ICAO CIRCULAR

CIRCULAR 215-AT/85

1989

Guidance Material on the Avoidance or Resolution of Conflicts over the Application of Competition Laws to International Air Transport

Prepared by the Secretary General
and published by decision of the Council

INTERNATIONAL
CIVIL AVIATION
ORGANIZATION
MONTREAL • CANADA

Published in separate English, French, Russian and Spanish editions by the International Civil Aviation Organization. All correspondence, except orders and subscriptions, should be addressed to the Secretary General.

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Foreword

In 1985 the Third Air Transport Conference adopted Recommendation 5 which called on the Council to "develop as a matter of high priority, appropriate guidance material for avoidance or resolution of conflicts between Contracting States over application of national competition laws to international air transport, especially where bilateral air services agreements provisions are affected and where extraterritorial application is alleged". The Conference considered that Recommendation 5 represented one specific aspect of implementing Assembly Resolution A24-14 which instructed the Council "to study with the resources available in the Secretariat, the effects which unilateral measures may have on international air transport and to consider the need for developing guidelines in this respect, particularly as regards the extraterritorial implications of national legislation". The Council subsequently approved Recommendation 5 and a study was undertaken by the Secretariat with the assistance of a group of experts drawn from Contracting States and international organizations.

The study led to the development of guidance material consisting of a number of specific guidelines for States, accompanied by explanatory comments, and a model clause for potential inclusion in bilateral air transport agreements. After examination by the Air Transport Committee in September 1988, the Council decided in November 1988 that the guidance material should be issued to States. While in no way binding on States, the guidance would assist them in the avoidance or resolution of conflicts over the application of national competition laws, policies and practices to international air transport. The guidance material is presented in this circular, accompanied by an appendix which provides some historical and descriptive information on interrelationships between international air transport regulation and the application of competition laws, policies and practices to such transport.

In addition to providing immediate guidance to States, this Circular will serve as a reference for the 27th Session of the Assembly in September 1989 when it considers the issue of the application by States of national competition laws to international air transport.

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Guidance Material on the Avoidance or Resolution of Conflicts over the Application of Competition Laws to International Air Transport

INTRODUCTION

States adopt policies and practices, and often laws, regarding how competition in their domestic and foreign commerce shall be promoted or constrained. Because of the wide spectrum of national positions involved, conflicts tend to arise between States over the actual or potential application of the competition laws of one to commercial entities of the other. International air transport is a commercial activity where strongly differing views exist as to desirable levels of protection, competition and industry co-operation. Consequently, unilateral actions regarding competition in this field increase the potential for conflicts between and among States. The unilateral regulation by one State of air services activities of an airline of another State by use of competition laws or practices not accepted by that other State increases the likelihood of disputes between them which could adversely affect international air transport.

The guidance material on conflict avoidance and conflict resolution which follows consists of a number of specific guidelines, accompanied by explanatory comments, and a model clause for potential inclusion in bilateral air transport agreements. It is intended to assist States whenever the actual or potential application of competition laws of one State or group of States to international air transport, particularly on an extraterritorial basis, gives rise to an actual or potential conflict in air transport relations with another State or States. It should be noted that any reference hereinafter to "the application of competition laws" should be taken to also embrace the application of competition policies and practices, which are part of the wider process of government action.

A number of international bodies including the Organization for Economic Co-operation and Development (OECD), the International Chamber of Commerce (ICC) and the International Law Association (ILA) have produced recommendatory material on the general problem of the extraterritorial application of national competition laws. In addition, several bilateral agreements on competition law procedures and co-operation are in existence. While these efforts with applications far beyond the air transport field were useful and relevant to the development of the guidance material contained herein, the ICAO guidance is particularly oriented towards dispute situations specifically involving international air transport. Furthermore, it is intended to be comprehensive in the international air transport field and seeks to take into account a wide range of national viewpoints among Contracting States of ICAO on this issue.

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Guidelines

Each of the guidelines which follow is accompanied by commentary intended to draw out salient points or provide clarification as to its scope or intent. Because the line between conflict avoidance and conflict resolution may not always be clear-cut, the two categories of guidance have not been separated out. They have been placed instead in a logical sequence of progression from conflict avoidance principles and procedures through conflict resolution principles and procedures.

GUIDELINE A

States should ensure that their competition laws, policies and practices, and any application thereof to international air transport, are compatible with their obligations under relevant international agreements; with regard to the adoption of such laws, policies and practices or changes thereto, States should provide opportunities for the receipt of views from any interested foreign party and, upon the request of another State or States, clarify the extent to which such laws, policies and practices or changes thereto might affect the activities of the international airlines of such State or States.

Comments. An aspect of widespread concern in the airline industry is that of legal certainty about their co-operative activities. In recent years a number of States have revised their competition laws and in some cases brought air transport within their scope. One consequence is a period of uncertainty for airlines and the need for initiatives to clarify any actual or proposed application to international airlines and their activities. Guideline A contains principles and procedures aimed at regularizing such situations. Its emphasis is on compatibility with existing international air transport regulation, particularly bilateral regulation. States are presumed to seek harmony between their domestic legislation and their international commitments. The phrase "competition laws, policies and practices", as used in this and in subsequent guidelines, is purposely wide because some competition law regimes may encompass some or all of statutes, regulations, directives, policy statements, administrative guidance and processes.

GUIDELINE B

When a State is implementing its competition laws, policies and practices it should give full and sympathetic consideration to the views expressed by any other State or States whose significant international air transport interests might be affected, and should have regard to international comity, moderation and restraint.

Comments. This guideline enunciates some relevant international principles and practices to guide States when implementing their competition laws where international air transport interests might be affected. "Comity" is a concept often found in international air transport and is also a prominent aspect of the judicial rules, doctrines and precedence built up around the extraterritorial application

of national legislation and jurisdictional issues. It means deference by one State or its agency to the acts of another State or its agency. It is not generally considered a binding obligation in international law but is rather a matter of courtesy and its relevance and application will depend on circumstances.

GUIDELINE C

Where the competition laws, policies or practices of States are such that they might give rise to actual or potential conflicts in their international air transport relations, consultation should take place among those States to seek an understanding on what competition laws, policies and practices shall be applied in such relations so as to provide airlines with as much legal certitude as possible and to avoid potential conflict as much as possible.

Comments. Guideline C stresses co-operation and legal certainty and encourages understandings between States on what competition laws, if any, should be applied in their aviation relations. An "understanding" could be an agreement or something less and conceivably could deal with the question of specific exemptions.

GUIDELINE D

When the application of competition laws, policies and practices to international air transport may result in disputes between States over matters of jurisdiction or policy, States should have regard to their relevant international commitments and to practices in international relations such as notification, consultation, comity and co-operation; States should carefully weigh the interests of other States in such matters.

Comments. This guideline deals with conflict resolution and complements Guideline B concerning conflict avoidance. It urges use of certain practices in international relations when the application of competition laws leads to a dispute. The application referred to could be public or private. Similarly, the weighing of interests could be public or private although the idea of a domestic court weighing foreign interests is contentious.

GUIDELINE E

Any conflict arising from the application of competition laws to international air transport which has been raised by another State and which involves significant national interests or policies of that other State should, to the extent permitted by national laws and policies and as a matter of international relations between the two States, be addressed by the executive level or branch of government.

Comments. A conflict over the application of competition laws to international air transport is essentially a matter of international relations, but it may also involve different levels or branches of a State. This guideline stresses that the executive level of the government should be the main focus

of conflict resolution whenever significant national air transport interests or policies of other States are involved. With use of the phrase "to the extent permitted by national laws and policies", this guideline recognizes that constitutional or administrative limitations may exist which take a private legal action beyond the control of the national executive.

GUIDELINE F

Without prejudice to the right of each State to protect its interests, when a potential conflict arises over the application by one State of its competition laws, policies and practices to matters related to the operation of an air transport agreement with another State, the States concerned should use their agreed bilateral process of consultation before taking any unilateral action which might aggravate the conflict.

Comments. Over the past four decades bilateral air service agreements have in varying degrees permitted the evolution of airline co-operative practices. They have invariably contained one important and constant feature, the consultation process. In an era when national policies are being reassessed and the regulatory environment is experiencing changes and strains, this Guideline states that the consultation process should be accorded priority over unilateral action whenever a potential competition law conflict concerns matters coming under a bilateral agreement. However, such priority could not foreclose a State's right of action to protect its interests. Examples of matters would be any co-operative airline practices such as multilateral tariff co-ordination that are endorsed or sanctioned by the agreement.

GUIDELINE G

A State which undertakes under its competition laws an investigation or proceeding that may affect significant international air transport interests or policies of another State should notify that other State, if possible in advance, and consult with it if requested. Consultations should clarify the particular interests and concerns of each State and should aim to avoid, minimize or resolve any possible conflict between them.

Comments. A bilateral air services agreement may not always exist when competition law actions of one State are considered by another State to affect its interests or policies. This guideline is intended to cover any situation when enforcement actions by the competition authorities are involved. While the onus in this Guideline falls on the State taking action to notify another potentially affected State, the initiative for consultation is borne by the latter. The notification by the State taking action should be as early as possible so that the consultation mechanism can be used for the purposes specified in the Guideline.

GUIDELINE H

A State which becomes aware of a private legal action under its competition laws, where such action may affect significant international air transport interests or policies of another State, should notify that other State and consult with it if requested.

Comments. This guideline complements Guideline G and covers private legal actions. It also incorporates the notions of notification and consultation but differs from Guideline G in that notification is, of necessity, an *ex post facto* matter, since advance notification of a private legal action would be highly improbable. Furthermore, this guideline does not set out the purposes of consultation as does its counterpart. Nevertheless, consultation is, by implication, a mechanism to clarify interests and avoid or resolve possible conflicts.

GUIDELINE I

When a private legal action has been instituted under the competition laws of one State, and where such action may affect significant international air transport interests of another State, the State where the action has been instituted should facilitate access by the other State to the relevant judicial body and/or, as appropriate, provide information to that body. Such information could include its own foreign relations interests, the interests of the other State as notified by that State and, if possible, the results of any consultation with that other State concerning the action.

Comments. Although constitutional and administrative arrangements may preclude outside intervention in a judicial process, many States accept the need to permit access to the judicial system by parties or agencies having an indirect interest in the proceeding but who may be able to assist the judiciary by volunteering relevant views or information. In some systems this is known as an *amicus curiae,* a "friend of the court". Other States permit variations of this idea. This guideline addresses the idea but places the onus for using it on the State whose interests may be affected. If the State in which the action takes place approaches its judiciary, the guideline indicates the matters which may be presented. Presumably, if the affected State is permitted to approach the judiciary it would present its own interests.

GUIDELINE J

States should co-operate, in accordance with any applicable international obligations and to the extent not precluded by their national laws or policies, in allowing the disclosure by their airlines or other nationals of information pertinent to a competition law action to the competent authorities of another State, provided that such co-operation or disclosure would not be contrary to their significant national interests.

Comments. Legal discovery or disclosure of information procedures, particularly in private competition law actions, are a major area of controversy and a source of conflict. "Blocking legislation" has been spawned in some States in response to expansive discovery actions by other States. Co-operation in discovery should be encouraged where it accords with international obligations and is not contrary to national interests. The aim of the Guideline is simply to set some parameters for the use of a practice which can be a source of that conflict. "International obligations" refers not just to bilateral agreements but also to the obligations and requirements arising for States who are parties to the Hague Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. That Treaty deals with the national processing and implementation of discovery requests from judicial bodies of another State; it also permits a Member State to refuse assistance or discovery where to do so would prejudice its sovereignty.

GUIDELINE K

While an action taken by the competition law authorities of one State is the subject of consultation with another State, the State in which the action is being taken should refrain from requiring the disclosure of information situated in the other State and that other State should refrain from applying any so called "blocking legislation" which may exist regarding such disclosure.

Comments. This guideline is also designed to control a conflict situation and deals with the use of discovery procedures by one party and of "blocking legislation" by the other. It urges both parties to refrain from taking action in these two respects while consultation is pending in order to give that process the maximum opportunity to resolve the issue. The guideline's application is restricted to consultation on actions taken by competition enforcement authorities of one State. This guideline was not extended to private legal actions, in part because control over the discovery process may reside in the judicial body.

GUIDELINE L

Where relevant, these guidelines should be applied, *mutatis mutandis,* to relations between States where a group of States has common competition laws, policies and practices or where multilateral arrangements exist.

Comments. The final guideline extends all the foregoing guidance, to the extent relevant, to groups of States which have competition law regimes that apply to their individual Members. Several such groupings exist but the best known is the European Communities where, increasingly, the Community competition standards, as laid out in the Treaty of Rome and supplemented by Commission Regulations and Directives and European Court of Justice decisions, are being applied to air transport activities within the Communities. The long-term implications for air transport activities within the Communities by non-Community operators are unclear but the potential for conflict exists since the "effects doctrine" is recognized in the Community's competition law regime.

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Model Clause on Competition Laws

The model clause which follows is intended to be a comprehensive but adaptable guide for any pair of States which have or may have a bilateral agreement and which have experienced or may experience difficulties in their air transport relations from the application of national competition laws. Its use by States in their bilateral agreements is entirely optional and it would be of little relevance, for example, where both parties endorse co-operative airline practices and neither party has a competition law. Nor is the clause intended to supplant any existing procedures. In general it seeks to strengthen the bilateral machinery for conflict avoidance and resolution and to bring issues in the application of competition law standards to air transport into the bilateral framework. The clause draws mainly on the concepts and principles laid out in the Guidelines.

MODEL CLAUSE

Article "X"
Competition Laws

(1) The Parties shall inform each other about their competition laws, policies and practices or changes thereto, and any particular objectives thereof, which could affect the operation of air transport services under this agreement and shall identify the authorities responsible for their implementation;

(2) The Parties shall, to the extent permitted under their own laws and regulations, assist each other's airlines by providing guidance as to the compatibility of any proposed airline practice with their competition laws, policies and practices;

(3) The Parties shall notify each other whenever they consider that there may be incompatibility between the application of their competition laws, policies and practices and the matters related to the operation of this Agreement; the consultation process contained in this Agreement shall, if so requested by either Party, be used to determine whether such a conflict exists and to seek ways of resolving or minimizing it;

(4) The Parties shall notify one another of their intention to begin proceedings against each other's airline(s) or of the institution of any relevant private legal actions under their competition laws which may come to their attention;

(5) Without prejudice to the right of action of either Party the consultation process contained in this agreement shall be used whenever either Party so requests and should aim to identify the respective interests of the Parties and the likely implications arising from the particular competition law action;

(6) The Parties shall endeavour to reach agreement during such consultations, having due regard to the relevant interests of each Party and to alternative means which might also achieve the objectives of that competition law action;

(7) In the event agreement is not reached, each Party shall, in implementing its competition laws, policies and practices, give full and sympathetic consideration to the views expressed by the other Party and shall have regard to international comity, moderation and restraint;

(8) The Party under whose competition laws a private legal action has been instituted shall facilitate access by the other Party to the relevant judicial body and/or, as appropriate, provide information to that body. Such information could include its own foreign relations interests, the interests of the other Party as notified by that Party and, if possible, the results of any consultation with that other Party concerning the action.

(9) The Parties shall co-operate, to the extent not precluded by their national laws or policies and in accordance with any applicable international obligations, in allowing the disclosure by their airlines or other nationals of information pertinent to a competition law action to the competent authorities of each other, provided that such co-operation or disclosure would not be contrary to their significant national interests.

(10) While an action taken by the competition law authorities of one Party is the subject of consultations with the other Party, the Party in whose territory the action is being taken shall, pending the outcome of these consultations, refrain from requiring the disclosure of information situated in the territory of the other Party and that other Party shall refrain from applying any blocking legislation.

Appendix

COMPETITION AND THE REGULATORY ENVIRONMENT FOR INTERNATIONAL AIR TRANSPORT — BACKGROUND INFORMATION

The regulatory framework

1. The regulatory framework of bilateralism which governs the conduct of scheduled international air services is a consequence of the principle of national sovereignty over territorial airspace (Article 1 of the Chicago Convention) and the requirement for permission or authorization to operate over or into a Contracting State (Article 6). Attempts were made at the Chicago Conference in 1944, and for a few years thereafter within ICAO, to reach accord on a multilateral regulatory regime for international air transport but when these were unsuccessful bilateral agreements quickly emerged as the preferred option for aviation relations between States. Bilateralism was soon perceived by States as a system which could protect as well as advance their national interests in the aviation sphere. The widespread adoption of bilateral air service agreements (approximately 1 800 bilaterals are presently in existence) as a system of international regulation brings aviation into sharp contrast with the regulation of most other forms of international economic activity.

2. Bilateralism involves the trading of market access and routes, the establishment of administrative and operating conditions and the exchange of concessions for each partner's designated carrier(s). In practice, the parties to a bilateral negotiation will seek a balance of economic opportunities or benefits from the services between and beyond their territories. This balancing in a bilateral situation has meant that competition, in terms of market entry (traffic rights and designation), supply (the provision of capacity) and pricing (tariffs) may be limited. After the Chicago Conference some States, particularly if they had well-established aviation industries or positions of geographical advantage in terms of major traffic flows, sought to maximize opportunities for their carriers and succeeded in negotiating agreements that incorporated relatively liberal provisions on traffic rights, designation and capacity. But by and large the early history of post-war international aviation was one in which bilateral agreements closely regulated and controlled international air services.

Airline co-operation

3. In one important respect — tariff establishment — States in their bilateral agreements have traditionally delegated a large measure of responsibility to the carriers. Primarily through the machinery of the International Air Transport Association (IATA), the airlines have multilaterally negotiated tariffs and their associated conditions for all route sectors. IATA as a trade association has also served as a forum for the development of a range of co-operative industry-level practices and activities designed to prorate tariffs, facilitate interlining of passengers and cargo on the international network, clear and settle interline accounts, standardize airline documentation and procedures, and develop a world-wide agency programme. These co-operative arrangements were justified by the industry and accepted by most governments as necessary for the integration of the world-wide network of services constructed through bilateral air service agreements. Another area of airline co-operation which evolved bilaterally was pooling of capacity and revenue and other arrangements between carriers. Thus, in the years following the Chicago Conference, an extensive pattern of co-operation was superimposed upon the regulatory framework, usually in preference to a more competitive environment and standards.

4. For most States this framework and the co-operative practices which it often sanctioned provided a structured, predictable environment for the development of their international aviation links. Indeed, the 1950s and 1960s witnessed a reasonably stable period of growth and expansion for the international air transport system despite some particular strains on the industry such as the competitive challenge of non-scheduled (charter) operations in some markets, periodic cycles of over-capacity of equipment and progressive yield diminution.

Changes in the regulatory environment

5. Beginning in the 1970s, but increasingly in the 1980s, the regulatory environment has undergone some significant changes and adjustments. The basic framework of bilateralism has not been at issue to any great extent. Instead it has been national regulatory policies, approaches and arrangements which have been reevaluated, established airline arrangements and practices questioned, and the appropriate mix of control, competition and co-operation opened to debate. Such developments are not peculiar to air transport but are symptomatic of wider trends in the level and nature of public controls in market and mixed economies. The concerns voiced in ICAO bodies over the application of competition laws to international air transport are directly linked to these changes and challenges to the stability of the operating environment. A wide spectrum of national policy approaches to air transport and its role has always existed and made multilateral consensus and policy harmonization on issues such as capacity and traffic rights difficult to attain. These differences have, however, been heightened by the recent advance of reappraisals as to how air transport should be regulated.

6. A small but increasing number of States, often with well-established domestic airline industries, have come to view air transport as a mature, developed service industry which no longer needs regulatory protection or control and which should be subjected to a competitive operating environment and standards. This view entails a philosophical shift away from the historical approach to regulating air transport and towards reliance on market forces as the principle mechanism of control. On the other hand, a large number of States have continued to view air transport in terms of its public utility role and to regard the national airline as a necessity for national development and the maintenance of trade and communications links. This contrary and perhaps traditional approach is characterized by public ownership, regulatory oversight and protection by the aeronautical authority as well as the legal acceptance or condonation of co-operative airline practices. Still other States fall between these two approaches. In this connexion it may be noted that privatization, which is often undertaken to apply the disciplines of the financial markets as well as commercial standards to a publicly owned airline, is a recent trend that is not confined to States having a pro-competition approach to air transport.

7. Domestically, change has been manifested in the concept of deregulation or liberalization. The movement to either deregulate or liberalize can be found primarily, though not exclusively, in an increasing number of developed States. Deregulation, in practical terms, involves the reduction or removal of barriers to route entry and exit, capacity controls, tariff regulation and other matters formerly regulated by air transport authorities, and their replacement by the regulatory standards that are applied to other sectors of economic activity and are usually to be found in competition laws. In the case of the European Communities such laws are Community rather than national laws.

8. At the international level, States which advocate change have sought a more open, competitive environment and greater opportunities for their airlines. But the degree to which competition can be achieved internationally is governed and can be limited by the bilateral framework. Such a State must not only negotiate a competitive environment for each bilaterally

agreed market or markets in which its airlines operate, but also contend with some inherent features of the bilateral framework. Firstly, there is the aforementioned unwritten requirement for a bilateral balance of economic benefits, which places emphasis on the results of the exchange between the parties as opposed to an open environment where no balance of benefits is sought or necessarily anticipated. Another obstacle is the nationality principle, the requirement invariably inserted in bilateral agreements that each party's designated carrier(s) be substantially owned and effectively controlled by its nationals. With a few exceptions, this has tended to inhibit the growth of the transnational form of aviation enterprise which, if they had become more widespread as in other industries, might have had broad implications for the competitive environment in international aviation. Nevertheless, despite such impediments, a number of bilateral agreements containing liberal provisions on designation, beyond (fifth freedom) traffic rights, capacity and tariffs have been negotiated in the past decade. Liberalization, internationally, has also involved pressures aimed at reducing the extensive pattern of co-operative airline arrangements at the bilateral and multilateral levels. For example, IATA has considered it necessary, not only in response to the pressures but also in recognition of the changing environment, to restructure and to adjust its activities in certain fields, especially in tariff co-ordination and its agency programme.

Competition laws

9. National competition laws are enacted to control most economic behaviour in a market or mixed economy and to attain certain national objectives in economic relationships and activity. Their aims, scope and purposes may vary but will normally include the promotion of competition between economic units, the encouragement of economic efficiency, the optimum allocation of economic resources and the protection of consumer interests. The types of economic activity that competition laws concern themselves with include agreements on price fixing, price discrimination, market sharing, certain co-operative arrangements, mergers, acquisitions and industry monopoly. In some cases competition laws are founded on broad national socio-economic and political objectives and priorities, and competition may be viewed either as a means to an end or even as an end in itself. The implementation and enforcement of competition laws are usually delegated to a separate governmental instrumentality, although its specific role may vary and in some instances overlap with other regulatory agencies charged with responsibility for specific industries.

10. Comprehensive competition laws are largely a post-World War II phenomenon, although competition laws did exist in several States prior to the War. In one State the first competition laws were enacted nearly 100 years ago and are a cornerstone of that country's approach to economic activity. Approximately 50 States have now adopted competition laws in varying degrees of scope and application. A number of those States have in recent years revised, strengthened and extended their previously existing legislation.

11. In 1980 the United Nations Conference on Trade and Development (UNCTAD) approved a "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Practices". By Resolution 35/63 the United Nations General Assembly in 1980 adopted this set of principles and rules which are aimed at promoting the adoption of competition laws by States which do not have them and controlling restrictive business practices which may have adverse effects on international trade. Besides setting standards, they also place emphasis on collaboration and information sharing between States. A significant feature of the principles and rules for international air transport is that they do not apply to, and therefore implicitly sanction, intergovernmental agreements and restrictive business practices that directly result from such agreements.

12. Many competition laws include mechanisms for the granting of exemptions or immunity from the enforcement impact of the competition laws, either to industries or for certain proscribed practices, usually on the basis of specified criteria or because of the existence of alternative regulatory schemes. This allows a measure of flexibility in the implementation of the competition regime for cases where the attainment of different policy objectives may prevail. In the case of air transport the practice has been, until recent times, to exempt or immunize most airline co-operative activities using this mechanism, wherever such exemption was considered necessary. In this way, either through specific exemption or because of the bilateral framework and regulatory approaches which permitted co-operative arrangements, international air transport has not been particularly concerned with competition laws as a regulatory regime. Air transport, both domestic and international, has, until recently, been largely outside the ambit of competition laws.

The application of competition laws to international air transport

13. The application of competition laws to international air transport arises from their enforcement in the domestic law context. Some competition law regimes contain legal doctrines which extend the impact of those laws to activities that take place outside the territorial limits of the State whenever those activities have certain effects within the national territory. Though its precise formulation and parameters may differ, this is in essence the "effects doctrine". The "effects doctrine" is a controversial issue in international law because of its jurisdictional basis.

14. The assumption of jurisdiction in international law by an agency of a State can take several forms, of which the two most relevant for present purposes are "nationality" and "territorial". The nationality of a subject is a common ground for the assumption of jurisdiction although the notion of nationality of a business may itself be ambiguous. The other basis of jurisdiction — territorial — can be even more difficult. A strict rendering of territorial jurisdiction would confine a State to controlling economic activity occurring within its territory. The "effects doctrine" entails a wider use of the territorial jurisdiction and is rationalised as being essential to the control of economic behaviour in an interdependent world. The limits of jurisdiction and the "effects doctrine" are long-standing, complex issues in international law going well beyond the aviation context and are also beyond resolution under the terms of reference of the study which led to the guidance material contained in this document.

15. It is relevant to note that part of the concern over the application of competition laws to international air transport lies in the potential use of the "effects doctrine" as a jurisdictional basis for applying competition standards beyond territorial boundaries. Although several States and the European Communities endorse the doctrine in their competition law regimes, its actual use in international air transport has been limited. The jurisdictional interests of other States have generally tended to dictate a cautious approach, either as a matter of policy or through the development of rules and precedents by the judiciary intended to carefully circumscribe employment of the doctrine by competition regulatory authorities.

16. The main difficulty and area of concern lies in competition laws which adopt the "effects doctrine" and where private legal actions are permitted to enforce the competition standards. This private right of action is available in only a few jurisdictions. Some of its features which can give rise to concerns in other States are its provisions for punitive damages (e.g. treble damages), the use of contingency fees (which is the payment to a legal representative in a private suit of a fee based on a percentage of what the client recovers) and extensive discovery procedures for obtaining pre-trial evidence.

17. Such a system is viewed by its critics as interposing the judiciary between the competition standards and their objects, economic enterprises, as an additional regulatory medium that is beyond any direction by the agency legislatively charged with enforcing the competition laws. In a private competition law action the judiciary decides on the basis of the law and judicial precedent whether the competition standards apply in the given situation. Despite the development of an extensive body of legal doctrines and judicial rules and precedents which give due recognition to foreign interests whenever these may be relevant to the determination of jurisdiction, this has not always diminished the concerns and objections of other States. Some of these objections are: an objection in principle to the domestic courts of any one State assuming jurisdiction over matters that are considered to be within the territorial jurisdiction of another; the unpredictability of result in a process which judicially balances or weighs the interests of another State for the purposes of establishing jurisdiction; and the practical consequences of a system that permits expansive pre-trial discovery procedures to obtain evidence situated in other jurisdictions. The private right of action has been a source of conflict in the application of competition laws to international air transport, thus particular attention was paid to this problem area in the development of guidance material.

"Blocking legislation"

18. Conflicts over the application of competition laws are usually the result of regulatory policy differences rather than objections to actual legislation. A conflict can be exacerbated by misunderstandings of each party's objectives, by internal constitutional and administrative arrangements and by a lack of policy co-ordination at the domestic level. It may also be escalated by the use of "blocking legislation". This is legislation, adopted on the basis of prior jurisdictional claim or perceived prejudice to the national interest, which seeks to limit the local implementation of evidence discovery procedures for purposes of litigation under another State's competition laws and/or to prevent or redress the local enforcement of foreign judicial judgements giving monetary damages in private competition law suits.

19. "Blocking legislation" in some form has been enacted in about 20 States, often as a reaction to cases where the jurisdiction of the courts of one State in a competition law action, or the use of extensive discovery procedures, were objected to by the adopting State. "Blocking legislation" is viewed by the latter as a necessary mechanism to prevent the enforcement of such claims to jurisdiction and discovery processes and, in some cases, as a means of redressing the award of punitive damages by the courts of another State. It is in effect, however, a retaliatory action which will not necessarily of themselves resolve a conflict and might have the contrary result.

20. In an era when an increasing number of States are willing to accept a more competitive air transport environment bilaterally, or in the case of the European Communities multilaterally, while a large number of others prefer to sanction traditional co-operative approaches to air transport growth and development, the prospects are for competition policies, practices and laws to be destablizing factors in air transport relations between States. At the airline operating level this translates into possible situations of legal uncertainty over existing or proposed co-operative practices and the problems and costs of operating under conflicting national requirements.

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ICAO PUBLICATIONS
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The following summary gives the status and also describes in general terms the contents of the various series of publications in the air transport field issued by the International Civil Aviation Organization:

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(or equivalent in other currencies)

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2/89, E/P1/1600

Order No. CIR215
Printed in ICAO