KMA ZUCKERT

The International Air Transportation Fair Competitive Practices Act – A Limited, But Powerful Tool for U.S. Carriers

David Endersbee and Barbara Marrin
KMA Zuckert LLC[1]

The International Air Transportation Fair Competitive Practices Act ("IATFCPA"), 49 U.S.C. § 41310, as amended, gives the U.S. Secretary of Transportation the authority to take action against "anti-competitive, discriminatory, predatory, or unjustifiable activities by a foreign government or foreign airline" that negatively impacts a U.S. carrier.[2] While most disputes are resolved through informal advocacy or government-to-government communications, U.S. carriers have the option to file a formal IATFCPA complaint with the Department of Transportation (DOT) if they feel aggrieved. In this article, we review IATFCPA and discuss some recent complaints.

IATFCPA Process

If a U.S. carrier submits a complaint to DOT that is subsequently found to be meritorious, IATFCPA authorizes the Secretary to "deny, amend, modify, suspend, revoke, or transfer … a foreign air carrier permit or tariff…"[3] as a retaliatory (or equalizing) measure. In other words, IATFCPA authorizes DOT to impose countermeasures against foreign air carriers for their government's "anti-competitive, discriminatory, predatory or unjustifiable activities."

Procedurally, a complainant must file a complaint before DOT invoking the IATFCPA, reciting the facts and circumstances giving rise to the complaint, and requesting DOT action.

The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on bilateral interpretation, disputes, and government affairs matters. For further information regarding the matters discussed in this article, please contact either of the following attorneys:

David M. Endersbee
(202) 973-7935
dendersbee@kmazuckert.com

Barbara M. Marrin
(202) 973-7961
bmarrin@kmazuckert.com

KMA Zuckert LLC
888 17th Street, NW, Suite 700
Washington, D.C. 20006
Telephone: (202) 298-8660
Fax: (202) 342-0683
www.kmazuckert.com

Under IATFCPA, DOT has 60 days to approve, deny, or dismiss the complaint. The statute provides for an additional 30 day period if "it is likely that a complaint can be resolved satisfactorily through negotiations with the government of the foreign country or foreign entity." A further 90 additional days are available to DOT if it determines that negotiations will result in an "imminent" resolution of the complaint.

Following the submission of an IATFCPA complaint, DOT will then issue an order instituting a formal proceeding and setting a calendar for answers and replies from the public – typically only interested carriers, trade associations, and foreign government agencies file comments.[4] Once DOT has received comments and has developed a record, it will issue an order denying or approving the complaint.

A review of IATFCPA complaints over the past several years illustrates how this process unfolds.

IATFCPA Complaint Dispositions

Generally rare, two IATFCPA complaints have been filed recently. Below, we discuss these recent complaints as well as complaints from the previous ten years.

- JetBlue Airways Corporation v. The Kingdom of the Netherlands

On February 14, 2023, JetBlue filed a complaint with DOT, alleging that the Government of the Netherlands was violating U.S.-EU Open Skies Air Transport Agreement.[5] Specifically, JetBlue argued that by failing to ensure it received slots at Amsterdam Airport Schipol (AMS), the Dutch government was violating IATFCPA and provisions of the open skies agreement. JetBlue requested that DOT require KLM to provide it with at least two slot pairs. In response, DOT opened a proceeding on February 21, 2023. JetBlue's complaint has been the subject of several comments, including from Air France-KLM Group (the parent company of Dutch airline KLM), KLM, the Dutch government, Airlines for America, and Airports Council International - North America. As of the time of writing, this proceeding remains open.

- Members of Airlines for America v. Commonwealth of Bahamas and Various Bahamian Carriers

On February 21, Airlines for America ("A4A") filed a complaint with DOT alleging that the Government of the Bahamas was imposing "unjustifiable, unreasonably discriminatory, anticompetitive and unreasonable" air navigation charges on U.S. carriers" in violation of the U.S. – Bahamas bilateral.[6] Specifically, A4A argued that the high cost of air navigation charges (actually provided to the Bahamas by the FAA on a contract basis, but charged to carriers by the Bahamas) vastly exceeded the actual cost of the services and, furthermore, that A4A members already pay into FAA's Airport & Airway Trust Fund pay to support air traffic control and related facilities, such as those the FAA provides to the Bahamas, resulting in duplicative payments. A4A asked DOT to curtail or suspend the

authority of Bahamian carriers serving the U.S. In response, DOT opened a proceeding on December 21, 2022. Several parties submitted comments, including the National Air Carrier Association, the Bahamas, Spirit Airlines, and several Bahamian carriers. On February 21, 2023, DOT denied A4A's complaint, announcing that it would seek resolution through consultations with the Bahamas as provided for under the bilateral. (DOT has, in fact, already begun exchanging letters and meeting with their counterparts in the Bahamas.) DOT's decision indicated that "While we do not believe that the complaint successfully alleges a claim under IATFCPA [because U.S., Bahamian, and third-country carriers were all charged the same rates] we fully expect to reach satisfactory closure of the issue through diplomatic efforts."[7]

- Kalitta Air, LLC against The Kingdom of the Netherlands, Amsterdam Airport Schipol, and Stichting Airport Coordination Netherlands

On January 29, 2019, Kalitta filed a complaint with DOT alleging that Airport Coordination Netherlands did not award it its historic slots at AMS for the summer 2017 season, due to a narrow interpretation of the 80/20 use it or lose it rule that is typical at Level 3 slot-controlled airports like AMS.[8] Kalitta was instead awarded sufficient ad hoc slots from the slot pool to continue and was stuck with no slots in Winter 2018 season. Kalitta asked DOT to restrict or suspend the authority of Dutch cargo carriers KLM and Martinair. In response, DOT opened a proceeding on February 2019. Comments were filed by offices of the Dutch government, JetBlue and KLM. DOT extended the proceeding thirty days to provide time for discussions between Kalitta and the Dutch authorities as well as between the U.S. and the Dutch government. On May 1, 2019, DOT dismissed the proceeding without prejudice following the adoption of a "Local Rule" which provided sufficient flexibility to accommodate Kalitta's request for slots.

- The Imposition of Unjust User Charges at Italian Airports

On March 15, 2013, and on its own initiative, DOT issued an order to show cause proposing to impose remedial action under IATFCPA as a result of user charges at Italian airports.[9] Specifically, DOT stated that the charges imposed by the Italian government were "an unjustifiable or unreasonable discriminatory, predatory, or anticompetitive practice against U.S. air carriers and impose an unjustifiable or unreasonable restriction on access of U.S. air carriers to the Italy market" and also violated Article 12 of the U.S.-EU Air Transport Agreement. Italy had, for several years, imposed one set of user charges for intra-EU flights and another, much higher set of charges, for flights beginning or ending outside the EU. As a remedy, DOT proposed to "preclude Alitalia from participating in any or all services (on-line, interline or codeshare) between any point or points in Italy, via any intermediate point in the EU, and any point or points in the United States." Comments were filed by the European Commission, Alitalia, A4A, and U.S. carriers. DOT terminated the proceeding on March 28, 2014, announcing that the Italian government implemented changes to eliminate discriminatory charges following U.S.-EU Joint Committee consultations.

Key Takeaways

IATFCPA is one of several key authorities available to DOT to curtail discriminatory practices.[10] Foreign carriers from countries that impose burdensome/discriminatory treatment or requirements on U.S. carriers should be aware that U.S. open skies agreements include articles relating to the fairness of user charges.[11] While these agreements also include consultation clauses in the event of a dispute,[12] consultations do not guarantee that the U.S. will be satisfied with the outcome if U.S. and foreign carriers are treated differently.[13] Importantly, foreign carriers face the risk of having their U.S. operations suspended or curtailed if they are on the losing end of an IATFCPA complaint.

On the other hand, U.S. carriers should not forget the utility and leverage that IATFCPA complaints provide, provided they have first undertaken their own efforts to resolve any disputes with foreign regulators.

Carriers seeking clarity about IATFCPA and its implications in concrete scenarios should consult with counsel.

---

[1] The authors thank Jim Thumpston for his invaluable assistance in researching this topic.

[2] https://www.transportation.gov/policy/aviation-policy/iatfcpa-complaints.

[3] 49 U.S.C. § 41310(c).

[4] DOT has, in practice, generally opened a public docket for each IATFCPA complaint in order to develop a record upon which to base its decision.

[5] Docket DOT- OST-2023-0028.

[6] Docket DOT-OST-2022-0150.

[7] Order 2023-2-19.

[8] See Paragraph 1.7.2(f) of the IATA Worldwide Slot Guidelines, outlining the key principles of slot allocations at Level 3 airports: "An airline is entitled to retain a series of slots for the next equivalent season if they were operated at least 80% of the time during the period for which they were allocated. This is referred to as historic precedence."

[9] Docket DOT-OST-2013-0038.

[10] See David Endersbee and Barbara Marrin, "International Relations: DOT's Measured Responses Are Fair But Pull No Punches" (Oct. 2020) (available at https://www.kmazuckert.com/publications/aviation/Aviation-EndersbeeMarrin-AviationForeignPolicy2020_13OCTOBER2020.pdf).

[11] See, e.g., Article 10 of the U.S. Model Open Skies Agreement https://www.state.gov/wp-content/uploads/2022/12/Open-Skies-Model-Text-2012-June-2017-update-Accessible.pdf:

> 1. User charges that may be imposed by the competent charging authorities or bodies of each Party on the airlines of the other Party shall be just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users. In any event, any such user charges shall be assessed on the airlines of the other Party on terms not less favorable than the most favorable terms available to any other airline at the time the charges are assessed.
>
> 2. User charges imposed on the airlines of the other Party may reflect, but shall not exceed, the full cost to the competent charging authorities or bodies of providing the appropriate airport, airport environmental, air navigation, and aviation security facilities and services at the airport or within the airport system. Such charges may include a reasonable return on assets after depreciation. Facilities and services for which charges are made shall be provided on an efficient and economic basis.
>
> This language, or a variation thereof, is standard in U.S. open skies agreements.

[12] Id. as such consultations relate to user charges and Article 13 for formal consultations about any matter arising out of the bilateral relationship.

[13] Perhaps due to the evolution of U.S. bilateral air service agreements to open skies agreements, IATFCPA complaints are increasingly uncommon. Between 1995 and 1999, for example, prior to the widespread adoption of open skies agreements, 17 IATFCPA complaints were filed.