Flying towards a fair competition horizon

Continuity and change in the European Union’s approach of competition in air transport: from regulation 868/2004 to regulation 2019/712

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The European Union’s (EU) regulation 2019/712 on safeguarding competition in air transport is an unusual piece of legislation in two regards. First, it aims at shielding EU airlines from allegedly unfair competition on the part of third-country airlines, an approach which can seem contradictory with the core principles of EU competition policy. Competition policy is a key policy in EU integration. In what came to stabilize as its core principles, the goal is to improve consumer welfare through ensuring fair and open competition between economic actors: competition is considered as a source of economic efficiency, and in general shielding companies from competition is not regarded as a legitimate option. Second, at a global level, civil aviation is characterized by the centrality of state sovereignty. Giving powers to a supranational institution (in this case the Commission) to decide upon redressive measures against third-country entities contrasts with this logic.

Therefore, this master thesis seeks to address the following research question: why was regulation 2019/712 adopted when prevailing frames of understanding of competition in EU policies and the organization of air transport around state sovereignty go against such measures? This master thesis looks at the process that led to the adoption of regulation 2019/712. It makes the hypothesis that discourses matter, but that they unfold in the context of a specific “field” which constrains them: they are situated both within the remit of EU policies affecting competition and of aviation policy. A process-tracing approach is used, which allows to consider context and temporality as causal factors. The research design includes several types of sources: a press review, a study of documents produced by EU institutions and by the main implicated interest groups, and 13 semi-directive interviews.
Three causal mechanisms are identified as explaining the adoption of regulation 2019/712: (1) a long-term advocacy campaign of major EU legacy airlines calling for EU action against allegedly unfair competition practices on the part of non-EU carriers has put their preferred policy option in coherence with pre-existing frameworks concerning competition; (2) the issue was embedded in a broader agenda, supported by a wider coalition and it became much more politicized; (3) during the legislative process, the balance of power within and between EU institutions allowed to overcome an awakened opposition voicing its concerns about the impacts of the regulation on state sovereignty and connectivity.

Chapter I. “Fair competition” takes off. A long-term mobilization of key actors in the field of EU policies affecting competition in civil aviation.

EU policies affecting competition in civil aviation unfold in a three-faceted context. First, EU legacy airlines are confronted with heightened intra-EU and extra-EU competition. Second, global governance of civil aviation resting upon state sovereignty, there is limited leeway for framing competition rules at a multilateral level. It is for that reason that the third facet of EU policies affecting competition in civil aviation is the centrality of bilateral agreements.

In this context some EU legacy airlines, and more particularly Air France-KLM and the Lufthansa group, advocated taking the path of unilateral legislative action. The aim was to give the EU the possibility to sanction third-country airlines engaging in allegedly unfair competition practices. For that purpose, EU legacy airlines voiced a specific frame on their situation, that of their economic activity being threatened by unfair practices of third-country airlines. Regulation 868/2004, adopted in 2004, allowed unilateral action of the EU, but was adopted in a very specific context and had a restricted scope. For that reason it was perceived as unsatisfactory by the EU legacy airlines implicated, but yet set a precedent in terms of legal tools used.

The advocacy work therefore continued, and resulted in 2012 into a proposal of revision of regulation 868/2004 by the Commission. It was embedded in a wider initiative and accompanied by significant change in discourses: it is highlighted that shielding airlines from unfair competition is legitimate and coherent. A consultation was subsequently launched in 2013-2014, revealing that new frames were fully integrated by the Commission. However, they also showed that oppositions to a new regulation were to be expected during its future legislative path. More generally, although the set of implicated actors and salience of the issue remained restricted, there was a polarization of the debate among those actors, who linked the issue with broader governance considerations.
Chapter II. “Fair competition” in the air. Politicization and appropriation of a discourse by stakeholders (2015-2016).

From 2015 onwards, the initiative promoting the safeguarding of “fair competition” was integrated in the agenda of more airlines and in that of unions. Indeed, in 2015-2016, major American legacy airlines conducted an intensive campaign denouncing allegedly unfair competition on the part of “Gulf carriers”: the issue was politicized by this transatlantic campaign. The three major EU-level groupings of unions for the sector of air transport also supported the initiative for an EU-level instrument. Therefore, the coalition supporting the creation of a new instrument became more important.

At the same time, the EU agenda in the field of civil aviation was made more salient and broader through the publication of the 2015 Aviation strategy for Europe. This strategy is focused on enhancing the competitiveness of the aviation industry sector, which represents a change of approach compared to an exclusive focus on liberalization. Its reception by stakeholders was not unanimous, but they all recognized a shift in the perspective of the Commission. Thus, the revamp of regulation 868/2004 became embedded in a broader agenda, compatible with a proactive safeguarding of fair competition in civil aviation.

Therefore, policy formulation for the reform regulation 868/2004 was made in a context favorable to the claims of the coalition promoting it. This dynamic was further reinforced by the appropriation of the project developed by the Commission by more actors: some EU member states, particularly the French and German governments, openly supported the project of revamp of regulation 868/2004, as did the European parliament (EP). When the legislative proposal was made by the Commission, it was generally welcomed by the actors of the coalition who had advocated for it and was fitting with their preferences.

Chapter III. Landing “fair competition” at compromise. A successful coalition throughout a legislative process under pressure (2017-2019).

The legislative proposal of 2017 had still to go through the EU decision-making process. Consensus on the revamp was reached in the EP, thanks to a combination of three elements. First, general pre-existing structures in the EP were favoring the adoption of a measure like the revamp of regulation 868/2004. Combined with issue-specific factors, this situation created an equilibrium favorable to the reform in the responsible committee. As a result, an ambitious text was adopted, accommodating oppositions within the EP and backed by a strong majority.
Simultaneously to the establishment of the position of the EP on the draft regulation, EU member states were establishing the position of the Council. More actors staunchly opposing the revamp of regulation 868/2004 became vocal on their concerns about state sovereignty and connectivity, particularly some member states at the Council. The French and German representatives were also defending their national interests, but the latter were in that instance aligned with furthering of EU integration. Because of these stark oppositions in the Council, finding a common position was a cumbersome process, resulting in the adoption of a text differing importantly from the draft of the Commission and the version defended by the EP.

The trilogues brought back in more actors favorable to the reform, that is the Commission and the EP. In trilogues, the dynamics favorable to the revamp of regulation 868/2004 which had developed in previous stages of the reform process aggregated, making it more likely to overcome the double hurdle of prevailing schemes regarding competition in EU policies, and centrality of state sovereignty. As a result, the adopted text was relatively close to the Commission’s proposal, and the new regulation is generally considered as more effective and part of a broader change of approach in EU policies.

**Conclusion. Flying towards a fair competition horizon.**

Two hurdles for the adoption of regulation 2019/712 were identified: pre-existing schemes regarding competition in EU policies and the centrality of states in air transport. Of the two, only the second was “overcome”, in the sense that the new regulation indeed amounts to the possibility of unilaterally taking redressive measures against third-country airlines and to the delegation of powers to the Commission. Regulation 2019/712 was put in coherence with pre-existing schemes regarding competition, even if it can be considered as representing, especially in the context of the *Aviation Strategy for Europe*, as a change of focus. Making an analogy with the work of Jabko, who showed that the project of the common market constituted a common “horizon” for implicated actors, competition was the common horizon of actors implicated in the making of regulation 2019/712: they did not interpret it in the same way, asked for different measures to implement it, but still referred to it and even more importantly, did not question it in its principle.

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