually a convenience cost to doing so. Making multi-homing easier will be a key element in encouraging competition".[4]

Digital platforms play an intermediary role between the consumer and the supplier and therefore it is inevitable, in this digital era of commerce that platforms would vie for market dominance, thus displacing and creating an imbalance in the market that would result in an erosion of fair and equal opportunity to compete among providers. According to commentators "competitive pressure on both sides of the market (*ceterus paribus*) keep quality and prices at competitive levels, benefiting market participants. In the platform context, the equilibrium price is known as the "take rate," the gap between what the buyers pay and what the seller receives. In order to avoid low take rates and strong competition, market leaders in platform markets often search for tactics that help them reduce multi-homing in the short run and thus deprive rivals of scale economies and network effects in the longer run"[5]

Abuse of dominant position gained by a platform in annexing other platforms may not only destabilize the market and degrade interoperability but would also erode the principles of consumer protection as well as the protection of air carriers who are deprived by that practice from equality of opportunity (to compete) as embodied in the Chicago Convention.[6] In a digital context, an analogy can be seen in computer reservation systems (CRS) of airlines where prominence is acquired by one carrier over others in the display of flight information. The Sherman Antitrust Act (SAA) 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 either 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 that is found to be 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 of SAA 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, to be 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 case of *Alaska Airlines, Inc.; Midway Airlines; Muse Air Corporation,* v. *United Airlines, Inc., and Alaska Airlines, Inc, and Northwest Airlines, Inc., United Airlines, Inc., and American Airlines, Inc*.,[7] the plaintiffs, each previous subscribers to Apollo and SABRE, were unhappy about the ability of their largest competitors to extract substantial booking fees from them. Accordingly, the plaintiffs brought suit under SAA. Plaintiffs argued that United and American had individually violated Section 2 of the Sherman Act by, among other things: denying plaintiffs reasonable access to their CRS services, which were alleged to be "essential facilities;" and "leveraging" their dominance in the CRS market to gain a competitive advantage in the downstream air transportation market. The district court granted summary judgment in favour of defendants on both claims, holding that: The traditional claim for monopolization has two elements: the possession of monopoly power in the relevant market; and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

In Re Air Passenger Computer Reservation Systems,[8] was a case where the plaintiffs, a group of ten airlines ("USAir plaintiffs"), filed an antitrust action against defendants United Airlines ("United") and American Airlines ("American"), claiming damages from monopolization or attempted monopolization by each defendant of the CRS industry. The plaintiffs averred *inter alia* that the predatory pricing of the defendants was subsidized for over seven years from incremental revenues received by the vendor airlines in the air transportation market through "biasing" the system.

The court observed, citing an earlier decision handed down by the Supreme Court,[9] that certain criteria had to be met that would enable the plaintiffs to succeed in recourse: (1) whether the nature of the plaintiff's injury is the type the antitrust laws were intended to forestall, (2) the directness of the injury; (3) the existence of more direct victims; (4) the risk of duplicative recovery; and (5) the complexity of apportioning damages.[10] The court held that the direct victims of an attempted monopolization claim are the competing CRS vendors on the basis that "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the [plaintiffs] to perform the office of a private attorney."

This article will examine the legal and regulatory aspects of how platform annexing is relevant to air transport.

2. Initiatives of IACO

The International Civil Aviation Organization (ICAO)[11] anchors itself on the fundamental principle enunciated in the Chicago Convention – that the air transport product should be offered to the consumer (passenger and customer who employs a carrier to carry his cargo) under principles of equality of opportunity to compete uniformly by all carriers involved. In other words, there should not be anti-competitive activity when carriers compete with each other. ICAO's policies on computer reservation systems (CRS) and the prevention of anti-competitive activities in the display of CRS goes back to 1996 when the Council of ICAO adopted a revised Code of Conduct for the Regulation and Operation of Computer Reservation Systems. This Code – which revised an earlier edition of 1991 - has five fundamental principles where States should: take into account developments in national and regional regulations as well as technological and commercial developments since the adoption of the previous Code in 1991; reflect transparency, accessibility and non-discriminatory application; include elements which give particular attention to booking data and display criteria; maintain particular focus on the participation of developed countries, and address the retention of Article 10 of the Code on safeguarding the interests of developing countries;

and seek compatibility with the General Agreement on Trade in Services (GATS) Annex[12] which also covers CRS.[13] Assembly Resolution A41-27 adopted at the 41st session of the ICAO Assembly in 2022 recognized the symbiosis between ICAO's role (inter alia in CRS) and the General Agreement on trade in Services (GATS) of the World Trade Organization which has CRS as an item in the Annex.

Appendix A of the ICAO Resolution[14] reaffirmed the need for ICAO to continue to explore future regulatory arrangements and develop recommendations and proposals to meet the challenges facing international air transport, responding to the internal and external changes affecting it. It also recognizes that such arrangements should create an environment in which international air transport may develop and continue to flourish in an orderly, efficient and economical manner without compromising safety and security, while ensuring the interests of all Member States and their effective and sustained participation in international air transport while reaffirming the primary role of ICAO in developing policy guidance on the regulation of international air transport.

Resolution A41-27 also requests ICAO member States to take into account rights and obligations vis-à-vis those of ICAO Member States which are not members of the WTO and to examine carefully the implications of any proposed inclusion of an additional air transport service or activity in the GATS, bearing in mind, in particular, the close linkage between economic, environmental, safety and security aspects of international air transport. States are also requested to file with ICAO under Article 83 of the Convention copies of any exemptions and specific commitments pertaining to international air transport made under the GATS while requesting the WTO, its Member States and Observers to accord due consideration to: a) the particular regulatory structures and arrangements of international air transport and the liberalization taking place at the bilateral, subregional and regional levels; b) ICAO's constitutional responsibility for international air transport and, in particular, for its safety and security; and c) ICAO's existing policy and guidance material on the economic regulation of international air transport and its continued work in the field and further requests the Council to maintain communication, cooperation and coordination between ICAO, the WTO, and other intergovernmental and non-governmental organizations dealing with trade in services.

Earlier, the overall ICAO approach to competition became evident in the Conclusions of the Worldwide Air Transport Conference (ATConf/5) held in Montreal from 24 to 28 March 2003, which called for aviation specific safeguards of carriers adversely affected by anti-competitive practices of other airlines, while recognizing that general competition laws are an effective tool, given the differences in competition regimes and the differing stages of liberalization among States which had distinct

regulatory frameworks for international air transport. Implicitly, ATConf/5 called for an agreed set of anti-competitive practices which can be used, and if necessary modified or added to, by States as indications to trigger necessary regulatory action.

The Conference suggested that States consider a draft model clause that could be incorporated in their bilateral or multilateral air transport services agreements in this context which read as follows:

> Safeguards against anti-competitive practices
>
> 1. The Parties agree that the following airline practices may be regarded as possible unfair competitive practices which may merit closer examination:
>   1. charging fares and rates on routes at levels which are, in the aggregate, insufficient to cover the costs of providing the services to which they relate;
>   2. the addition of excessive capacity or frequency of service;
>   3. the practices in question are sustained rather than temporary;
>   4. the practices in question have a serious negative economic effect on, or cause significant damage to, another airline;
>   5. the practices in question reflect an apparent intent or have the probable effect, of crippling, excluding or driving another airline from the market; and
>   6. behaviour indicating an abuse of dominant position on the route.
> 2. If the aeronautical authorities of one Party consider that an operation or operations intended or conducted by the designated airline of the other Party may constitute unfair competitive behaviour in accordance with the indicators listed in paragraph 1, they may request consultation in accordance with Article __ (Consultation) with a view to resolving the problem. Any such request shall be accompanied by notice of the reasons for the request, and the consultation shall begin within 15 days of the request.
> 3. If the Parties fail to reach a resolution of the problem through consultations, either Party may invoke the dispute resolution mechanism under Article __ (Settlement of disputes) to resolve the dispute.

This model clause has been made part of the ICAO Template Air Services Agreements (TASA), Appendix 1. to ICAO Doc 9587 Policy and Guidance Material on the Economic Regulation of International Air Transport.

Anticompetitive Behaviours under Competition Law

Under competition law, we may distinguish four broad categories of anticompetitive behaviours, to which effective competition rules and review procedures should apply in order to preserve consumer welfare and ensure fair competition:

1. Anticompetitive agreements/arrangements

″Hard core cartels″ - when firms agree not to compete with one another - are the most serious violations of competition law. The categories of conduct most often defined as hard core cartels are price fixing, output restrictions, market allocation and bid rigging (the submission of collusive tenders). Increasingly, prohibition against hard core cartels is now considered to be an indispensable part of national competition laws (See OECD on “Cartels and anti-competitive agreements")

In the air transport sector, many airlines have entered into commercial relationships with foreign/domestic carriers in order to be able to expand their networks and to remain competitive and to deepen cooperation in a sector where full-scale mergers and acquisitions are difficult to take place. These complex agreements or arrangements may include ticketing-and-baggage agreements, joint-fare agreements, dry and wet leases, reciprocal airport agreements, code-sharing, blocked space relationships, computer reservations systems joint ventures, joint sales offices and telephone centres, e-commerce joint ventures, frequent flyer programs alliances, coordination of pricing and scheduling, pooling of traffic and revenue, and more recently, metal neutral joint ventures. Such agreements or arrangements may have adverse effects on users through preventing, restricting or distorting competition in certain conditions if no appropriate control mechanisms are put in place to prevent that.

2. Abuse of dominance/monopoly

Behaviour falling under the abuse of dominant position/monopoly can be broadly grouped into two categories: exclusionary abuses which aim at driving competitors out of the market; and exploitative abuses where the dominant company exploits its market power against customers. Commonly raised concerns in the international air transport sector are related to predatory pricing or capacity dumping by dominant market players.

3. Mergers and acquisitions

Full-scale international mergers between airlines from different States are relatively rare, except in cases where specific arrangements enable each airline to preserve nationality requirements under bilateral air services agreements, specific to the air transport sector. The concentration attained through mergers and acquisitions might impede effective competition, in particular as a result of the creation or strengthening of a dominant position. A considerable body of rules has developed in the areas of airline mergers. There are strong incentives from the regulators' perspective to encourage convergence and consistency in decision-making by different competition authorities in the area of cross-border mergers and acquisitions which encouraged establishing cooperation between competition authorities.

4. State aid/Subsidies

Any aid or subsidies granted by a State or through State resources may distort or threatens to distort competition or create inefficiencies by benefiting certain competitor(s). On the other hand, state aid/subsidies may provide an important instrument to address market failures such as providing essential air services to communities to support economic and social development.

Laws and regulations have been developed by certain States and regional organizations to define state aid/subsidies, lay down disciplines for their use, introduce ex ante or ex post assessment mechanisms and provide for actions that States can take to counter their negative effects.

In 2015 the Council of ICAO adopted Core Principles on Consumer Protection[15] and New Long-Term Vision for Air Transport Liberalization for the consideration of States when they were considering their policies for market access and consumer protection in the air transport field. The principles were identified in three phases of a customer's experience: before, during and after travel. The first phase is directly linked to platform annexation and multi homing in that it says that prior to travelling, passengers should benefit from sufficient levels of advance information and customer guidance, given the wide variety of air transport products in the market and associated legal and other protections which may apply. Product and price transparency is also recommended as a basic customer right.

As for the second phase – during travel – the core principles suggest that passengers should be provided regular updates on any special circumstances or service disruptions

which arise, as well as due attention in cases of a service disruption. This could include rerouting, refund, care, and/or compensation. The core principles also alert airlines that they should plan for situations of massive disruptions characterized by multiple flight cancellations and reiterate the fundamental right to fair access for persons with disabilities.

The third phase is also integral to linking platform annexation and multi homing in that the principles call for the availability of access after the travel experience, customers should have access to efficient complaint handling procedures that should be established and clearly communicated to customers. With regard to the core principles the ICAO stated: "improving the level of regulatory convergence in global civil aviation is at the heart of ICAO's role, and these new core principles represent an important milestone in our continuing effort to foster harmonization in worldwide air transport regulation".[16]

The Sixth Worldwide Air Transport Conference (ATConf/6), held from 18 to 22 March 2013, recommended that ICAO develop a compendium of competition policies and practices in force nationally or regionally. The Compendium was developed with a view to providing easy and quick access to relevant information. Where possible, hyperlinks were inserted as references. In certain cases, the material is only available in a language other than English. At the 41st Session of the ICAO Assembly held from 27 September to 7 October 2022 the Assembly adopted Resolution A41-27[17] which *inter alia* invites Member States with experience in various forms of joint operation of international air services to submit to the Council, on a continuing basis, information concerning their experience, so that ICAO may have information that might be of assistance to Member States and requests the Council of ICAO to address the remaining issues of concern to be able to make progress towards a Convention on Foreign Investment in Airlines, which aims to liberalize air carrier ownership and control on a multilateral basis in line with the ICAO Long-term Vision for International Air Transport Liberalization. The Resolution also contains a request of the Council to give assistance, when approached, to Member States that take the initiative in developing cooperative arrangements for the joint ownership and operation of international air services, directly among themselves or whose airlines develop such arrangements, and to promptly circulate to States information concerning such cooperative arrangements.

Section III of Resolution A41-27 is on cooperation in regulatory arrangements and competition which recognizes that certain economic, financial and operational constraints unilaterally introduced at the national level affect the stability of, and tend to create unfair discriminatory trading practices in, international air transport and might be incompatible with the basic principles of the Convention and the orderly and

harmonious development of international air transport. It also points out that ICAO has developed policy guidance for States to foster harmonization and compatibility of regulatory approaches and practices for international air transport, including on competition matters. In the action paragraphs the Resolution urges Member States to take into consideration that fair competition is an important general principle in the operation of international air transport services and to develop competition laws and policies that apply to air transport, taking into account national sovereignty and to consider ICAO guidance on competition.

The Resolution also calls on States to encourage cooperation among regional and/or national competition authorities when dealing with matters relating to international air transport, including in the context of approval of alliances and mergers and encourages Member States to incorporate the basic principles of fair and equal opportunity to compete, non-discrimination, transparency, harmonization, compatibility and cooperation set out in the Chicago Convention and embodied in ICAO's policies and guidance in national legislation, rules and regulations, and in air services agreements. Finally, the Council of ICAO is requested to develop tools such as an exchange forum to enhance cooperation, dialogue and exchange of information on fair competition between States with a view to promoting compatible regulatory approaches towards international air transport; and to continue to monitor developments in the area of competition in international air transport and update, as necessary, its policies and guidance on fair competition.

3. Analogous Anti Competitive Business Practices

In 2015 The European Union (EU) opened investigations into Google's antitrust practices of which were calculated to give prominence to Google's favorite platform which was the mobile operating system Android which would in turn obviate other systems. The inquiry of EU was "whether Google has illegally hindered the development and market access of rival mobile applications or services by requiring or incentivizing smartphone and tablet manufacturers to exclusively pre- install Google's own applications or services"[18]. The EU Commissioner in charge of the investigation said:: "The Commission's objective is to apply EU antitrust rules to ensure that companies operating in Europe, wherever they may be based, do not artificially deny European consumers as wide a choice as possible or stifle innovation. In the case of Google, I am concerned that the company has given an unfair advantage to its own comparison-shopping service, in breach of EU antitrust rules. Google now has the opportunity to convince the Commission to the contrary. However, if the investigation

confirmed our concerns, Google would have to face the legal consequences and change the way it does business in Europe".[19] If this analogy were to be applied to the sale of air transport it is incontrovertible that a platform that displays available air transport services on a particular sector cannot obviate or degrade the display of such services that are presented to the consumer by other platforms by controlling the tools, products and services offered by the latter.

In the same year, the US Federal Trade Commission (FTC) embarked on an inquiry whether Google' search engine was guilty of abusing its dominant position against other search engines, but withdrew its inquiry when Google undertook to change its practices.[20]

Big data and their collection by platforms play a big role in anti-competitive business practices. A year later, in 2016 in an EU investigation into Google's commercial practices and their possible infringement of data protection rules of the EU, The President of the Bundeskartellamt, stated: "dominant companies are subject to special obligations. These include the use of adequate terms of service as far as these are relevant to the market. For advertising financed internet services such as Facebook, user data are hugely important. For this reason, it is essential to also examine under the aspect of abuse of market power whether the consumers are sufficiently informed about the type and extent of data collected".[21] Once an incumbent platform is established it is difficult for other platforms to enter or survive[22] partly because they could be annexed by the incumbent. The Federal Trade Commission (FTC) of the United States has published its policy which says that it is illegal for businesses to act together in ways that can limit competition, lead to higher prices, or hinder other businesses from entering the market. The policy challenges unreasonable horizontal restraints of trade, particularly when competitors interact to such a degree that they are no longer acting independently, or when collaborating gives competitors the ability to wield market power together. Certain acts are considered so harmful to competition that they are almost always illegal. These include arrangements to fix prices, divide markets, or rig bids.

The FTC further states: "it is unlawful for a company to monopolize or attempt to monopolize trade, meaning a firm with market power cannot act to maintain or acquire a dominant position by excluding competitors or preventing new entry. It is important to note that it is not illegal for a company to have a monopoly, to charge "high prices," or to try to achieve a monopoly position by aggressive methods. A company violates the law only if it tries to maintain or acquire a monopoly through unreasonable methods".[23]

There are open, as well as closed platforms, where the latter allows for extension of a platform for other applications. One commentator explains: "In some markets the same firm might provide both open and closed platforms. For example, high-end phones usually come installed with an open operating system that allows for third-party applications. The Nokia N95 comes with the S60 software that permits users to install software from third party application developers. Cheaper mobile phones, such as the Nokia 1600, are often closed and does not have the ability to install applications. Interestingly, when Apple entered the mobile phone market in June 2007 with the iPhone, they entered with a closed platform. Native third party application development was impossible for the phone, upsetting developers that had become used to open high-end phones. Apple has, however, announced that third-party application development will be possible for the iPhone in June 2008".[24]

The Australian Competition and Consumer Commission has a similar policy which says *inter alia* that business conduct can be illegal when it has the purpose, effect or likely effect of substantially lessening competition in a market under the following circumstances: when business behavior interferes with or damages the competitive process in a market in a meaningful way, usually by deterring, hindering or preventing competition; competition is substantially lessened when, as a result of the business's behavior; the business's competitors are restricted from competing effectively; the business is able to significantly and sustainably increase its prices; it would be very hard for a new business to set up and start competing. Competition can also be substantially lessened when two or more businesses engage in conduct that weakens competition.[25]

In the European Union, Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits the abuse of a dominant position by one or more undertakings having a dominant position in a particular market within the EU, or in a substantial part of it, insofar as it may affect trade between EU Member States. "A business can be said to be in a dominant position where it *possesses "market power" and can therefore behave, to an appreciable extent, independently of its competitors, customers and, ultimately, consumers*. Whether a business is dominant is a complex question of law and economics but, broadly speaking, concerns will begin to arise where a business has a share of 35 to 40 per cent or more of supplies or purchases of goods or services in a properly defined geographical and product market. The level of market share is a guide only: the key issue is whether the business in question has market power".[26]

4. Conclusion

The problem with air transport has been that its legal and regulatory structure got off the wrong foot at the start. Whereas the theme at the Chicago Conference of 1944 which gave way to the Chicago Convention was connectivity of "the peoples of the world" to promote "friendship and understanding" among them through air carriers which operated air services with "equality of opportunity" to compete with one another, the focus shifted to the commercial viability of national carriers through intense competition and polarized protectionism. In the process, the consumer (passenger) was forgotten. This set the scene for dominance by the strong carrier over the weaker ones, buttressed, aided and abetted by two restrictive provisions in the Chicago Convention – Article 1 which absolutely grants peremptory sovereignty to States over the air space above their territory, and Article 6 which provides that no scheduled international air transport service can operate into a State without that State's permission or authorization.

In this context ICAO wields little or no power under Article 44 of the Chicago Convention to prescribe global rules on the commercial aspects of air transport (unlike its ability to develop the "principles and techniques of international air navigation") as it only has only an obligation to "foster the planning and development of international air transport". This gives air carriers – under the auspices of their supportive national governments – ample leeway to indulge in anti competitive practices at the expense of the consumer of the air transport product. One example is the decision handed down by the European Commission in February 2004 regarding the Ryanair-Charleroi issue[27] that raised interesting perspectives both from a competition law angle as well as a regulatory context. *A fortiori*, the decision set the tone for a re-examination of the fundamental concept of competition in the Common Market as embodied in Article 85.1. a) of the Treaty of Rome which pronounces that any agreement which distorts competition is void.

If, in future instances, platform annexation that prevents a customer from multi homing in search of equitable air transport services is brought into adjudication, it would be worthwhile to remember that competition law *de lege ferenda* – which is law as it should be if the rules were changed to accord with good policy – would dictate that in a state of "perfect competition", there would be a benchmark for evaluating performance in actual markets. Perfect competition exists when an industry has a large number of business firms as well as buyers; the firms on the average are small; and buyers and sellers have complete knowledge of all transactions within the market. The practical advantages of these three elements, where a large number of small firms and

many buyers compete, is that the power to influence the behavior of the participants in the market is effectively spread out so that no single competitor has the ability to dictate the terms on which the exchange of goods and services takes place. This ensures that market results are truly impersonal.

Endnotes

[1] Professor Abeyratne, DCL, PhD, LLM., LLB, FRAeS, is Former Senior Legal Officer at the International Civil Aviation Organization. He is currently Visiting Professor, Aviation Law and Policy, McGill University in Canada and Senior Associate, Aviation Strategies International. The author has incorporated some text from his earlier publications in this article as relevant.

[2] It is argued that, from an economic sense "a platform has more than one side. For example, a platform might bring together buyers and sellers of a good or service (a two-sided market) or readers, publishers, and advertisers (a three-sided market). In this setting, network effects (often across sides of the market) are usually critical. The buyers want to shop where there are sufficient sellers. The sellers want to post their goods for sale where there are sufficient buyers. A new platform will have a hard time attracting buyers when it does not have sellers and vice versa, which in principle makes for a significant entry barrier". See Susan Athey, Fiona Scott Morton, *infra* note 5.

[3] The Internet is the network created by the interconnection of computers and computer networks worldwide. It is not a tangible or physical entity but remains an amorphous and giant network which links together numerous smaller groupings of computer networks which are linked together. Within this intangible spatial concept lies the entirety of the computer spectrum, commonly called 'cyberspace'. Cyberspace can be described as a global medium of communication which links people, corporations, institutions and governments throughout the world.

[4] Stigler Committee on Digital Platforms, , Final Report, Stigler Center for the Study of the Economy and the State, Chicago Booth, at 2

[5] Susan Athey, Fiona Scott Morton, Platform Annexation, March 2021. See https://digitaleconomy.stanford.edu/publications/platform-annexation/

[6] Convention on International Civil Aviation signed at Chicago on 7 December 1944 which is the international treaty containing provisions governing international civil aviation. The Preamble to the treaty says *inter alia* that… the undersigned governments having agreed 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". See ICAO Doc 7300/9 Ninth Edition, 2006. In August 1945, at the first meeting of the Opening Session of the Interim Council of the Provisional International Civil Aviation Organization (PICAO), the Hon. C.D. Howe, Minister of Reconstruction, Canada said: We (Canada) believe that there must be greater freedom for development of international air transport and that this freedom may best be obtained within a framework which provides equality of opportunity and rewards for efficiency. See *Proceedings of the International Civil Aviation Conference*, Chicago, Illinois, November 1–December 7, 1944 United States Government Printing Office: Washington, 1948 at 65.

[7] 948 F.2d 536 (1991).

[8] 727 F. Supp. 564 (C.D. Cal. 1989), US District Court for the Central District of California, 727 F. Supp. 56.

[9] *Associated General Contractors of California, Inc*. v. *California State Council of Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983).

[10] *Id*. at 538-47, 103 S. Ct. at 908-13.
[11] The International Civil Aviation Organization (ICAO) is the specialized agency of the United Nations handling issues of international civil aviation. ICAO was established by the Convention on International Civil Aviation (Chicago Convention). The overarching aims and objectives of ICAO, as contained in Article 44 of the Convention, are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport to meet the needs of the peoples for safe, regular, efficient, and economical air transport. ICAO has 193 member States, who become members of ICAO by ratifying or otherwise issuing notice of adherence to the Chicago Convention.
[12] The World Trade Organization's Annex on Trade in Services (air transport) defines CRS as "services provided by computerized systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued. "Selling and marketing of air transport services" mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising, and distribution. These activities do not include the pricing of air transport services nor the applicable conditions. *https://www.wto.org/english/tratop_e/serv_e/9-anats_e.htm*
[13] See Generally, Ruwantissa I .R. Abeyratne, *Emergent Commercial Trends and Aviation Safety*, Ashgate: Aldershot, 1999 at 87-100.
[14] Assembly resolutions are formal expressions of the opinions of States reflecting their collective will and that they are merely the result of political compromises where no legal force, credibility or legitimacy can be ascribed to them. Professor Ian Brownlie says that decisions by international conferences and organizations can in principle only bind those States accepting them. See Ian Brownlie, *Principles of Public International Law*, (1990 4th Ed.) Clarendon Press: Oxford, 691. Professor Malcolm Shaw, referring to the binding force of United Nations General Assembly Resolutions states: "...one must be alive to the dangers in ascribing legal value to everything that emanates from the Assembly. Resolutions are often the results of political compromises and arrangements and, comprehended in that sense, never intended to constitute binding norms. Great care must be taken in moving from a plethora of practice to the identification of legal norms." See Malcolm N. Shaw, *International Law*, (2003 Fifth Ed) Cambridge University Press, 110.
[15] See https://www.icao.int/sustainability/SiteAssets/pages/eap_ep_consumerinterests/ICAO_CorePrinciples.pdf.
[16] ICAO Council adopts core principles on consumer protection and new Long-Term Vision for Air Transport Liberalization, 10 July 2015. See https://www.icao.int/sustainability/Compendium/Pages/0-default.aspx.
[17] Consolidated Statement on of continuing ICAO policies in the air transport field, RESOLUTIONS ADOPTED BY THE ASSEMBLY – 41st SESSION Montréal, 27 September–7 October 2022t 130-147. See, https://www.icao.int/Meetings/a41/Documents/Resolutions/a41_res_prov_en.pdf.
[18] European Commission, 'Antitrust: Commission Opens Formal Investigation Against Google in Relation to Android Mobile Operating System', Press Release, 15 April 2015, http:// europa.eu/ rapid/ press- release_ MEMO- 15- 4782_ en.htm.
[19] Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android, EU Commission Press Release, 15 April 2015, at https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4780.
[20] Maurice E. Stucke, *Big Data and Competition Policy*, at https://www.researchgate.net/publication/308970973.
[21] Bundeskartellamt, 'Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules', Press Release, 2 March

2016, http:// www.bundeskartellamt.de/ SharedDocs/ Meldung/ EN/ Pressemitteilungen/ 2016/ 02_ 03_ 2016_ Facebook.html. quoted by Stucke, *ibid.*

[22] Newspapers are a good example where Google and Facebook have drastically reduced the readership of print media. A 2019 Report says: "At least 1800 newspapers closed in the United States since 2004, leaving more than 50% of US counties without a daily local paper". See *Stigler Committee on Digital Platforms*, Final Report, *supra*. Note 4.

[23] Federal Trade Commission, *Anti Competitive Practices*, at https://www.ftc.gov/enforcement/anticompetitive-practices. This does not mean that the FTC is against collaboration between partners. It says: "In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs. Such collaborations often are not only benign but procompetitive ". See *Antitrust Guidelines for Collaborations Among Competitors* Issued by the Federal Trade Commission and the U.S. Department of Justice April 2000. https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[24] Joacim Tåg, Open Versus Closed Platforms, IFN Working Paper No. 747, 2008, at 2. See Antitrust Guidelines for Collaborations Among Competitors Issued by the Federal Trade Commission and the U.S. Department of Justice April 2000. https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[25] Australian Competition and Consumer Commission, *Competition and anti-competitive behaviour,* athttps://www.accc.gov.au/business/competition/competition-and-anti-competitive-behaviour. The Australian *Trade Practices Act* of 1974, which is administered through the Australian Competition and Consumer Commission, provides in Section 46 that, when a firm takes control of dominant market power, particularly with intent to lessen or eliminate competition, the onus is on the person holding the position of dominance to prove his actions are not tantamount to predatory practices. The criterion used is that recoupment through pricing at supra competitive levels was a *sine qua non* to prove predatory pricing.

[26]https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---overview-of-eu-competition-law/

[27] On 6 November 2001, the owner of Charleroi Airport– in the Walloon Region of Belgium, signed an agreement with Ryanair giving the airline a reduction of approximately 50 per cent of the landing charge at the airport which had ordinarily been fixed by the Walloon Government for all carriers serving the airport. The common rated charges base had been fixed by a decree issued in 1998 by the Government and was applicable to airport taxes that included landing, passenger and parking fees. It was claimed that the reduction granted was discretionary on the part of the Walloon Minister of Transport, by means of a private contract by-passing the requisite statutory process. The deviation from established practice was, it was alleged, not in keeping with the required objectivity as the charges were calculated on the basis of each embarking passenger, instead of the usual tonnage weight of the aircraft.