Competition Law Application to Air Transport

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1. Introduction

It seems that there are two confilicting trends in international air transport. One is the world-wide dergulation or liberalization of air transport, which means, for airlines, easier market entry, and autonomy in deciding routes to fly, providing capacity, and setting fares. The other is the emergence of mega-carriers which resulted from the concentration of airlines through acquisitions and mergers, and the phenomenon of airline alliance.

Even though the former was intended to encourage competition among airlines, thereby enabling more airlines to operate, and allowing them the freedom to provide capacity and determining the level of tariffs, the actual experience of deregulation of the air transport industry throughout the world shows that deregulation has not had precisely the anticipated effects, particularly in that the concentration of the air transport industry resulted, more often than not, in monopoly or oligopoly in a given market.

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This paradoxical phenomenon suggests that deregulation, which refers to the desengagement of government from a regulotory system, resulted in a situation where the re-engagement of government is required to ensure fair competition.

However the question remains as to the degree to which government should be involoved in airline business in as new regulatory context. On what grounds other than fair competition could such re-engagement in the post-dergulation era be justifiable ? Perhaps the employment, guarantee of airline profitability, protection of national carriers, and the public interest are among those other grounds. If so does it mean that goverments are returning to they very regulatory regime which they had proeviously abandoned ?

Against this background, the Clinton Administration established the "National Commission to Ensure a Strong Competitive Airline Industry", where Comite des Sage(the Wisemen Committee) was created o\in the European region, both of which were aimed at helping financially troubled carriers get out of the worst recession which hit the airline industry in the post-deregulation era.

The Candian competition authorities recently approved the deal between Canadian Airways International and American Airlines. In this case, the Canadian authorities disregarded the allegation that Gemini, which was jointly participated by the two Canadian carriers, could not be run if AMR Insisted on using SABRE for CAI which was also a part of the package deal. What are the most prevailing considerations in approving the deal ? Is it intended to strengthen the competitive force of the Canadian carriers, or simply to save the CAI from worsening financial difficulties ?

A variation on this worldwide dilemma also exists within the Korean air transport industry. Under Circumstance of two carriers fierce competition arises, although competition itself is generally regarded as being very much in the public interest.

In this regard, I would like to introduce legislation and practices of some countries and to raise some issues in the application of competition rules

in reponse to the need to harmonize the two conflicting concepts. However, I have to admit that answering issues raised here in a concrete manner will be attempted later.

2. Legislation and Cases of some countries

The Sherman Act and Antitrust Act are main statutes which are aimed to encourage competition and prevent antitrust in overall economic activities. the Federal Aviation Act is the legislation which directly deals with competition issues in air transport. However, the application of competition rules to actual cases has remained largely at the great discretionary power of DOT(the Department of Trasportation) and DOJ(the Department of Justice) officials

Case :

KLM and Northwest's commercial agreement[1] was designed to provide a legal framework for the airlines to operated as though they were a single company. However, because the Federal Aviation Act precludes foreign airlines from owning more than 25% voting control and 49% equity control of any US airlines, KLM and Northwest's alliance ran a 'very real risk' that collaborative planning, scheduling, pricing and marketing or services could be challenged as being perse price-fixing and market allocation agreemnets between horizontal competitors, rather than the actions of a single enterprise. In that Commercial Agreement, the two airlines put forward their arguments for antitrust immunity which the U.S DOT finally granted in January 1993.

The intention of the KLM-Northwest Integration Agreement was to establish a transnational global airline service while not at present altering the level of KLM investment in Northwest and keeping to the term of on the testrications on foreign ownership of US airlines.

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1. The Commercial Cooperation and Integration Agreement between Northwest and KLM signed on Sep. 9 1992.

Until this agreement, KLM and Northwest's cooperation has stopped short of arrangements that could be subject to antitrust attack. Since KLM's initial equity stake in Northwest in 1989, tie-ups between the two have included coordinating frequent flyer between the two have included coordinating frequent flyer programmes, a limited amount of code-sharing and the setting up of Minneapolis/St. Paul-Amsterdam and Detroit-Amsterdam routes on a blocked-space code-share basis.

But to achieve a service that would allegedly bring genuine service and pricing benefits to consumers, the airlines required protection from US antitrust laws. Now that KLM and Northwest gained this immunity, it may have important consequences for the whole of the U.S. aviation industry, particularly any potential U.S.－foreign airline alliance that would fail the foreign ownership restrictions.

However, KLM and Northwest's arguments for antitrust immunity-were closely connected with the recently-signed U.S.-Netherlands "open skies" bilateral.

The airlines argued that direct competition between them is minimal at present－the only overlap are the two blocked-space code share flights from Minneapolis/St. Paul and Detroit to Amsterdam. While Northwest and KLM arguably compete in several U.S. － Europe city-pair markets through behind-gateway connections, neither carrier holds a significant share of the overall North Atlantic market,[2] the carriers contended. They insisted that by joining forces against the larger transatlantic carriers,[3] competition would actually increase.

DOJ, according to the two airlines, effectively concluded that a full merger of Northwest and KLM, which of course could not be accomplished because of foregin ownership restrictions, would not substantially reduce competition. and therefore neither would do commercial and marketing integration.

2. KLM 10.6%, Northwest 3.7%, calculated from IATA Route Area Statistics and U.S. DOT Air Carrier Traffic Statistics Monthly.
3. e.g., BA, Lufthansa, American, Air France, supra note.

Additionally, as the open skies agreement guarantees competition in the U.S-Netherlands, market will continue to grow and flourish.

2. 2 EC

EEC Treaty of 1957 has some provisions relating to competition.

Art. 85

1. The following shall be prohibited as incompatible with the common market : all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object of effect the prevention, restriction or distortion of competition within the common market, and in particular those which :

(a) directly or indirectly fix purchase or selling prices or any other trading conditions ;

(b) limit or control production, markets, technical development, or investment ;

(c) share markets or sources of supply ;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage ;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of :

—any agreement or category of agreements between undertakings ;

—any decision or catgory of decisions by associations of undertakings ;

—any concerted practic or category of concerted practices ;

which contributes to improving the production or distribution of goods

or to promoting technical or economic progress while allkowing consumers a fair share of the resulting benefit, and which does not :

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives ;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Art. 86

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatibhle with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in :

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading condition ;

(b) limiting production, markets or technical development to the prejudice of consumers ;

(c) applying dissimilar conditions to equivalent transactionw with other trading parties, thereby placing them at a competitive aesadvantage ;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. 3 Japan

Here are some provisions relating to competition in the Civil Aeronautices Law.

Art. 111

(Exception from Application of the Law concerning the Prohibition of Private Mononpoly and methods of Preserving Fair Trade) The provisions of Law concerning the Prohibition of Private Monopoly and the Methods of Preserving Fair Trade(Law No. 54 of 1947) shall not apply to any lawful

act effected upon approval under paragraph 1 of the preceding Article. However, the same shall not apply in case where unfair methods or competition are used or an unreasonable increase in the fares, rates or charges is made possible by limiting competition in the field of trade.

2. 4 Canada

The Competition Act(R.S.C. 1985, c. C-34) is the main statute relating to competition.

Art. 1.1

states the purpose of the act as "The purpose of this act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprisee have an equitable oppotunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

The Competition Tribunal Act sets out the details including the jurisdiction and powers of the authorities which deal with matters relating to competition in Canada.

8. (1) Jurisdiction.-The Tribunal has jurisdiction to hear and determine all applications made under Part III of the Competition Act and any matters related thereto.

(2) Powers.-The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcements of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

(3) Power to penalize. No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the

finding of contempt and the punishment are appropriated in the circumstances.

9. (1) Court of record.—The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

(2) Proceedings.—All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

(3) Intervention by persons affected.—Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to make representations relevant to make representations relevant to those proceedings in respect of any matter that affects that person.

3. Areas of Application in Air Transport

Here we are going to introduce EC's application of competition rules in air transport because of lack of data and actual cases in other countries. However, in view of the global characteristics of international air transport, EC's rules and practices would be very relevant to other countries.

3. 1. Application in Practice

One decision by the European court of Justice and several instances of action by the EC Commission provide some clarification with regard to the practical application of the competition rules to international air transport within the EC.

3. 1. 1 Tariff agreements

Bilateral or multilateral agreement on tariffs for scheduled services are automatically void pursuant to EEC Treaty, art 85 in any one of three

4. Sec 2(prohibition of abuse of dominant position in market), SEc. 3 (restriction of mergers and concentration),Sec. 4 (prohibition of cartel), Sec. 5 (prohibition of unfair practices of Act on Antitrust and Fair Transactions, as amended on 13 Jan. 1990 (Act No. 4198). ARt. 7 (approval of foreign investment by the Ministry of Finance) of Act of Introduction of Foreign Capital, as amended on 8 Dec. 1992 (Act No. 3691).

situations :

—where no application for exemption has been made ;

—where an appliation for exemption has been made but has received a negative response from the EC Commission within the appropriate period ;

—where the period of validity of an exemption has expired or the EC Commission has withdrawn the exemption.

The application of a tariff resulting from an agreement can constitute an infringement of Article 86, as well as Article 85, where the agreement only formalises the result of a dominant position(e.g., if a dominant airline succeeds in imposing tariffs on other airlines on a particular route).

3.1.2. Joint operation agreements

The EC Commission has granted exmptions from EEC(Treaty, art 85(1) in respect of joint operation agreements between Air France and NFD, Air France and Brymon and London City Airways and SABENA, has succeeded in securing termination of joint operation agreements between British Airways and Air France, British airways and Alitalia and Air France and Alitalia, and has reserved its position in connection with certain other pending exemption applications.

3. 1. 3 Interlining agreements

Following the withdrawal by Lufthansa of an interlining facility from Air Europe, after Air Europe introduced lower fares on the London-Munich route, the EC Commission intervened an, arguing that Lufthansa was thus abusing its dominant position in infringement of EEC Treaty, art 96, succeeded in persuading Lufthansa to reinstate the interlining agreement.

3. 1. 4. Mergers

The EC Commission investigated the takeover of British Caledonian by British Airways and obtained from British Airways, as a conditioin of allowing the takeover to proceed, certain undertakings designed to preserve competition and give opportunities to smaller competitors. The legal basis of the EC Commission's conditions was not made clear but must have been argued to derive from the competition rules.

3. 2. Block Exemptions

In addition to having the power to issue individual exmptions from EEC Treaty, art 85(1) by reason of Article 85(3), the EC Commission is also empowered to issue block exemptions which, until 31 December 1992, automatically exempt agreements, decisions and concerted practices which satisfy certain criteria. Such block exemptions may in particular cover the following areas, in each case subject to certain particular conditions :

- Joint planning and co-ordination of capacity for scheduled services ;
- sharing of revenue from scheduled services ;
- consultations on fares and conditions for scheduled services ;
- slot allocation and scheduling at airports ;
- co-operation on computer reservation systems ;
- technical and operational handling ;
- passenger, baggage, cargo and mail handling ;
- in-flight catering.

In pursuance of these powers the EC Commission has published three Regulations conferring block exmption until 31 January 1991 in the following terms.

3.2.1. Planning and coordination of capacity

EC Commission Regulation (EEC) 2671/88 creates a block exemption for agreements, decisions and concerted practices whose purpose is the joint planning and co-ordination of capacity to be provided on scheduled services, provided that ;

- the results are not binding ;
- they are intended to ensure a satisfactory supply of services at off-peak times or periods or on small routes ;
- they do not include arangements which limit in advance the capacity to be provided or which share capacity ;
- they do not prevent participants from changing planned services, or from withdrawing from future participation ; and
- they do not seek to influence the capacity or schedules for non-partici-

pating airlines.

3.2.2 Revenue Sharing

Commission Regulation (EEC) 2671/88 also creates a block exemption for agreements, decisions and concerted practices whose purpose is the sharing of revenue, provided that, with regard to each route concerned

－the transfer of revenue is made in compensation for scheduling flights at off-peak times or periods ;

－the transfer is made only in one direction, which is to be determined in advance of the season ;

－the transfer does not exceed 1% of the revenue earned by the transferor on the route (after deducting 20% of that revenue as a contribution to costs) ;

－neither party bears any of the costs incurred by the other ; and

－neither party is impeded from providing additional capacity.

3.2.3 Tariff Consultations

Commission Regulation (EEC) 2671/88 also creates a block exemption for agreements, decisions and concerted practices whose purpose is the holding of consultations for the joint preparation of proposals on tariffs for passengers and baggage, provided that ;

－the consultations are solely intended for the joint preparation of tariff proposals to be submitted to the authorities of Member States, and do not extend to the capacity for which such tariffs are to be available ;

－the tariffs are applied without discrimination on grounds of passengers nationality or place of residence within the EC ;

－participation is voluntary and open to any air carrier who operates or has applied to operate on the route concerned ;

－any resulting proposals are not binding ;

－agreement on agents remuneration or other elements of the tariffs is not entailed ;

－each participant informs the EC Commission of its submission of any tariff concerned to the authorities of Member States ; and

－the EC Commission and the Member States concerned may observe

tariff consultations and must be given advance notice of them, and a full report on the consultations must be given to the EC Commission.

An EC Commission Note sets out brief procedures for the notification to the EC Commission of intended consultations on tariffs, tariff submissions and reports of tariff consultations. A further EC Commission Notice confirms that consultations on inclusive tour and group inclusive tour fares are within the scope of the block exemption, provided that certain conditions are met.

3.2.4. Slot Allocation and Airport and Scheduling

Commission Regulation (EEC) 2671/88 also creates a block exemption for agreements, decisions and concerted practices whose purpose is slot allocation and airport scheduling, provided that :

—the consultations are open to all carriers having expressed an interest in the slots concerned ;

—any rules of priority established ; -are not related to carrier identical nationality or category of service (although they may take account of grand-father rights) ; take into account constraints and air traffic distribution ru-rules ; are made available to any interested party on request ; and are applied without discrimination ; and

—The EC Commission and the Member States concerned may observe multilateral consultations and must be given advance notice of them.

An EC Commission Notice sets out brief procedures for the notification to the EC Commission of intended consultations on slot allocation and airport scheduling.

3.2.5. Computer Reservation System

Commission Regulation (EEC) 2672/88 creates a block exemption for certain obligations in agreements for the common purchase, development, marketing or operation of a computer reservation system, subject to certain conditions aimed at ensuring non-exploitation and on-discrimination in the treatment of participating airlinesand subscribers. The exemption is aimed principally at the Amadeus and Galileo systems.

3.2.6. Ground Handling Services

Commission Regulation (EEC) 2673/88 creates a block exemption for

bilateral agreements, decisions and concerted practies dealing with the supply to an airline at an EC airport of ground technical and operational services, services connected with the handling of passengers, baggage, cargo and mail, and in-flight catering services, provided that :

- the airline is not obliged to obtain all or any of such services exclusively from a particular supplier ;
- the supply of such services is nct tied to the acceptance of other unconnected goods or services ;
- the airline may choose from a range of services offered by the supplier and is not prevented from taking some services from another supplier or from supplying them itself ;
- the supplier does not impose prices or conditions which are unreasonable and which, in particular, bear no reasonable relation to cost ;
- the supplier does not apply dissimilar conditions to equivalent transactions with different airlines ; and
- the airline may withdraw from the agreement on no more than 3 months notice.

4. Current Issues in Korea

4. 1. Policy

Current policy in international air transport is aiming at catching two rabbits with a stone, which is to promote competition at one side, and to curb excessive competition at the other.

This policy is well reflected in the revised "Guidelines to Enhance the Competitiveness of the Korean Carriers". For example, the new guideline abolished the geographical limitation on Asiana Airlines' operation while raising the threshold of double designation to 210,000 passengers on the long haul and 180,000 on the short and medium haul in order to avoid excessive competition.

However, apart from operation, the detailed conditions particularly regarding acts of airlines with which competition rules can be applied are not

developed and elaborated.

4. 2. Relevant Provisions

Art. 121 (agreements relating to air transport) of the Aviation Act stipulates that agreements relating to air transport between airlines shall not limit competition between them in substantial terms.

Art. 129 para. 7 of the Act says that when an airline does the acts of excessive competition such as cutting fares, providing seats excessively and other unfair competitive practices which are harmful to national interests, the Minister shall cancel licence.

Article 49 of Presidential Decree to Aviation Act exemplifies unfair competitive acts in Appendix 2 as follows :

1) Acts of giving information to which may result in undermining belong to negotiating partner, which may result in undermining national interests
2) Provision of predatory pricing and excessive capacity which may unduly affect the operation of airlines and undermine sound development of the market
3) Advertisement of incorrect, and exaggerated information which may mislead to wrong judgement of users
4) Slandering other airlines and making public false information for the same purpose

Until now these provisions have not been applied in actual cases. However, in view of ever-present competition and often heated confrontation among national airlines, the chance of applying these provisions remains very high.

Apart from relevant provisions of the Aviation Act, the Antitrust and Fair Transactions Act are the main statutes which regulate the possible mergers and acquisitions of enterprises including those between domestic airlines, domestic and foreign airlines. Until now there has been no application of these two acts to this area because of absence of such transactions either between domestic carriers or between domestic and foreign carriers.

However, as domestic monopoly in domestic and overseas market has disappeared since 1988, the applicability of these acts is likely to be increased with the growing possibility of transactions between foreign and national carriers.

5. Conclusion

Many States have had statutes with repect to anti-trust or pro-competition [5] even though they generally provided airline industry with anti-trust immunity for the reason that it was regarded as a public utility. some of these States began to apply competition rules to international air transport including mergers and acquisition of competition rules to international air transport including mergers and acquisition of airline wherever such laws are applicable, particularly since they eased the control of air transport industry which became a competitive industry controlled by the market forces.[6]

However, international air transport is a commercial activity where strongly differing views exist as to desirble levels of protection competition and industry cooperation, together with comity and international relations.[7] Consequently, unilateral actions regarding competition in the 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 the application of competition laws or practices not accepted by that other State increases the likelihood of disputes between them which adver-

5. e.g., Section 408 of the Federal Aviation Act as amended, the Sherman Act and the Clayton Act in the U.S. and Articles 85 and 86 of the Treaty of Rome and relevant rules of the EC.
6. Jerry L.Beane, "The Anti-Trust Implications of Airline Deregulation", J.A.L.C. Vol 45, 1980. p.12.
7. Patricia Barlow, "Aviation Antitrust-International Consideration After Sunset", Air Law, Vol. XII, No.2, 1987. pp.82-83

sely affect international air transport.[8]

Moreover, taking into consideration dim demarkation between "sound" and "excessive" competition, it is advisable to take a cautious approach when applying these competition rules to actual cases.

In any case, the use of common sense and sound judgement considering policy objectives is also required in applying competition rules in the air transport field.

8. ICAO Circular 25-AT/85, Guidance Material on the Avoidance or Resolution of Conflicts over the Application of Competition Laws to International Air Transport. p.1.