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- **ICAO Reform – a delayed departure**
- **Aviation and the Environment – a dialogue of the deaf**
- **Airport Charges Directive – the airlines are 'worse than the farmers'**
- **ANSP un-bundling and the myth of sovereignty**

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ICAO Reform – a delayed departure

It is not clear if it was the pressure that the environment debate put on to the ICAO Assembly or some other thing, but after a summer of talking about the need for change of the ICAO process, and a paper from Canada (on behalf of 18 countries) proposing a review process to look at the issue, the ICAO Assembly pulled back from any meaningful internal reform; three more years are now lost – except perhaps that the three years gives Canada and its allies more time to find voice.

Is there any doubt that ICAO could do with change? Apparently there is doubt, or the proposal for a working review might have been carried. Machiavelli once observed that the hardest thing to do is to introduce change, because those that stand to gain cannot be seen to be supporting you, and you can be sure that those that stand to lose will oppose you. Maybe that is what happened here. Sure, there was a resolution passed that imposed term limits on the offices of both Secretary General and President of the Council. Maybe that of itself is a good start, but does it actually address the real questions?

If there wasn't an ICAO, would the world invent it? Would the aviation industry demand it? Would other world bodies support it? And even if the answer to all of these questions is 'yes', would it look like this? These are not idle questions. Is there a need for an international forum for aviation issues? Absolutely. Is it ICAO?

Perhaps it is the World Trade Organization. After all, the WTO could also look at questions like overflight issues over member states, the environment, security and multi-lateral, broad ranging open skies agreements in their existing multi-lateral forums. It might be argued that the WTO itself does not have a flawless record of achievement, but then again, as the WTO is quick to point out, the existing system is not working. For all the talk of liberalisation and open skies, currently, not more than 1 in 6 passengers flying internationally, does so under the auspices of a generally liberal air services agreement. Admittedly, this does not include the EU-US agreement, and its passengers, but the record is not heart warming. And for all ICAO's talk of technical achievements, not to be dismissed, the pace of that achievement can perhaps best be called glacial.

The WTO is straining at the leach, looking explicitly at the question of whether air services should be included in the WTO Services agreement. The airline industry argues vehemently that the current system is doing just fine, but the members of the WTO that we have spoken to remain to be convinced; the Assembly was hardly ICAO's shining hour after all, and there is considerable concern and cynicism that there is sufficient progress being made to liberalise and modernise the system. Term limits for the Secretary General might be a good start, but what is needed might be a good finish.

Aviation and the Environment – A dialogue of the deaf

The headlines coming out of the ICAO Assembly were stark, but the meeting they were reporting was not exactly clear. Perhaps there were two meetings of ICAO in Montreal? What happened depended entirely on which headline you read. The European Union (EU) and other pro-environment lobby saw the vote of all 142 non-ECAC States against the EU proposal to allow member states to unilaterally introduce emission trading as a bitter pill to swallow, but one that would only cause them to redouble their efforts to ensure that airlines participated fully in their campaign to fight environmental damage. Obviously disappointed by the Montreal Assembly's rebuttal, the European Union reacted angrily and said that "it stood firm on ambitious action to cut aviation emissions" and "will not feel bound by this part of the conclusions." The latter statement is intriguing as it would indicate that majority rule (on a global basis) is not always binding on the EU.

At the same time, others, including the American delegation and ICAO itself, tried to play up the outcome of the Assembly, noting the 95% agreement on most all other issues, and that the disagreement centred on one small phrase in an annex to a resolution, regarding unilateral versus mutually agreed introduction of economic measures, such as emission trading. Instead, this line avowed, look at the outcome, a committee to 'aggressively' pursue proposals for addressing environmental issues. Cynics were not entitled to dismiss this, according to the President of the Assembly, the highly respected Jeff Shane, under-secretary for Policy of the Department of Transport in the US. The use of the word 'aggressive' of itself was a diplomatic code word to show that this was to be taken seriously.

What neither side is saying is that the meeting was held with most unfortunate timing, a week before President Bush's first ever White House meeting to discuss this matter. The outcome of that meeting has since disappeared into the void (the Europeans noting only, icily, that the US was isolated, the Chinese and Indians noting disappointingly that whilst they agreed with a need for binding targets the US did not) except to freeze (or at the very least confuse) for a further three years the outcome as it impacts aviation. Neither side felt able to take a strong position one week before the Presidential meeting, for fear of up-staging the meeting in the White House. Perfectly acceptable, in the big picture, but it leaves aviation with no leadership – so an 'aggressive' committee has been established instead.

So perhaps now, the real question is whether the world's environmental regulators, due to meet in Bali in December can read the diplomatic code word in the ICAO statement and thus be prepared to again exempt aviation from the Kyoto process (and any subsequent, post-Kyoto round). The question is whether the code word is convincing. We will need to wait and see. And, it needs to be understood, that will be in the context of a cacophony of increasing environmental taxes in aviation, moves towards alternate means of complying with environmental obligations and other actions. Perhaps ominously, it is also in the context of other regulatory agencies, and in particular the WTO, looking at the regulatory framework for aviation.

IATA voiced their standing opposition to the EU initiative in the aftermath of the ICAO Assembly. IATA said that "Europe was out-of-touch on emissions trading." Out of touch

with getting ETS into place globally perhaps, but not with the mechanics of emission trading. With all respect to IATA, nothing could be further from the truth.

While all this was happening, to prove the point, members of the European Parliament moved into top gear. In August, the EP Transport Committee voted in favour of 20 percent auctioning of allowances and 80 percent ATK benchmarking, a start year 2012 for EU and non EU flights and a base year 2008. The Committee also voted to exempt aircraft under 20 tonnes. It was looking like a reasonable outcome for the aviation industry, or at least one they could live with.

Then, in early October, as this newsletter went to press and after the ICAO meeting, the European Parliament Environment Committee, which is the lead committee on the matter, voted for an earlier start date – 2010 for both intra-European and international flights, with a baseline of the years 2004-2006, allowances for emissions 75% of the base year, with half of that up for auction. The benchmark allowance for the remaining 25% is an allowance of 150kg per passenger of revenue ton per kilometre (RTK). The Committee also voted to include small and general aviation in the scheme. As the lead committee on this dossier, this position is potentially more influential than that of the Transport Committee. The fact that assuming an allowance of 150kg per passenger will put many aircraft above their maximum allowed take off weight is apparently beside the point.

This is a considerable hardening of the proposed ETS, and cannot be seen as anything other than a further blow to any hope of reconciliation. Still the Environment Committee's position is likely to be watered down during negotiations with the Transport Committee and in the EP Plenary Session in November. Under the EU co-decision procedure, the Parliament's position must ultimately be merged in a *joint text* with the Council's , and there are currently a number of views of what the full Council will say. Nevertheless, it certainly raises the bar.

And the bar is perhaps the only reason one can assume as to why it got to this. The Greens (who moved the most stringent amendments at the Environment Committee meeting) are actually outnumbered by Christian Democrats and other central and moderate parties at the Environment Committee, but that assumes that the normally pro-business Christian Democrat aligned parties bother to turn up. They didn't and the Greens carried the day. It is hard to see this as anything other than a failure of the airline lobby. It is inexcusable that they were not paying sufficient attention to actually fall for a procedural issue like this.

Maybe, to be fair, the airlines' friends were afraid to take a radical step such as opposing the environment movement on this dossier. Perhaps they read the political wind. The Member States all seem to be in the process of adding aviation environmental taxes to the books. The Dutch have done so, the Germans are proposing a sliding tax depending on the CO_2 each aircraft emits and the British are now reshaping their per-passenger tax into a per-aircraft tax. All these moves are welcomed by the environmental lobby, albeit that generally they see them as merely a good start. The stated aim of many of these groups is to tax passengers off planes. It is not clear how flying nearly empty aircraft will improve the environmental situation.

But this too is curious. Even the Intergovernmental Panel on Climate Change (the IPCC) puts aviation's contribution to climate change at less than 2% albeit with a very high growth rate. Even assuming that all these predictions of rapid growth eventuate, the total aviation contribution to carbon emissions by 2020 is unlikely to exceed 3%. An outright ban on air travel is not going to, of itself, solve the problem, and no one is suggesting an outright ban. (How would the green lobby get to Bali if there was an outright ban?) And even if there is an outright ban, it is verging on a Pyrrhic victory. A mere 97% to go after that.

The road to a global stable regulatory environment which reconciles the apparently conflicting claims of the greens and those of the economy (and the airline industry) appears to be long, and getting longer. So, where to from here?

No member of ICAO disputed the right of the EU to include emissions from European aircraft in its trading system but not the right to include third-country carriers unilaterally. And then they lined up to vote accordingly. The EU got to the point of pleading that their scheme would not apply to carriers that fly in to Europe less than daily. Think that through.

The signatories to the April letter State Letter, that so accurately foreshadowed this dispute signalled their intention to take appropriate measures under international law should the EU insist on moving forward unilaterally. The European Transport Ministers noted that their intention was to work within ICAO on a global solution, but signalled their determination to reach an outcome, reserving the right to 'keep all options open'. Now, the die is cast. The EU is pushing ahead. Will these States, or the international community in general carry through with their threat to take action? If so, how and where? Traditionally, disputes arising between States to UN treaties, such as the Chicago Convention, took their dispute to the International Court of Justice in The Hague. At least, from the perspective of the EU, a trip to The Hague to argue this point will be quite efficient in terms of their carbon footprint.

So that is a saving.

Airport Charges Directive – the airlines are 'worse than the farmers'

In January this year, the European Commission (EC) tabled a draft Directive on airport charging. The EC argued that the draft did little more than ensure that the ICAO principles were adopted formally by the European member states. The principles: transparency, non-discrimination and full consultation needed to be applied consistently around Europe, the EC argued. The method by which this was to happen was to propose that all airports with more than one million passengers a year (or more than 25,000 tonnes of cargo) be required to comply with these requirements (set out in close detail in the draft). The process would be overseen by independent regulatory authorities in each member state.

Maybe it is because the airlines have been distracted by the environment debate, whereas the airports have only had this to focus on, but this is starting to look like a good old fashioned hiding in the making. The airports are ahead and pulling further away from

the airlines in the lobbying stakes. There is not one point that the airlines have tried to make that has carried the debate; on the other hand, the airports sweep all before them.

The debate swings on a small number of issues. The most important is scope: to which airports should this Directive apply? There is an argument of principle at stake in this debate – rules based regulation versus principle based regulation. On the one hand, there is a strong lobby in favour of a strict numerical approach based on passenger (and cargo) numbers. This has in its favour some measure of certainty. It is possible to know the number of passenger throughput and thus to assess whether or not the airport is required to comply with the Directive.

Against that, those in favour of the principles based approach argue that the issue is not airport size, it is airport behaviour, and specifically, anti-competitive behaviour. The size of the airport is not important, it is whether the airport is acting in a way that abuses its dominant position in a market, or that is restricting competition. Whilst that calls for a market analysis on a case by case basis, it ensures that the Directive would only apply to regulate the behaviour that it sets out to regulate.

At its core, the issue here is competition between airports. If one accepts that airports do actually compete between themselves, then reference to the usual principles of competition law should be sufficient. If one does not consider that airports compete one with another, then there is a good case for directed, prescriptive intervention. Interestingly, in both the UK and in Ireland, which already have rules regarding charging for major airports, very few of the airports to which the rules apply are able to charge up to the cap the regulations would allow. That is felt to be due to the competitive pressures airports are under. On the other hand, it can be argued, that there are any airports that can charge up to that limit, critics of this approach would argue, shows that there is a need for intervention and prescriptive solutions.

The airlines will argue that, notwithstanding their objection to this sort of intervention and prescription when it comes to their behaviour, it is necessary in the case of airports because the underlying nature of aviation is such that it is verging on the impossible to prove predatory behaviour, and abuse through pricing. Thus, even if it calls for detailed language this is the only means to ensure that airlines can enforce reasonable behaviour from airports.   Do as I say, not as I do.

The lobbying process has been interesting for a number of reasons, not least of which that clearly it is the airports (rather than the airlines) that have been carrying the day. At a recent public consultation, the Chairman, a leading member of the European Parliament Tourism and Transport Committee and a member of the European Socialist Party accused the airlines of being ‘worse than the farmers’. Several members of the Socialists group noted that they felt that the market should provide a solution, consistent with all parties making a reasonable profit, only for the one of the airline lobbyists, in a move that had shades of the sort of actions one might associate with the Propaganda Team Workers of the Glorious Cultural Revolution to ask that the regulation apply to all airports and that there be a specific obligation that airports provide cost efficiency. That this, rather like beauty, is in the eye of the beholder and somewhat difficult to regulate for was not of concern to the airline representatives. In their mind, almost certainly, they would know what it was when they saw it.

Clearly, we are standing at a cusp in the way that the airport-airline interface is to be regarded and regulated. To the extent that the usual competition law rules apply in what was until very recently considered by most as a 'natural monopoly' is to be welcomed. At the same time, airports and airlines are now going to need to learn considerably more about those rules to be able to navigate their way through them.

ANSP un-bundling and the myth of sovereignty

Almost all government owned and operated infrastructure networks are now being dismantled and sold, or have already been so. Airlines, airports, power, telecommunications, rail, even post offices have all had public discussions and, generally, in varying ways and at varying speeds are being transferred out of the hands of direct control of the government. So what makes air navigation service providers so special that ANSPs are not on that disposable list of government owned and controlled infrastructure networks?

In a couple of exceptional cases, they are: in the UK, NATS styles itself as privatised. NavCan in Canada is a user owned company that pays its dividends as lower user fees. But these two organisations are very much in the minority. A number of other ANSPs are corporatised and work along corporate lines with a clear customer focus and user consultation. AirServicesAustralia, Airways NZ, skyguide in Switzerland and the Irish ANSP arm of the Irish Aviation Authority are examples of this.

But in no case is there an example of one ANSP coming into the territory of another and 'poaching' business; no example of competitive pricing; no example of a takeover. There are some arrangements whereby the ANSP of one country manages a piece of airspace over another on the grounds that it is more efficient (usually where there is an airport close to an international border. Switzerland's Geneva and Zurich airports are in this category, and skyguide has had cooperation arrangements with France and Germany's ANSPs respectively). However, a recent judgement regarding these arrangements, discussed below, has thrown considerable doubt over these in the future.

In corridors of ANSP meetings, sometimes, very sotto voce, some of the more assertive ANSP managers talk about the possibility of looking at these sorts of things at some time in the future, but not yet. Even with the direct and forceful blessing of the European Commission to create a single European sky have the ANSPs been able to find a way forward. This is intensely frustrating to the Commission, who have threatened to amend the Single European Skies legislation to force change more quickly. The airlines are certainly calling for more rapid action.

Some of this can be put down to the inherently conservative nature of ANSPs and their management. At one level this is to be applauded of course. No-one is all that interested in an air traffic controller that takes risks. That culture becomes all pervasive. There are stirrings and calls for action, but usually, stirring as these calls are, once the CEO gets home from the meeting (most usually a CANSO meeting) the call to action gets lost in the details. There are also a number of unique factors inherent in ANSPs; each is a complete monopoly, and they are not network services, where it is not possible

to easily find introduce a substitute supplier, and, and this is usually regarded as the killer argument, there is the question of 'sovereignty' even if one did want to bring in a new supplier.

Sovereignty has been used in almost all major industries going through this process, whether couched in terms of 'vital state industry' or 'national defence'. The argument is still current in areas such as energy supply and pipelines, but seems to have been defeated in telecommunications, for example. Nothing seems able to break the sway of this emotive, and very arguably invalid, argument within the ranks of the ANSPs. The recent judgements arising from the Ueberlingen case, when a German judge found that the arrangement between skyguide and DFS (the German ANSP) whereby skyguide controlled a sector of German airspace, was insufficient on the grounds that the arrangement was not an intergovernmental arrangement has put the case for these sorts of arrangements back by several years and strengthen the hand of those resisting the call for commercialisation and change in the ANSP sector.

But change must come, to ensure that there is a more rational approach to this fundamental part of the air transport system. Recent calls from the airlines for rationality have added the environmental case to their usual calls for efficiency and thus lower costs, and currently, the environmental case is a trump card. Improving efficiency in air route planning, flight management and flow control is estimated to reduce emissions (and thus costs) by between 12 and 20%. Leaving aside for one minute the question of why, having been identified, it is not possible to make these savings now, IATA argues that this is not possible whilst there is such a fragmented and disparate system of air traffic control management. The EC is also pushing hard for efficiency gains through the Single European Skies, and has recently been explicit in venting frustration at the slow pace of reform.

Part of the reason for that slow pace may be put down to the 'turkey voting for Christmas' syndrome. As noted above, in a very conservative industry the voice of slow, considered progress through what might be a legal and regulatory minefield has a siren-like attraction.

But all is not lost. Increasingly, there is a push towards 'unbundling' ANSP services; finding parts of the ANSP product suite that can be detached from the 'core' business and commercialising this. To date, this has included training, (both skill and language) maintenance and consulting on system integration and development. As more commercially minded senior managements look for ways to work around issues such as sovereignty this is likely to expand.

It is not without issue. ANSPs are therefore likely to be competing with their current suppliers for many of these contracts. The issue of competition law arises, or might arise in some cases, if not properly considered.

Properly managed, unbundling is a way that addresses a number of concerns for ANSPs, including that of commercialising and to buy time for the sovereignty issue to also be fully debated. It is likely too to see a reduction of costs to users and to point the way to more efficient service provision in the future.