Gulf Airlines Competition Challenge by US and EU: The Legal Framework

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February 2016

On the 7th of December 2015, the European Commission adopted and published a package of measures entitled “Aviation Strategy for Europe” with its accompanying stated intention being “to ensure that the European (EU) aviation sector remains competitive and reaps the benefits of a fast changing and developing global economy”.

A key part of the package of proposals is an attempt by the European Commission to change the way aviation agreements with key partner countries are negotiated.

In an accompanying fact sheet to its Aviation Strategy, the European Commission specifically targets the Gulf Co-operation Council (GCC) region, and notably UAE and Qatar, and announces that the Commission is seeking a new EU level policy to challenge the region which it “sees as one of the most dynamic and fast growing aviation markets in the world”. The document states that “while the additional connections provided by Gulf airlines are welcome, there are concerns regarding the conditions under which they operate. Comprehensive aviation agreements between the EU and the GCC states would be the right way forward to bridge the interests of both sides by creating conditions that would allow further market developments and growth based on common rules and transparency”.

The Convention on International Civil Aviation (1944) “The Chicago Convention” governs international civil aviation and it provides for a system whereby individual States have complete and exclusive sovereignty over their own national airspace. By Article 6 of the Chicago Convention “special permission” may be granted by a State for the operation of scheduled international air services. Such “special permission” is traditionally given in “bilateral air service agreements” between States opening each other’s national airspace to international air traffic.

In its Aviation Strategy document, the European Commission acknowledges that traditionally, international air transport has been governed by bilateral air service agreements between States, but it refers to these agreements as “a patchwork of differing market access and rules for airlines… and consequently the EU has developed an external aviation policy aimed at concluding comprehensive aviation agreements and aviation safety agreements between the EU as a whole entity and key aviation partners worldwide”. The European Commission points out that the EU has already concluded comprehensive aviation agreements with the United States and Canada, and is currently finalizing an agreement with Brazil, and has concluded aviation safety agreements with the United States, Canada and Brazil.

This attempt by the European Commission to move away from existing bilateral agreements between the Gulf States and individual European countries is a new departure and development. Indeed, one UAE airline issued an immediate response to the European Transport Commissioner’s proposal by saying that “the competition related issues are already covered under existing sovereign bilateral air service agreements, as well as existing EU regulation. Therefore, we find it interesting that rather than use these tools to address specific grievances, the European Commission is instead looking at a new EU level policy or updated instrument. We would also be interested to see what such policy would mean for state supported airlines in Europe, as well as existing anti-trust immunised joint ventures between European and non-European carriers and

other “protected” commercial arrangements of this nature”.

The European Commission announcement follows on the heels of a challenge commenced in February 2015 by three US airlines, American, United Airlines and Delta, who published a 55 page report alleging, among a series of perceived grievances, that Etihad, Emirates Airlines and Qatar Airways have benefitted from state subsidies, and requesting that US administration officials begin talks with the UAE and Qatar to renegotiate existing international air service agreements.

The debate with the US carriers has brought into sharp focus the position of the Gulf Carriers who argue that they have flourished because they are clean-sheet business model businesses based on exemplary customer service, on new aircraft, with international hubs at the crossroads of the world’s main trade routes. Consequently, Gulf Carriers perceive the challenges to existing international arrangements as particularly ill advised.

Given the heated nature of the debate surrounding the attempts by the European Commission and the three US carriers to re-negotiate existing arrangements, it is worth stepping back and briefly explaining the historical legal framework under which the Gulf airlines have successfully conducted aviation business.

The Chicago Convention provides for the principle that states can impose limitations on flights of foreign aircraft and that each state has complete and exclusive sovereignty over the airspace above its national territory. In essence, national airspace is closed to foreign aircraft unless there is “special permission”. This “non-freedom of the air” can be turned into freedoms of the air pursuant to the terms of bilateral or other international air service agreements which have the effect of opening up the airspace of the parties to the agreement. Essentially a bilateral air service agreement is a contract between states to liberalise aviation services.

The Chicago Convention introduced “nine freedoms of the air” for States that have adopted the Convention, and the first “five freedoms of the air” are now recognized by international treaty so that States may enter into bilateral air service agreements that may grant any of the following rights:

- To fly across the territory of the State without landing
- To land in either State for non-traffic purposes e.g refuelling/disembarking passengers
- To land in the territory of the first State and disembark passengers coming from the home State of the airline
- To land in the territory of the first State and board passengers travelling to the home State of the airline
- To land in the territory of the first State and board passengers travelling to a third State where the passengers disembark – e.g scheduled flight from United States to UAE can pick up traffic in the U.K and take it all to UAE.

Since the Chicago Convention came into force, there has been a gradual development in aviation regulation to move from closed to open airspaces. When finalizing bilateral air service agreements, States followed a pattern based on the Bermuda 1 agreement of 1946, which was a treaty originally made between the US and the UK. It is fair to say that the Bermuda 1 regime was a compromise between a more restrictive market view put forward by the UK and a more open market view put forward by the US.

Following on from Bermuda 1, bilateral air service agreements between States have been used to designate which airlines may operate agreed services. The agreements generally provide for the designation of routes, ensuring “fair competition” certification of operating certificates, designation of prices and capacity, rules for safety and security, code sharing provisions, noise and emissions and environmental provisions, user charges for air services, taxation, access to airports, dispute

settlement, and termination provisions if a State decides to withdraw its rights to fly.

The United States began pursuing the policy of negotiating “Open Skies” agreements from 1979 onwards, and it has signed many bilateral air service agreements worldwide to achieve this policy. Most of these existing “Open Skies” bilateral agreements include provision for free market competition and pricing determined by market forces, an equal opportunity to compete and co-operative marketing arrangements, such as code sharing and leasing arrangements with airlines, provisions for dispute settlement, safety and security provisions, together and what are called optional “seventh freedom on cargo rights”, so that the airline of one country can operate cargo services between another country and a third country via flights that are not linked to its homeland.

The Gulf state airlines argue that its existing Open Skies and bilateral air service agreements have succeeded and do not require re-negotiation either with the US carriers or with the European Commission.

In the context of the Chicago Convention, and aviation regulation generally, the European Union has pursued a policy to liberalise the transport sector both internally within the EU, and externally with countries outside of the EU.

Internally within the EU, the EU agreed to liberalise the air transport sector in 1987 and to create a single European aviation market by giving all airlines within the EU in possession of a community license “unrestricted access” to the intra European market. Until 1987, International air transport in Europe was governed by bilateral air service agreements between pairs of European countries which often allowed only one airline from each country to operate services on a limited number of specific routes. Liberalisation Packages were introduced in 1987 and 1990 so that European carriers were granted almost unfettered freedom to fix their own routes, schedules, fares and capacities without any State intervention. This liberalisation and unrestricted access to intra EU markets have facilitated the emergence of low cost carriers, operating a different model to the legacy owned national carriers, with low cost, high capacity flights.

The EU’s external aviation policy has also evolved so that the EU has increasingly has sought to enter into treaty negotiations on behalf of its member States. In 2002[1], the European Court of Justice (ECJ) concluded that member States were entitled to negotiate bilateral air service agreements provided that such agreements did not breach EU law. The ECJ confirmed that certain provisions of these agreements did not contravene EU rules, and in particular the provisions regarding the nationality of air carriers and the fares that foreign carriers were entitled to charge on inter-community flights.

In parallel with this, the European Commission issued a document[2] commenting on the ECJ decision, and seeking a mandate to negotiate with third countries on behalf of member States as a whole. As a result, the EU Council has since given mandates to the European Commission to negotiate Open Aviation Air Agreements, examples of which are the EU-US Agreement on Air Transport (2007and 2010) and the EU-Canada Air Transport Agreement of 2009.

The European Commission’s Aviation Strategy for Europe is perhaps a continuation of this process, so that the European Commission is seeking to renegotiate on behalf of the EU as a whole, and potentially it is seeking a mandate to replace existing bilateral air service agreements concluded between EU member States and the Gulf Carriers.

It is difficult to predict whether the European Commission will succeed in its aim, or whether the US carriers will succeed in pressing for a re-negotiation of existing arrangements. There are provisions within the European bilateral agreements and the 2002 Open Skies agreement made between the US and the GCC states for dispute resolution, and indeed termination, but at this stage it is fair to say that the attempt by the European Commission to seek to tackle a perceived issue of

competition from the Gulf Carriers within its new Aviation Strategy, and the position of the three US carriers, has raised much comment from the aviation industry.

Perhaps the best example of this divergence of views is exemplified by a new association of European airlines which was formed in January 2016 under the name Airlines for Europe (A4E). The new association is made up of Ryanair, IAG, (BA, Iberia Veuling, Aer Lingus), Easyjet, Air France-KLM and Lufthansa. Whilst the association's stated intention is to provide a unity of approach, where possible, within the European aviation industry, A4E made it clear that its inaugural press conference in January 2016 that one area where the association will "agree to disagree" is the attempt by the European Commission to change existing arrangements with the Gulf carriers.

It is evident that the present system under which Gulf Carriers conduct aviation business is being challenged by the European Commission in that it is seeking a mandate to negotiate a new comprehensive aviation agreement on behalf of the EU as a whole. The possibility of this, coupled with the possibility of the US administration re-negotiating existing bilateral air service agreements again if the US carriers' arguments succeed, is an important issue for the forthcoming year. Nevertheless, it is hoped that Gulf carriers will continue to flourish as they have done so within the framework of international aviation law for the foreseeable future.

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[1] European Court of Justice Judgment, 5th November 2002. Cases C-466, 467, 468, 469, 471, 472, 475 and 476/98: Commission v United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany.

[2] COM (2002) 649 Final: Communication from the Commission on the Consequences of the Court Judgment of 5th November 2002 for European and Air Transport Policy.