Disciplining Subsidies within an EU–U.S. Open Aviation Area

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INTRODUCTION

The negotiations between the European Union and the United States aimed at establishing an Open Aviation Area, announced on 25 June 2003 and begun on 1 October of the same year, herald a new era not only in trans-Atlantic aviation relations but also in global air transport. What finds its way into any EU–U.S. agreement is likely to set the pattern for subsequent bilateral agreements even more dramatically than did the Bermuda I Agreement1 of another era; indeed, it may become the basis of a multilateral arrangement. Combined air transport traffic in the EU and the United States represents approximately half of the world’s aviation traffic as measured by passenger-kilometres performed.2 What the EU and the United States agree to will be impossible for other countries to ignore. This is particularly so given the ambitious negotiating agenda set by the EU, which now finds itself in the position of being the most ardent suitor seeking greater liberalization, a role once jealously claimed by the United States.

Whereas United States-backed Open Skies agreements had focused mainly on removing restrictions upon the exercise of traffic rights, an Open Aviation Area as conceived by the EU would also seek to open up domestic rules governing investment and to ensure that competition rules could not operate so as to create artificial barriers to trade in aviation services. In a sense, formal traffic rights fade in significance if one has a common framework for investment and competition. Where foreign investors are given a right of establishment and national treatment, restrictions against cabotage become in essence commercially irrelevant. Trans-border operations can be coordinated through subsidiaries so as to accumulate country-specific traffic rights. This allows carriers to develop local, regional or global networks in accordance with their business strategies and allows consumers to benefit from whatever network efficiencies carriers are able to exploit.

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1 T.I.A.S. 1507 (1946).
2 See Annual Review of Civil Aviation, 58 ICAO Journal 6, 2003, at 12.
However, these virtues of a shift from an Open Skies framework to an Open Aviation Area framework can be defeated by State measures. Just as an Open Skies arrangement between two countries, each having a single State-controlled carrier, would not have much prospect of expanding trade in aviation services, so too an Open Aviation Area characterized by a race to dole out subsidies to national champions would upend trade. Consumers may seem to be the beneficiaries of trade-distorting subsidies, at least when these subsidies take the form of direct cash transfers. After all, such transfers offset costs for the subsidized firm and thus should tend to lower prices. As taxpayers, however, consumers also foot the bill for these subsidies, which are usually not returned dollar-for-dollar as a price benefit. Also, by keeping less commercially successful national champions afloat, subsidies impede the emergence of the strongest business model. In this respect, they are analogous to abuse of a dominant market position by incumbents but backed by the deeper pockets filled from government coffers.3

At the same time, however, disciplines against State aids should not hamper the provision of public goods or hamstring the capacity of governments to respond to situations of national emergency or threats to national security. A wide berth should be given to the deployment of public resources for publicly chosen ends as long as, for these purposes, national treatment is accorded to foreign carriers and the means chosen are in fact tailored to public purposes.

In short, appropriate regulatory disciplines governing subsidies, or what are called “State aids” in EU parlance, should ultimately form part of an Open Aviation Area. Given the breadth of the EU negotiating mandate, they have predictably become a subject of discussion in the EU–U.S. negotiations. In the absence of an agreement on this question, both sides will be left to seek self-help. Significantly, the EU is currently arming itself to be able to apply sanctions against subsidization and unfair pricing practices in the supply of airline services from countries not members of the European Community. The United States can implement parallel measures under the International Air Transportation Fair Competitive Practices Act of 1974 (IATFCA).6

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4 The European Commission’s negotiating mandate from the Council, which has not been made public, covers a wide range of issues. Among them are traffic rights, routes, capacity, frequency, slots, fares, application of competition rules and high standards of safety and aviation security; see at: www.eurunion.org/news/press/2003/2003037.htm. Recently, however, the EU has acknowledged that it is unlikely to make progress on all issues through this round of negotiations and will have to envisage more than one phase to the negotiations; see Press Release from the Transport Council meeting of 8–9 March 2004 at: ue.eu.int/pressData/en/trans/79411.pdf.
