THE EUROPEAN COURT OF JUSTICE 'OPEN SKIES' JUDGMENTS OF 5 NOVEMBER 2002: A European Contribution to the Multilateral Framework for International Aviation Relations

By

Delphine DELEAU

Faculty of Law

Institute of Air and Space Law

McGill University, Montréal

November 2003

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Masters of Laws (LL.M.)

Your file Votre référence
ISBN: 0-612-98779-5
Our file Notre référence
ISBN: 0-612-98779-5

RESUME

La politique de 'ciel ouvert' lancée par les Etats-Unis dès 1992 a donné naissance à de nouveaux accords bilatéraux entre ces derniers et la majorité des Etats Membres de l'Union Européenne, alors même qu'ils se dotaient d'un marché unique des transports aériens. Cependant, la clause de nationalité que contenaient ces accords, entrait en conflit avec le principe communautaire de liberté d'établissement.

Le 5 novembre 2002, la Cour de Justice des Communautés Européenne a donc constaté sa violation. Mais la véritable question posée par ces accords venait moins de cette violation, bien antérieure auxdits accords, que de leur fragmentation et de la situation d'inégalité ainsi créée dans les échanges aériens Europe/Etats-Unis.

Effectivement, la problématique à isoler dans ces arrêts, tient à la construction de la compétence extérieure de l'Union en matière de transport aérien. Si la politique de la Cour fut d'éviter d'accorder à la Communauté une compétence générale, elle a cependant rendu celle des Etats Membres impraticable, traçant la voie vers un mandat de négociation globale au profit de la Commission.

Les orientations des accords à conclure sont prévisibles, mais la place de l'Union Européenne dans une éventuelle négociation globale au sein d'organisations internationales reste à définir.

ABSTRACT

The 'Open Skies' policy launched by the United States in 1992 gave birth to new bilateral agreements between them and most Member States of the European Union, as the latter were adopting a single aviation market. Nevertheless, the nationality clause the agreements included conflicted with the Community principle of freedom of establishment.

On November 5, 2002, the European Court of Justice therefore ruled there was indeed violation. However, the true question raised by the agreements focused less on such violation, which was anterior to those agreements, than on their fragmentation and the inequality they created in the Europe/United States aviation relations.

Indeed, the issue to be stressed in the judgments is linked to the building of the external competence of the Union with regards to aviation. While the Court refused to grant total competence to the Community, it made that of the Member States impracticable, leading to a global mandate for the Commission.

Although the orientations of the agreements to be concluded are foreseeable, the role the European Union will play in a potential multilateral negotiation remains to be defined.

ACKNOWLEDGMENTS

I wish to express my gratitude to Professor Dr. Michael Milde for delaying his retirement in order to teach another class of Air & Space law students,

I am extremely grateful to my parents and family for having understood how important it was for me to go study at McGill University for this additional year,

My most sincere thanks to Olivier for his help and unconditional support throughout my never-ending calling into question, whether legal or not.

INTRODUCTION

After the internal market was established in the European Union, it became clear that some aspects of the Bilateral Services Agreements Member States had concluded with third countries contradicted Community Law. The November 5, 2002 cases settled the issue.

Nevertheless, it is worth stressing once again what the issue really was, for many headlines in the aftermath of the cases were misleading: the European Court of Justice did not address the issue of the legality of 'Open Skies' agreement but rather: how do we merge Community law and obligations in air services agreements.

The line of argument was twofold. The fundamental principle of Community law known as the right of establishment was negated by the fact that 'Open Skies' agreements allowed parties to refuse a designation of carrier. That conflict and its consequences on the principle of national treatment had to be solved. Moreover, the question remained: who could negotiate for that? The Court came to the conclusion that power to negotiate such Bilaterals falls to the Commission and not to each Member State. Air fares, Computer Reservation Systems, and slot allocation were declared to be part of the Commission's competence.

Consequently, a huge amount of Bilateral Agreements had to be renegotiated, and areas of exclusive and mixed competence had just been defined which would be difficult to apply.

Although the necessity to address those Bilateral Services Agreements that the Court dealt with first was clear, the E.U. needed to find a pragmatic way forward. Which areas would be reserved to the Community or to the Member States? Who would they

need to renegotiate with? Should multilateral fora such as ICAO or the WTO be more convenient for broad negotiation?

The extent of the task authorities were faced with in the aftermath of the decision led countries to imagine a much more global approach to civil aviation. While a first step towards that multilateral framework appears to be a free U.S.-E.U. market, the question whether aviation shall be considered part of trade requires renewed attention.

Aviation once again proves to be a very political industry, which cannot be treated as any normal money making industry.

After describing how this new case for the European Court of Justice arose, i.e. the factual and legal backgrounds of the dispute, and the issues at stake (in part one), we will analyze both the ruling itself and its aftermath which led to the granting of a Commission's mandate (in part two), in order to conclude on the importance of the judgments with regards to international negotiations, the possibility of a Transatlantic Common Aviation Area, and the new role of the E.U. as an international actor of the liberalization of aviation scheme (in part three).

PART ONE:

'OPEN SKIES' AGREEMENTS AND EUROPEAN AIR TRANSPORT LAW:

A new case for the European Court of Justice

Chapter 1 THE FACTUAL BACKGROUND OF THE DISPUTE: The development of 'Open Skies'

1. Origin of bilateralism

Under the Convention on International Civil Aviation signed in Chicago on December 7, 1944[1] which came into force on April 4, 1947, "every State has complete and exclusive sovereignty over the airspace above its territory" (Article 1). Every sovereign jurisdiction therefore has the right to permit or deny foreign carriers access to its airspace. Together with the equally fundamental principle of equality of opportunity[2], the cornerstone principle of State sovereignty has long been the basis for bilateral agreements. There is indeed no multilateral agreement on international commercial traffic rights. The origin of bilateralism is therefore often explained as a consequence of the need for countries to set forth where and how often one another's carriers may operate between their territories. Nevertheless, it also derives from the political choice of States: "*the lack of political incentive to expand the multilateral system, initiated at Chicago in the shadow of the Convention, caused the emergence of the bilateral regulatory framework as the norm*"[3] Benoit Swinnen writes.

---

[1] [*Convention on International Civil Aviation*, December 7, 1944, 15 U.N.T.S. 295, ICAO Doc. 7300/6]
[2] [R.I.R Abeyratne, *The Air Traffic Rights Debate, A Legal Study*, 18 Annals of Air & Space Law3, 27 (1993)]
[3] [Benoit M.J. Swinnen, *An opportunity for Trans-Atlantic Civil Aviation: from Open Skies to Open Markets*, 63 Journal of Air Law and Commerce 249 (1997)]

2. Bilateral agreements in general

Contents

As clearly summarized by Henri Wassenbergh, bilateral air agreements regulate:

- *"Who may operate the air services agreed to in the exchange of rights between governments (designation),*
- *What these air carriers my fly (routes, capacity and frequencies),*
- *What traffic they may carry (freedoms of the air), and*
- *At what tariffs they may carry traffic (pricing), as well as*
- *How they may sell their products (soft rights).*" [4]

Types of bilateral agreements

The Bermuda I agreement which was concluded between the U.S. and the U.K. in February 1946 is regarded as the first major post-World War II bilateral air transport agreement. Although it was replaced by the Bermuda II agreement of 1977[5] Bermuda I became a standard model for all bilateral air transport agreements. Nevertheless, there are other models known as the 'predetermination model' and the 'U.S. liberal model'. As summarized by Peter Haanappel[6], features of the predetermination type of agreement are price and capacity controls, whereas the Bermuda I type abandons the idea of capacity control, nevertheless remaining characterized by price control. Only when an agreement provides for no tariff restriction is it called a liberal agreement, also known as an 'open skies' agreement .

---

[4] [Wassenbergh, H. *Common Market, Open Skies and Politics*, Air & Space LAW, VOLXXV NUMBER 4-5, 2000]

[5] [Authors do not agree whether Bermuda II was more restrictive (see Böhmann, K., *The Ownership and Control Requirements in U.S. and European Union Air Law and U.S. Maritime Law Policy*, 66 Journal of Air Law and Commerce 689 (2001)) or "*contrary to popular belief and except for numerous details, (...) similar to the 1946 agreement*" (Haanappel, P.P.C., *Canadian International Development Agency Teaching Materials* (1987)).]

[6] [Haanappel, supra note 5]

It is worth noting, for further discussion, that "*since the mid-1940s, almost all bilateral air transport agreements, including the Bermuda agreements, contain nationality clauses that follow the model of the IASTA (International Air Services Transit Agreement), which addressed the issue of airline nationality*" as underlined by Kirsten Böhmann[7]. Such clauses reserve the right of a contracting State to withhold or revoke the certificate or license of the airline of the other State where it is "*not satisfied that substantial ownership and effective control are vested in nationals of [the other] State*"[8].

3. 'Open Skies' agreements in particular

The U.S. 'Open Skies' policy

Open Skies agreements are considered the U.S. Department of Transportation (DOT) response to the inherent inefficiencies of the previous bilateral formats. They fall under the 'Open Skies' policy as defined and introduced by the U.S. Assistant of Transportation Jeffrey Shane in an order of August 5, 1992[9].

Definition and contents of Open Skies agreements

Henri Wassenbergh defines 'Open Skies' as follows[10]: "*Open Skies (...) means that everything is permitted, unless what is expressly forbidden. Open Skies means freedom of safe flight, freedom of air traffic carriage, and freedom to do business, while this freedom does not apply where or when flight is forbidden, to carriage that is forbidden, and to business deals and practices which are forbidden*".[11]

---

[7] [Böhmann, supra note 5]
[8] [International Air Services Transit Agreement, Dec. 7, 1944, Art. I, § 5, 84 U.N.T.S. 389, 394]
[9] [Department of Transportation Order No. 92-8-13, (Aug. 5, 1992)]
[10] [Wassenbergh, H.A., *Principles and Practices in Air Transport Regulation*, Paris ITA, (1993)]
[11] [Previous work by students of the McGill Institute of Air & Space Law on the subject show they have either opted for a longer definition of 'Open Skies': see Lapointe, H., *Regional Open Skies Agreements:*

Most condensed but equally interesting as the eleven basic elements which are often cited to describe the contents of such bilateral agreements[12] are the principles of a model 'Open Skies' agreement according to Daniel C. Hedlund. They can be summarized as follows[13]:

- Market access in member states should be open, and there should be no restrictions on capacity or frequency of services.
- All fares and rates should be determined by the market, subject only to competition rules, and all other governmental controls on pricing should be eliminated. ("*In order to help ensure that this liberalization does not lead to an oligopoly situation where a few major players dominate the market, rules are needed to prohibit anti-competitive agreements, predatory behavior and abuse of dominant market position. Non-discriminatory rules are also necessary for matters such as fair commercial opportunities, setting up sales and distribution*

Law and Practice, McGill University, (1995) or for further explanation of their contents, see Göppert, A.R., *The Liberalization of International Air Transport Services: Developments in the U.S.-German Bilateral Relations and their Implications on Future Regulatory Approaches Towards Aviation*, McGill University, (1998)]

[12] [Swinnen, supra note 3; see also Schless, A.L., *Open Skies: Loosening the Protectionist Grip on International Civil Aviation*, 8 Emory International Law Review 435 (1994)]:
(1) Open entry on all routes;
(2) Unrestricted capacity and frequency on all routes;
(3) Unrestricted route and traffic rights, that is, the right to operate service between any point in the United States and any point in the European country, including no restrictions as to intermediate and beyond points, change of gauge, routing flexibility, co-terminalization, or the right to carry Fifth Freedom traffic;
(4) Double-disapproval pricing in Third and Fourth Freedom markets and in intra-E.C. markets: price matching rights in third-country markets, and price leadership in third-country markets to the extent that the Third and Fourth Freedom carriers in those markets have it;
(5) Liberal charter arrangements (the least restrictive charter regulations of the two governments would apply, regardless of the origin of the flight);
(6) Liberal cargo regimes (criteria as comprehensive as those defined for the combination carriers);
(7) Conversion and remittance arrangements (Carriers would be able to convert earnings and remit in hard currency promptly and without restriction);
(8) Open code-sharing opportunities;
(9) Self-handling provisions (right of a carrier to perform/control its airport functions going to support its operations);
(10) Pro-competitive provisions on commercial opportunities, user charges, fair competition and intermodal rights; and
(11) Explicit commitment for nondiscriminatory operation of and access for computer reservation systems.]

[13] [Hedlund, D.C., *Toward Open Skies: Liberalizing trade in International Airline Services*, 3 Minnesota Journal of Global Trade 259 (1994)]

offices in member countries, ground handling, and other airport facilitation issues essential to airline opportunities.")

- There should be an accession clause open to any state willing and able to abide by the agreement's terms.

Adam L. Schless writes that the DOT clearly announced "*it would take the lead in international airline deregulation by negotiating Open Skies agreements with other countries, specifically those in the [European Community]*"[14]. Although it is agreed to have had a major influence on the European Community air transport policy, one might wonder whether this call for a less restrictive regime between the U.S. and the participating countries really did amount to deregulation of the international market.

Did the 'Open Skies' policy amount to deregulation of the international market?

Benoit M.J. Swinnen suggests it did not. He writes: "*First, restrictive national regulations limit and constrain the operation of fully efficient hub and spoke systems. Second, any flight from an Open Skies signatory state to a non-signatory state is subject to the terms of the traditional bilateral agreement between the third state and the carrier's national state. Therefore, since the airlines do not have free access to the respective countries' internal markets, they remain unable to feed international routes at the lowest possible cost. Consumers thus continue to pay non-competitive prices and are limited in their choices of routes or flight schedules in planning their travel arrangements.*"[15]

Moreover, the "*DOT refused to include provisions in its Open Skies definition that would promote the liberalization of foreign investment or cabotage restrictions*"

---

[14] [Schless, supra note 12]
[15] [Swinnen, supra note 3]

Kirsten Böhmann adds[16].

Finally, after having described with which arguments in mind Open Skies were developed by the U.S.[17], Frederik Sørensen, Wilko Van Meert and Angela Cheng-Jui Lu insist that "*despite what its title suggests, the Open Skies agreements do not provide carriers of the signing parties with complete freedom to provide air transport services*"[18].

4. Application of the DOT order of 1992 to the European Community

Following is an analysis by Thomas D. Grant[19] of the advantages the U.S. had to negotiate such agreements and what they were seeking by doing so. He explains that: "*The United States, under a single jurisdiction, possesses the largest market in the world for air transport services. For virtually every airline in the world operating long haul international services, access to that market is a coveted prize*". He goes on by describing what the U.S. expected in return: "*The smaller internal markets of countries like Japan, the Netherlands, or the United Kingdom present far less tempting a prospect to American air carriers. However, access to landing slots on international routes into those countries and rights to use those slots in as liberal a fashion as possible are goals American air carriers do very much seek*".

Therefore, the U.S. not only entered into 'Open Skies' agreements with European Countries, but also with countries of the Asia pacific region[20]. Nevertheless, the subject

---

[16] [Böhmann, supra note 5]

[17] ["*(1) to enhance competition in the international air transport market with minimum government interference and regulation; (2) to provide airlines with more opportunities to offer the traveling public a variety of services; (3) to develop and implement innovation and competition without breaching competition/antitrust law; and (4) to maintain safety and security of international aviation*" says the Preamble of U.S. Model Bilateral Air Transport Agreement of March 20, 1995]

[18] [Frederik Sørensen, Wilko Van Meert and Angela Cheng-Jui Lu, *ECJ Ruling on Open Skies Agreements v. Future International Air Transport*, Air & Space Law, VOL. XXVIII/1 (February 2003)]

[19] [Grant, T.D., *An end to "Divide and Conquer"? EU may move toward more united approach in negotiating "open skies" agreements with U.S.A.*, 67 Journal of Air Law and Commerce 1057 (2002)]

[20] [For an analysis of such bilateral agreements, see Elek, A., Findlay, C., Hooper, P., Warren, T., *"Open Skies" or open clubs? New issues for Asia Pacific Economic Cooperation*, Journal of Air Transport

matter of this background analysis is to understand the application and implications of the U.S. 'Open Skies' policy to the European Community.

Divide and Conquer

Anglophone authors refer to the strategy of 'divide and conquer' in order to describe the way the DOT applied the U.S. policy to European countries: *"The United States has thus been able to negotiate bilateral air transport agreements that pry open access to many markets for American air carriers, while ceding relative crumbs to air carriers of the counter-parties to the agreements, or so the European Commission has complained"* Thomas D. Grant writes[21]. This strategy echoes what French author Loïc Grard refers to as *"la théorie de l'encerclement"* (the encirclement policy)[22]. According to him, the application of the 'Open Skies' policy to Europe consisted in isolating the widest national markets by concluding bilateral agreements with smaller European countries in terms of traffic.

The Netherlands, which Loïc Grard considers to be the U.S. 'cheval de Troie' (Trojan horse), were indeed the first to sign an 'Open Skies' agreement with the U.S. in October 1992. Although an analysis of the U.S. - Netherlands agreement shows that the later were neither granted the right of cabotage nor the right to invest in the capital of U.S. carriers, the Netherlands did obtain the antitrust exemption they longed for with regards to KLM's alliance with Northwest thereby opening the door for code sharing between the two companies.

Management 5 (1999) 143-151; Tae Hoon Oum, *Overview of regulatory changes in international air transport and Asian strategies towards the U.S. open skies initiatives*, Journal of Air Transport Management 4 (1998) 127-134; Li, M.Z.F., *Air transport in ASEAN: recent developments and implications*, Journal of Air Transport Management, vol.3, No.3, pp145-153, (1997); HU, H., *Open Skies and its recent impact on the Asia Pacific Region*, McGill University, (1997). For an analysis of the Canadian 'Open Skies' agreement, see Kaduck, R.J., *Canadian carrier strategies and the 1995 open skies* agreement, Journal of Air Transport Management 4 (1998) 135-144]

[21] [Grant, supra note 19]

[22] [Grard, L., *Le nouvel accord franco-américain relatif aux échanges aériens transatlantiques: compromis et transition avant un traité bilatéral Communauté Européenne / Etats-Unis*, Annuaire Français de Droit International XLIV – 1998 – CNRS Editions, Paris]

In February 1995, the U.S. approached Switzerland, but the ratification of the 'Open Skies' agreement they signed was conditioned by the U.S. to the acceptation of a similar document by eight other European countries: Austria, Belgium, Denmark, Finland, Luxembourg, Norway, Sweden, , and Iceland. That, in the French author's opinion, proves that the U.S. approach was far from a strict bilateral negotiation.

Countries with more appealing traffic rights such as Germany, the U.K. and France resisted the policy.

Negotiations with Germany and with the U.K

While Germany finally signed an 'Open Skies' agreement with the U.S. in 1996, the U.K. resisted the U.S. proposition for three main reasons: first, they refused to grant all U.S. carriers access to Heathrow airport. Second, they refused to grant them fifth freedom rights. Third, the U.S. strongly opposed the creation of an arbitration body whose role would have been to scrutinize predatory pricing as the U.K. wished. Although the U.K. knew they would have to renounce the antitrust exemption which was needed to allow for the alliance between British Airways an US Air, negotiations failed and no agreement was concluded, thereby leaving the two countries governed by the rules of Bermuda II, as modified on April 11, 1991[23].

Negotiations with France

In 1992, the U.S. – France Bermuda type agreement which was concluded on March 27, 1946 became too threatening for Air France. While U.S. carriers TWA and Continental were protected by bankruptcy law, Air France was financially struggling with

[23] [At that time, the U.K. had obtained the designation of two to three carriers on main routes as well as fifth freedom rights beyond the U.S. territory (towards Australia for instance) in exchange for the new designation of United and American Airlines.]

the integration of UTA and of Sabena. "*On grounds that U.S. airlines were providing excessive capacity in the market, France renounced the U.S. – France bilateral aviation agreement on May 4, 1992, and it expired one year later*" Paul S. Dempsey adds[24].

Following the one year period after denunciation during which Air France had to agree to major concessions, came a transition period of almost six years after which Air France was brought back to a more stable level. Negotiations could begin again. Although the U.S. made it clear that they would only agree to an 'Open Skies' type of agreement, the bilateral signed on June 18, 1998 cannot be defined as such mainly because of the hard rights exchanged. The 1998 agreement indeed provided for a transition period and it is only in 2001 that an agreement was reached which could be considered an 'Open Skies' agreement.

"*Open-Skies agreements eliminate restrictions on how often carriers can fly, the kind of aircraft they can use, and the prices they can charge. The agreement covers both passenger and cargo services, as well as scheduled and charter operations. Today's agreement builds on the liberalized U.S.-France agreement that was signed in June 1998. While that agreement provided for the gradual elimination of restrictions on air services between the two countries, today's Open-Skies agreement also removes restrictions on service to intermediate and beyond countries*" the U.S. mission to the European Union reported on October 19, 2001[25].

Finally, "*U.S. Transportation Secretary Norman Y. Mineta and French Minister of Infrastructure, Transport, and Housing Jean-Claude Gayssot signed an Open Skies aviation agreement on behalf of their countries at a ceremony in Washington January 22*" reported the U.S. mission. "*This agreement marks another major step forward in U.S. efforts to create an open market for aviation services through the world,*" Mineta said. "*The pact allows Delta Air Lines and its partners -- Air France, the Italian carrier*

---

[24] [Dempsey, P.S., *Airlines in Turbulence: Strategies for Survival*, 23 Transportation Law Journal 15 (1995)]

[25] [*United States., France reach open skies aviation agreement*, October 19, 2001, http://www.useu.be]

Alitalia, and the Czech Republic carrier CSA -- to implement their alliance" according to a Department of Transportation press release[26].

5. The success of the 'Open skies' policy?

In 1994, Adam L. Schless[27] writes: "*states will need to address more subjects and to sign more treaties before the world can deem Open Skies a success*". The U.S. – France agreement being the 55th bilateral U.S. Open-Skies agreement worldwide and the 20th in Europe, can one say that such a success was then achieved?

At the national scale, David Hefferman considers it a success: "*In recent years, the success of the U.S. 'Open Skies' policy has diminished the burden on DOT's limited resources imposed by services allocation proceedings. Under a bilateral 'Open Skies' agreement, carriers of each county typically are authorized to operate from any point in one country to any point in the other. In such circumstances, 'Open Skies' literally can mean open markets in that the Government no longer need engage in the interventionist task of a carrier and route selection*"[28].

Nevertheless, in 1995, Paul S. Dempsey warned: "*Exporting 'open skies' to the international arena will, in the long term, export the severe overcapacity we face domestically, created by overlapping hub and spoke networks, while profitability is eroded by new entrants (...). In the short term, U.S. airlines might eat the lunch of some of the European and Japanese carriers (although airport capacity constraints in Europe will themselves deny U.S. carriers significant new entry). They enjoy a comparative labor cost advantage in both arenas. But in the long term, in an open skies environment, the Asian tigers might well eat the lunch of the U.S. flag carriers because of their comparative cost advantage, as well as their relatively higher service levels.*"[29]

---

[26] [*U.S., France sign open skies aviation agreement*, January 22, 2002, http://www.useu.be]
[27] [Schless, supra note 12]
[28] [Hefferman, D., *'So, when can you start?': A New Approach to Allocating International Air Service Rights*, Air & Space LAW, VOL. XXIV NUMBER 2, 1999]
[29] [Dempsey, supra note 24]

Therefore it seems like opinions diverge on the matter, but one can be sure of the following: the European Commission (EC) thinks the U.S. policy was a success for Americans for it only ceded crumbs to European Air carriers.

6. Critic of the policy by the European Commission

The EC has indeed complained that the most valuable provision the U.S. were able to achieve in such negotiations is the so called 'fifth freedom' right to operate air services from one country to a second country and then on to a third, with the freedom to pick up passengers in the second country. This permission for cabotage, i.e. this possibility for the U.S. to carry out internal flight within the Community is a prerogative that the EC would have liked to keep for future U.S. – European Union (EU) negotiations. It is true that the U.S. did not grant such a jealously guarded prerogative to the European States it negotiated with.

According to Paul Dempsey, this does not amount to such a valuable abandon of sovereignty: "*U.S. aviation labor unions have declared war against lifting of the cabotage prohibition. They are fighting the wrong battle. Even if the United States gave away cabotage tomorrow and received nothing in return, little would change. The foreign airlines are not so foolish to invest billions of dollars setting up a route network in a nation were almost every airline suffers from chronic economic anemia (...). All we would likely see from elimination of cabotage would be the elimination of some closed door restrictions on foreign carrier flights that serve two points in the U.S. Thus, a European carrier with a through flight from Europe to Los Angeles via New York could pick up a few passengers in New York. The competitive impact would be but marginal, as is our competitive impact on fifth freedom flights in Europe.*"[30]

[30] [Dempsey, supra note 24].

Indeed, Henri Wassenbergh writes: "*The value of a right granted depends on the use that is made of it, rather than on the use the government think can be made of it.*"[31]

Nevertheless, there is another set of provisions that, according to the EC, the U.S. has been able to secure thanks to its superiority in the negotiations: the 'nationality' clauses. Vigorously arguing that the 'divide and conquer' strategy the U.S. opposed to the EU Member States worked against the goal of a unified European market, the EC has proved that the two above mentioned provisions are contrary to Community Law.

[31] [Wassenbergh, H.A., *Aspects of the Exchange of International Air Transport Rights*, April 16, 1981]

Chapter 2 THE LEGAL BACKGROUNG OF THE DISPUTE: The establishment of a European Air Transport Policy

1. Establishment of the European internal market

"*One of the undoubted successes of the EC has been the creation of a competitive aviation market among its fifteen member states (or seventeen, if Norway and Iceland, the two members of the European Economic Area, are included).*" John Balfour writes. According to him, "*immediately perceptible changes were modest, but several years later it is clear that significant changes, to the benefit of the traveling public, have taken place.*" [32]

Origin of the EU unified policy

Applicability of the EEC treaty to air transport

After the Treaty of Rome, also known as the EEC Treaty, became effective in 1958, the following question arose: could the Treaty be applied to air transport? The answer to that controversial question[33] can be viewed as the first step towards the unification of European policy in the field of air law, and particular attention must be brought to the roles of the different European institutions.

As underlined by former Advocate General at the European Court of Justice Carl

---

[32] [Balfour, J., *A question of competence: the battle for control of European aviation agreements with the United States*, 16-SUM Air & Space Lawyer 7(2001)]

[33] [For an analysis of the legal and political obstacles to the application of general rules of the Treaty to air transport, see Estienne-Henrotte, E., *L'application des règles générales du Traité de Rome au transport aérien*, Etudes européennes, Editions de l'université de Bruxelles, 1988]

Otto Lenz[34], "*the Community legislature itself contributed to a degree of legal uncertainty. On February 6, 1962, it did adopt a regulation*[35] *implementing the competition provision of the Treaty, in order to ensure observance of the prohibition of anti-competitive agreements, decisions and concerted practices laid down in those provisions and to define the respective functions of the Commission and the Court of Justice in that area. But in a further regulation of November 26, 1962*[36]*, the Council retroactively withdrew transport from the scope of application of the first implementing regulation, on the ground* inter alia *that with regard to sea and air transport it was impossible to foresee whether and at what date the Council would adopt appropriate provisions for the regulation of competition in those areas.*"

Clarification by the Court of Justice was necessary, and this started a long process that allows one to say today that Europe was indeed built on Court decisions.

Although the Treaty entered into full force in 1969 after a twelve year transitional period, it took more time before the applicability of the Treaty was tested before the Court. It held that rules regarding the free movement of persons were directly applicable in cases 41/74[37] and 2/74[38]; and held that the same applied to goods in case 8/74[39] as well as to services in case 33/74[40]. Finally it held that this applicability extended to sea transport in case 67/73[41].

---

[34] [Lenz, C.O., *The decisions of the European Court of Justice on the applicability of the rules of the Treaty of Rome to air transport*, in *EEC Air Transport Policy and Regulation, and their Implications for North America,* Kluwer Law and Taxation Publishers Deventer – Boston (1990)]
[35] [Regulation No. 17: first regulation implementing the Articles 85 and 86 of the Treaty; Official Journal, English special edition 1959-1962, p.87 (Official Journal 1962, p.204)]
[36] [Regulation No. 141 of the Council exempting transport from the application of Council Regulation No. 17; Official Journal, English special edition 1959-1962, p.291 (Official Journal 1962, p.2751)
[37] [case 41/74, Slg. 1974, p.337]
[38] [case 2/74, Slg. 1974, p.631]
[39] [case 8/74, Slg. 1974, p.837]
[40] [case 33/74, Slg. 1974, p.1299]
[41] [case 67/73, ECR. 1974, p.359]

The French mariners case

This last case, also known as the French mariners case,[42] requires further attention. The Commission had brought proceedings against France for French legislation required a certain proportion of crews of ships to be of French nationality. The issue was therefore whether Articles 48 to 51 of the Treaty, which provided for the freedom of movement of workers in the field of transport, were applicable to sea transport. The holding of the Court was as follows: "*whilst under Article 84(2), therefore, sea and air transport, so long as the Council has not decided otherwise, is excluded from the rules of Title IV of Part Two of the Treaty relating to the common transport policy, it remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty. It thus follows that the application of articles 48 to 51 to the sphere of sea transport is not optional but obligatory for Member States.*"

In view of that jurisprudence, i.e. since the general provisions of the Treaty must apply to the field of transport, people started having doubts about the presumption that competition rules were not applicable to air transport.

The Parliament's transport case

Two years after the U.S. had started to deregulate its air transport, the Commission released its first memorandum on aviation in 1979[43]. It was soon followed by the Commission's first proposal of November 27, 1980 for the application of Article 85 and 86 to air transport. That proposal would result in the Council directive of July 25, 1983 on inter-regional services and was "*in spite of its limited scope, an important step in that the Commission had succeeded for the first time in removing the politically sensitive area of the market access and the granting of traffic rights (and a part of the tariff system) from the bilateral process, in favor of a common settlement*" Franky De Connick

---

[42] [or as the French seamen case, see Loewenstein, A., *European Air Law, towards a new system of International Air Transport Regulation*, Nomos Verlagsgesellschaft, Baden Baden, (1991)]

[43] [Mémorandum de la Commission du 4 juillet 1979, *Contribution des Communautés Européennes au développement des services de transport aérien*, Bull. CE, suppl. 5/79]

writes[44].

At the same time, the European Parliament, which was obviously displeased with the absence of air transport policy, brought action against the Council before the Court of Justice for failure to act in the field. Carl Otto Lenz lists two main issues behind the Parliament's claim: "*could the Parliament bring such an action? Could the Council be condemned for not defining a common transport policy?*"[45] Unfortunately, he says, "*there was no obvious answer to these questions*"[46]. Nevertheless, the case was decided against the Council in May 1985 enabling Carl Otto Lenz to write: "*The period of Euro-sclerosis was over*"[47].

The Nouvelles Frontières judgment

In the meantime, the 'Tribunal de Police de Paris', which wanted to know whether certain provisions of the French civil aviation code were compatible with the Treaty, had seized the Court with the question of application of Article 85 of the treaty to air transport.

Therefore the issue was finally resolved by a 1986 judgment in joined cases 209 to 213/84, known as the Nouvelles Frontières case[48]. Indeed, Carl Otto Lenz writes the Court ruled that "*for the application of Article 85 it was necessary to have either:*

- *rules adopted by the Council, (Article 87) or*
- *an appropriate decision of the Commission (Article 89), or*
- *a decision of a competent authority of a Member State, (Article 88).*"

"*In other words, the competition rules of the Treaty were applicable to air transport, but*

---

[44] [De Connick, F., *European Air Law: new skies for Europe*, Les presses de l'institut du transport aérien, Paris (1992)]

[45] [Lenz, C.O., *The European Court of Justice and European Air Transport Law*, Droit Européen des Transports No. 2, p. 307-314 (July 1999)]

[46] [The reason the case had to be cited is that it may be seen as a reason why the Commission brought no action against the Council although it did bring proceedings against the Member States in the 'Open Skies' case which is the subject matter of our discussion.]

[47] [Lenz, supra note 45]

[48] [Judgment of April 30, 1986 in joined cases 209 to 213/84, *Ministère Public v. Asjes*, (1986) ECR 1425]

not in the Nouvelles Frontières case" he concludes[49].

Gilbert Guillaume, French 'Conseiller d'Etat' who pleaded in Strasbourg has the following comment about the case: "*On peut certes se demander si la Cour de Justice a eu raison de déclarer les règles de concurrence applicables au transport aérien en l'absence de politique commune en ce domaine. Mais il faut reconnaître que cette solution était en germe dans l'arrêt de 1974 sur le transport maritime et que la Cour pouvait difficilement ne pas tirer toutes les conséquences de cet arrêt en lui-même contestable.*"[50]

Nevertheless, the Nouvelles Frontières case was later confirmed by the Saeed case, decided in April 1989[51]: there is no direct applicability of Article 85 but Article 86 is directly applicable. Peter Haanappel underlines the importance of this case the following way: "*it establishes the rule that the competition provisions of the treaty of Rome, in particular Articles 85 and 86, may be applicable* not only *to international air transportation on* intra-*EEC air routes, but also to air transportation on* domestic *air routes* within *the Community and,* above all, *to international air transportation routes between EEC and* non-*EEC countries*"[52].

Moreover, Carl Otto Lenz[53] adds that "*the Ahmed Saeed ruling opened the way for individuals to sue air companies for damages for violation of article 86 and thus the individual could – with the help of a national court – become an actor, outside the control of the national governments or the EC institutions*". [54]

---

[49] [Lenz, supra note 45]
[50] [Guillaume, G., L'arrêt de la Cour de Justice des Communautés Européennes du 30 avril 1986 sur les transports aériens et ses suites, RFDA, 1987, n°1, p.13 et s.]
[51] [ECR89/803]
[52] [Haanappel, P.P.C., *Changes in Bilateral Air Transport Agreements Between EEC Member States and Countries Outside Europe,* in *EEC Air Transport Policy and Regulation, and their Implications for North America,* Kluwer Law and Taxation Publishers Deventer – Boston (1990)]
[53] [Lenz, supra note 45]
[54] [For an extensive analysis of individual rights under EC law, see Hagelüken, A., The impact of EC law and WTO law on domestic law: a critical analysis of the case law of the European Court of Justice, McGill, (1998)].

"The paradox about the Nouvelles Frontières case is that it allowed all parties of the dispute to feel victorious" writes Prodromos D. Dagtoglou in his commentary on the judgment[55]. Is that the Court's way of slowly but surely showing both the Member States and the European institutions the way to the liberalization process?

The liberalization process

The Single European Act

According to Loïc Grard[56], the liberalization packages are the consequence of three elements: first, the work of the European Court of Justice in the above mentioned cases; second, the two communications issued by the Commission in 1979 and 1984[57]; and finally, the Single European Act.

The Single European Act, adopted in 1986 was intended to create a single European market, i.e. a market without internal frontiers, in order to facilitate the free movement of capital, labor, goods, and services, with the later of course including air transport.

Jacques Naveau, another French author analyzes the Single European Act as follows[58]: *"l'Acte Unique Européen de 1986 n'a ni l'originalité ni la portée du Traité de Maastrict de 1992. Il n'en a pas moins marqué une étape importante, de manière générale, sur trois plans : d'abord parce qu'il constituait, en lui-même,* une marque de confiance *dans le marché commun de la part des douze pays partenaires et introduisait le*

---

[55] [Dagtoglou, P.D., *Air Transport after the Nouvelles Frontières Judgment,* in *Toward a community air transport policy: the legal dimension,* edited by P.J. Slot and P.D. Dagtoglou, Kluwer Law and Taxation Publishers, Deventer – Boston, 1989]

[56] [Grard, L., *Droit communautaire des transports aériens,* étude extraite du Joly communautaire, rédigée le 30-06-1995]

[57] [Doc. COM (84) 72 final: *Etat d'avancement des travaux en vue du développement d'une politique commune des transports aériens.*]

[58] [Naveau, J., *Droit aérien Européen, les nouvelles règles du jeu,* Les presses de l'institut du transport aérien, Paris (1992)]

concept de marché unique sans frontières intérieures; ensuite parce qu'il fixait un agenda complet et précis *des mesures à prendre pour réaliser ce grand marché* à une date déterminée, le 31 décembre 1992 – *même si cette date n'était pas juridiquement contraignante ; et enfin, parce qu'il composait les* assouplissements nécessaires aux mécanismes décisionnels *prévus par le traité et quelques autres aménagement dans ce processus, de telle sorte qu'il soit possible à une majorité d'Etats déterminés d'entraîner les autres dans la voie du marché sans frontières."*

The three liberalization packages

After entitling the previously described period as the "Missing Council Air Transport Policy", Jacob W.F. Sundberg writes that the Council air transport policy finally came to life after the Milan Summit of 1985 which led to both the Single European Act and the liberalization packages[59].

Indeed, in preparation for the single market, the Council adopted the first civil aviation liberalization package in 1987. It consisted of four pieces of legislation:

1. Council Regulation No. 3975/87[60] "*on the application of EEC competition rules to undertakings in the air transport sector*"[61];
2. Council Regulation No. 3976/87[62] "*laying down the conditions to be met before certain categories of agreements and concerted practices in the air transport sector could be granted* automatic (block) exemption *from the competition rules without prior notification to the Commission*"[63];
3. Council Directive No. 87/601[64] "*on procedures for setting fares for scheduled air*

---

[59] [Sundberg, J.W.F., *Inter-governmental Relations in Air Transport between EEC and non – EEC countries: General aspects,* in *EEC Air Transport Policy and Regulation, and their Implications for North America,* Kluwer Law and Taxation Publishers Deventer – Boston (1990)]
[60] [(1987) O.J. L374/1]
[61] [Sundberg, J.W.F., supra note 59]
[62] [(1987) O.J. L374/9]
[63] [Sundberg, J.W.F., supra note 59]
[64] [(1987) O.J. L374/12]

services between the EEC Member States"[65]; and

4. Council Decision No. 87/602[66] "*on the sharing of passenger capacity between air carriers on scheduled air services between the EEC Member States and on access for air carriers to scheduled air services routes between the EEC Member States*"[67].

In June 1990, the second package was adopted and became effective in November of that year. It contains five regulations:

1. Council Regulation No. 2342/90[68] on fares for scheduled air services;
2. Council Regulation No. 2343/90[69] on ensuring access of air carriers operating on scheduled intra-Community air services routes and on the sharing of passenger capacity between air carriers on such routes;
3. Council Regulation No. 2344/90[70] amending Regulation No. 3976/87 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector;
4. Commission Regulation No. 83/91[71] on the application of Article 85(3) of the Treaty to certain categories of agreements between undertakings relating to computer reservation systems for air transport services;
5. Commission Regulation No. 84/91[72] on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices concerning joint planning and coordination of capacity, consultations on passengers and cargo tariffs rates on scheduled air services and slots allocation at airports.

---

[65] [Sundberg, J.W.F., supra note 59]
[66] [(1987) O.J. L374/19]
[67] [Sundberg, J.W.F., supra note 59]
[68] [(1990) O.J. L217/1]
[69] [(1990) O.J. L217/8]
[70] [(1990) O.J. L217/15]
[71] [(1991) O.J. L10/9]
[72] [(1991) O.J. L10/14]

The third package, which was introduced in 1992, "*established the framework for a legitimate internal market for air transport, consisting of freedom of establishment and freedom to provide services*" as Daniel C. Hedlund puts it[73]. According to Frederik Sørensen, Wilco Van Meert, and Angela Cheng-Jui Lu[74], it "*clearly demonstrated the intent of establishing a competitive intra-EU aviation market. Since it entered into force on 1 January 1993, the Community carriers have received the following benefits:*

(1) the freedom of establishment and the freedom to provide services (Council Regulation No. 2407/92 on Licensing of Air Carriers[75];

(2) traffic rights between any two airports within the EU and the removal of capacity restrictions (Council Regulation No. 2408/92 on Access for Community Carriers to Intra-Community Air Routes[76];

(3) consecutive cabotage rights and full cabotage from 1 April 1997 (Article 3 of Council Regulation No. 2408/92);

(4) free pricing (Council Regulation No. 2409/92 on Fares and Rates for Air Services[77].

For both capacity and pricing there is a possibility to freeze the situation if faced with catastrophic developments. Thus, a liberalized internal air transport market for the EU was established."

Moreover, as Nikolaos Lavranos rightly explains[78], "*the Community has also adopted a number of other measures in the field of air transport of which Council Regulations No. 2299/89 and 95/93 are relevant for our purposes.*" The first one[79] is a code of conduct for computerized reservation systems, and the second one[80] deals with

---

[73] [Hedlund, D.C., supra note 13]
[74] [Sørensen, F., Van Meert, W., and Cheng-Jui Lu, A., supra note 18]
[75] [(1992) O.J. L240/1]
[76] [(1992) O.J. L240/8]
[77] [(1992) O.J. L240/15]
[78] [Lavranos, N., *European Court of Justice, 5 November 2002, Cases C-466/98- C-469/98, C-471/98- C-472/98, C-475/98- C-476/98, Commission v. UK, DK, S, FIN, B, L, AUS, G,* Legal Issues of Economic Integration 30(1): 81-91, 2003.]
[79] [(1989) O.J. L220]
[80] [(1993) O.J. L14]

common rules for the allocation of slots at Community airports. [81]

2. Next step: the common external policy

From internal liberalization to a common external policy

"*Until recently, the EU's air transport policy has focused primarily on internal liberalization.*" writes Daniel C. Hedlund. "*Although the liberalization packages have transformed the EU's 'international' bilateral system into a 'domestic' system based on multilateral principles, EU member states still have separate agreements with countries outside of the Union and maintain their own separate negotiating authority. The adoption of a common external policy combined with individual member states ceding their negotiating authority to the EU Commission, are necessary preconditions to the successful conclusion of any EU air transport agreements with outside countries. Recognizing the inefficiencies of the present situation, the EU Committee of Wise Men has recommended the adoption of a common external aviation policy by the middle of 1995.*"[82]

This statement already announces that a quest for authority had begun. It is worth it to analyze that issue with the U.S. version of this competence question in mind. Indeed, the division of powers between the Federal government and the States governments was central to the legal history of the U.S. It is more than likely that the issue division of competence will have a likely effect for the European Union in the field of air law[83].

The Commission actually did not wait for the internal market to be completed before it started to claim competence over the external aviation relations: "*Even before the internal market process was completed, the Commission had turned its attention to*

---

[81] [For a detailed 1993 analysis of those issues, see Haanappel, P.C., *Recent European Air Transport Developments: 1992-1993,* annals of Air &Space law, Vol. XVIII, p.134-135]
[82] [Hedlund, D.C., supra note 13]
[83] [see Grant, T.D., supra note 19]

the question of external aviation relations. In 1990 it published a memorandum claiming, somewhat ambitiously, that the EC was exclusively entitled to conduct aviation negotiations with third countries on behalf of member states, and it proposed legislation authorizing it to undertake such negotiations." John Balfour writes with regards to that issue[84]. He echoes Onno Rijsdijk who also witnesses that: "*for quite some time the European Commission has tried to complement its powers with exclusive extra-Community competence regarding the negotiations of air traffic rights, including issues like tariffs, market access, capacity etc.*" and concludes that "*consequently, the Commission has since the early nineties expressed the opinion that certain bilateral air services agreements between Member States and third countries contain elements that infringe Community law.*"[85]

Already in 1992 was Frederik Sørensen warning Members States of the Commission's will: "*The Commission considers of vital importance to establish without further delay the necessary procedures for dealing with external aviation relations given the legal difficulties created by the current situations and the risk of fragmentation of external policy. (...)the Commission is of the opinion that the proposal for a Council Decision on a consultation and authorization procedure for agreements concerning commercial aviation relations between Members States and third countries should be adopted by the European Parliament and by the Council as soon as possible.*"[86]

Judicial activism?

Since those very issues are addressed by the Court of Justice in the cases which analysis will follow, one might before hand wonder if they were after all for a judicial body to decide. As shown by the extensive jurisprudence that led to the development of a

---

[84] [Balfour, supra note 32]
[85] [Rijsdijk, O., *EC Aviation Scene,* Air & Space Law, VOL. XXVI/6 (2001) p.336]
[86] [Sørensen, F., *EEC Internal and External Aviation Policy,* in *External Aviation Relations of the European Community,* Kluwer Law and Taxation Publishers Deventer – Boston (1992)]

European air transport policy, the European Court of Justice has always had such a most important role. Nevertheless, some authors do not agree with that behavior.

"*Questions concerning the future policy of the Community in the field of air transport, particularly with regard to air travel to non-Community countries such as Canada or the United States, are not a matter for the Court of Justice but must be directed to the political institutions of the Community, that is to say the Commission, the European Parliament and the Council*" writes Carl Otto Lenz himself[87].

Although his article was written in 1992 and therefore only covers jurisprudence up to that date, Davis Mazzarella directly addresses the issue as a matter of "*teleology and covert activism*"[88]. "*Instead of seeking to objectively apply the positive law, the Court views itself as an actor in the attainment of the Treaty's goals, namely the establishment of the Common Market.*" he writes. Later on when commenting upon the Parliament transport case, he analyses the political constraints to which the Court is subject: "*It derives its power from acceptance by governments and people of the Community. Thus, to protect its power, the Court cannot afford to become disfavored.*" Nevertheless, he gives evidence of the compelling power the Court has. He writes that, after the Nouvelles Frontières judgment, "*the Council capitulates and accepts the First Aviation Liberalization Package*". Moreover, "*By using and playing off of one another, the Court and the Commission were able to compel the Member States to establish a detailed air transport policy pursuant to the competition provisions of the Treaty of Rome.*" he adds.

Can this therefore be applied to the Court's ruling on Open Skies Agreements?

---

[87] [Lenz, supra note 45]

[88] [Mazzarella, D., *The integration of aviation law in the EC: Teleological jurisprudence and the European Court of Justice,* 20 Transportation Law Journal 353, (1992)]

Chapter 3 THE DISPUTE: A question of competence

1. A new role for the Commission

The necessary justification

In order to complete the Community air transport policy, an external dimension had to be added to the single European market. That further step towards a complete air transport policy might not be the last but is definitely not the least, as it involves the issue of the transfer of competence from the Member States to the Community. From the start, the European Commission clearly showed that its intention was to negotiate for all Member States as soon as the single market would be put in place in 1993. The transitional period it faced before that deadline came allowed the Commission to analyze the bilateral agreements Member States had already concluded with third countries in order to track down the incompatibilities with Community law. As years passed by, this "*dirigisme informel*" (informal interventionism), as Loïc Grard[89] puts it, became stronger and stronger.

Therefore, the question is on what grounds those exterior initiatives by the Commission could be justified. Indeed, "*when (the Commission) claims the authority to negotiate and conclude BATAs at the place of Members States and, eventually, when it has the intention to intervene in international specialized organizations or in the current*

[89] [Grard, L., *Du marché unique des transports aériens à l'espace aérien communautaire*, Thèse, Université de Bordeaux I, (1992)]

GATT negotiations, it must be backed by some explicit or implicit exterior competence in order to act in a legal and valid way" Andreas Loewenstein writes [90].

The first basic line of argument the Commission adopted to back its claim for exclusive competence is founded on Article 113 of the EC Treaty (now Article133). Article 133, as it was numbered at the time, confers exclusive Community competence in connection with the 'common external policy'. The European Commission therefore argued that the negotiation and conclusion of aviation treaties between Member States and third countries were part of that 'common external policy'. In 1995, when faced with the issue of EC competence related to international trade agreements in the GATT, the European Court of Justice made it clear that the Commission's interpretation was incorrect[91]. John Balfour describes what the Court held as follows: "*although cross-frontier suppliers of services generally fell within the scope of the common commercial policy, and hence of Article 113, this was not the case in connection with international agreements regarding transport.*"[92] Consequently, the Commission had no exclusive competence to negotiate and had to work with the Council[93].

The next claim the Commission made was that implied competence was established under the so-called ERTA doctrine. According to that doctrine, Commission is entitled to take over if (1) a common rule exists that regulates the activity within the Community and (2) that internal rule has been affected by a Member State. Further analysis of this line of argument will be provided when commenting upon positions of the parties to the 'Open Skies' case. The Commission had eventually used it even before that occasion, i.e. as soon as it started requesting a mandate from the Council.

---

[90] [Loewenstein, supra note 42]
[91] [Opinion 1/94 (1995) 1 CMLR 205]
[92] [Balfour, supra note 32]
[93] [For a further analysis of Article 113 as of 1989, see Slot, P.J., *Civil aviation in the Community: an overview*, p.25 in *Toward a community air transport policy: the legal dimension*, supra note 55]

The quest for a mandate

Long before the implementation of the liberalization packages was over, the Commission insisted on obtaining a mandate to replace the current 'Open Skies' between Member States and the US by a single agreement it would directly negotiate with the U.S. Various proposals to arrange for a transition period during which the Commission would assume the authority to negotiate have been submitted by the Commission and refused by the Council since then[94].

Indeed, in March 1993, "*the European Council took a pretty clear standpoint in the whole matter*" Onno Rijsdijk writes. "*It ruled that Member States shall remain fully responsible for their respective relations with third countries 'unless and until action has been taken by the Council'*" he adds[95]. Nevertheless, "*the Council also declared that in the course of bilateral negotiations, the Member States concerned should take due account of their obligations under Community law and keep themselves informed of the interests of other Member States*" warned lawyers at Hill & Knowlton[96].

Therefore it seems like negotiations can only be conducted at Community level after agreement by the Council that "*there is a clearly defined common interest among Member States and when at the same time a thorough analysis has shown that in such cases there can realistically be reached a better result for all Member States*" as the Council held at the meeting.

After the Council had instructed the Commission to report on the potential incompatibilities of bilateral air transport agreements with Community law in 1995, it nevertheless granted the Commission a limited mandate to negotiate soft rights with the U.S., i.e. competition rules, ownership and control of air carriers, Computer Reservation

---

[94] [see for instance the Commission's proposal of October 23, 1992 published in C 216/1993]
[95] [Rijsdijk, supra note 85]
[96] [See www.hillandknowlton.be/docs/pdf/openskies.pdf+open+skies+agreements&hl=en&ie=UTF-8]

Systems (CRS), code-sharing, dispute resolution, leasing, and environmental clauses. However, hard rights (i.e. market access and matters regarding code-sharing and leasing, capacity, carrier designations and pricing) were expressly excluded from the mandate and the U.S. consequently doubted the seriousness of the negotiations which took place in 1996.

Henri Wassenbergh sees this additional frustration on the part of the Commission as the event that really triggered off the 'Open Skies' proceedings: "*the main objective the (Commission) has with the 'open skies' court case apparently is to obtain for the EC the mandate to negotiate international air transportation 'hard rights' on behalf of the Member States with third countries, especially the USA*" he writes[97]. Later in the article he disapproves that behavior explaining that "*the EC should not try to reach its air-political goal (a mandate of full and exclusive air negotiating competence) by reading into the treaty rights which have not been agreed upon when drafting the Treaty (...). The only way for the Commission to obtain the exclusive competence it seeks is to be mandated by the Council of Ministers.*"

Nevertheless, the Council did not meet the 1998 deadline set by the Commission to obtain a broader mandate and eight Member States were brought before the Court to denounce their respective bilateral agreements with the U.S.: among them were Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden and the U.K. Since the Netherlands had concluded their 'Open Skies' agreement with the U.S. before liberalization legislation became effective, it was not part of these proceedings but nevertheless joined the other Member States out of solidarity. They are part of pending proceedings together with France, Italy and Portugal.

---

[97] [Wassenbergh, supra note 4]

2. A new case for the Court

Arguments of the parties

As previously stated when commenting upon the mandate issue, the Commission relied on a double competence argument. In order to prove that it had exclusive competence to negotiate and conclude air services agreements with the U.S., the Commission based its claim on two key words: 'necessity' (1) and 'effect' (2).

(1) First, the Commission argued that competence to deal with 'Open Skies' agreements was necessary in order to achieve the objectives of the EC Treaty.
(2) Second, the Commission claimed that the 'Open Skies' agreements Member States had concluded with the U.S affected Community air transport legislation. This alternative to the first line of argument is based on the 'implied powers doctrine', also referred to as the AETR doctrine according to which, Member States were preempted from signing bilateral agreements with the U.S. because Community legislation was already covering the field.

The first competence argument

The Commission argued it tried to prevent discrimination and disruption of what it thought should be an efficient aviation market but could not so protect the internal market because it did not have the authority to deal, at the same time, with third countries which could jeopardize its work.

As clearly exposed by Frederik Sørensen, Wilco Van Meert, and Angela Cheng-Jui Lu[98], the defending member States' raised the following response: "*Under Article 80(2) (ex Article 84 (2) of the EC treaty, the necessity for concluding a Community agreement in air transport sector is a matter to be assessed by the Council. The Council*

[98] [Sørensen, F., Van Meert, W., and Cheng-Jui Lu, A., supra note 18]

had explicitly rejected the necessity for such an agreement and had given a limited mandate for negotiating an air service agreement on behalf of EU Member States in 1996."

In a nutshell, the Member States' argument was basically that it was not necessary for the Commission to negotiate with the U.S. while working on the liberalization packages. They do agree that the Commission had the competence to elaborate such legislation of course, but argue that if the Commission had no mandate to negotiate with the U.S. it is because it was not necessary to build the internal framework.

The second competence argument

The second argument did not come as a surprise. Indeed in 1995, member of the European Commission Neil Kinnock addressed the transport ministers of the countries which were to conclude 'Open Skies' agreements with the U.S. in the following words: "*it is the view of the Commission, having regard to the case law of the Court of Justice and in particular to the ERTA case-law, that any negotiations which have such an effect on the internal market cannot be undertaken other than by virtue of a Community negotiation mandate authorized by the Council in accordance with the procedures set out in the Treaty. (...) the Commission reserves the right to initiate such procedures as are foreseen by the Treaty.*"[99]

According to this second version of the 'implied competence' argument, the Community acquires external competence when (1) it has already exercised internal competence, i.e. established rules and (2) the Member States have affected those rules (i.e. when concluding an 'Open Skies' agreement with the U.S. in the instant case). The question therefore is: is the Third Package such a preemption, i.e. are there internal rules in it that are undermined by the 'Open Skies' agreement?

---

[99] [Abstract of a letter addressed by Neil Kinnock on February 28, 1995 to Finnish transport and Communication Minister Johan Norrback]

The Commission alleged the following rules were so undermined: particularly Article 5 (duty of co-operation), and Article 52 (right of establishment) of the EC Treaty; and under secondary legislation, Regulations 2407/92 (licensing of air carriers), 2408/92 (intra community market access for Community carriers) 2409/92 (criteria for fares and rates) 299/89 (Code of Conduct for Computer Reservation Systems) and 95/93 (common rules for slot allocation).

In order to rebut the claim, the Member States therefore had to prove that negotiation and conclusion of their agreements had taken place before those rules were established. They tried to do so by arguing that the 'Open Skies' agreements with the U.S. were only an amendment to previous bilateral agreements, agreements that existed before the entry into force of the Treaty and of the above mentioned secondary legislation.

Opinion of the Advocate General

In his opinion of January 31, 2002, Advocate General Tizzano "*agreed with the Commission's argument in some, but not all, respects*" writes John Balfour[100]. He rightly analyses the opinion with regards to the two main issues: competence and right of establishment (flowing from the competence argument).

Competence

As far as the 'necessity' argument was concerned, the Advocate General was of the opinion that it could not be applied in the instant case: according to him, the Council would have had to recognize the necessity for the Commission to be involved in relations with third countries. Since the Council did not recognize there indeed was such a necessity "*for the attainment of one of the objectives of the Community*", the Commission could not be found competent on that ground.

[100] [Balfour, J., *EC aviation scene*, Air & Space law, VOL.XXVIII/4/5 (September 2002) p.259]

Nevertheless, the Advocate general received the second part of the competence argument much more favorably. He "*agreed with the Commission that Member States were not permitted to conclude any international agreements in matters covered by common rules, whether or not they conflicted with them*" John Balfour summarizes[101].

Since a general affectation of rules was not enough for him, the Advocate General looked for the particular affectation of specific rules. He concluded that the following provisions could indeed be found in both the Community legislation and in the 'Open Skies' agreements concluded by Member States with the U.S.:

- regulation 2409/92 on fares, and
- regulation 2299/89 on the code of conduct for CRSs.

In those two areas, the Commission therefore had exclusive competence according to the Advocate General.

Moreover, the Advocate General wrote that whether the provisions in the 'Open Skies' agreements were compatible or incompatible with Community rules was irrelevant. All that mattered to him was that the EC treaty had entered into force before the conclusion of the bilateral agreements, thereby prohibiting the Member States from dealing with provisions related to fares and CRSs.

Although all defendants but the U.K. were concerned with this first infringement, the next line of argument was intended for all eight Member States.

Right of establishment

The Commission indeed pointed at 'nationality clauses', i.e. clauses relating to the ownership and control of airlines, as infringing Article 52 (now 43) on right of establishment.

---

[101] [Balfour, J., supra note 100]

The Advocate General agreed with the Commission on that second element. He also rejected for the second time the Member States' argument based on Article 234(1) (now 307(1)) because he found that these clauses were not old clauses, i.e. they had not been concluded before the entry into force of the EC Treaty: "*although the nationality clauses in the new agreements essentially repeated those in the old agreements without re-negotiation, the fact that the rights given to designated airlines under the new agreements had been extended meant that the clauses had been 'profoundly altered' and hence did not benefit from the protection conferred by Article 234 (now307)*" John Balfour writes[102].

The Advocate general even backed up his argument by adding that were his line of argument wrong, Member States were nevertheless not taking all necessary measures to insure that incompatibilities were eliminated as required in Article 234(2) (now 307(2)) of the EC Treaty.

After having stated both the arguments of the parties and of the Advocate general, one shall compare them to the reasoning of the Court.

[102] [Balfour, J., supra note 100]

PART TWO:

FROM THE NOVEMBER 2002 JUDGMENTS

TO THE JUNE 2003 MANDATE:

A politically inspired case

Chapter 1: THE RULING

The least one can say when analyzing the different reactions to the decision is that authors do not agree on whom it benefited. Perhaps is it so because the European Court of Justice once more tried not to sound like it gave clear victory to either party to the case. This is more particularly true with regards to the competence claim.

Rene Fennes[103] summarizes the Commission's arguments as follows:

- Primary argument: "*Community law applying to aviation has developed in such a substantial way that (...) the Community should have exclusive competence over external aviation relations*".
- Secondary argument: "*the bilateral agreements included elements that at that time were already covered by Community legislation. The main elements at issue were the (...) so-called third package (...) and the Right of Establishment embodied in the Treaty itself, under Article 52 (new Article 43)*".

Although he concludes that the Court rejected the primary argument and upheld part of the secondary one, other authors write that the external competence of Member States was only partially excluded. This is the opinion of Loïc Grard[104] for instance. According to John Balfour[105], "*The Court upheld the Commission's claim (regarding competence), but only to a limited degree*". "*It did not agree that the Community had competence on the basis of necessity, or that any general distortions in the flow of services in the internal market affected EC legislation in the AETR sense*" he writes before enumerating the three provisions "*capable of being so affected*"[106].

---

[103] [Fennes, R., *The European Court of Justice decision on Bilateral Agreements: the future of relations*, 17-WTR Air & Space Lawyer, 1, (Winter, 2003)]

[104] [Grard, L., *La Cour de Justice des Communautés Européennes et la dimension externe du marché unique des transports aériens*, Cahiers de Droit Européen, n°5-6 p.695 (2002)]

[105] [Balfour, J., *EC Aviation Scene*, Air & Space Law, VOL. XXVIII/2 (April 2003), p.116]

[106] [Article 1(3) of Regulation 2409/92 on fares; Regulation 2299/89 on CRSs, and Regulation 95/93 on slots]

Nevertheless, all agree that the Court found that 'nationality clauses' in 'Open Skies' agreements infringed Article 43 of the EC Treaty on the right of establishment.

Therefore, commentators of the November 5, 2002 cases are faced with the following set of conclusions:

- on the one hand, a conclusion with regards to competence, which is directly linked to the issue of 'Open Skies' and follows an already dense jurisprudence on the subject, and,
- on the other hand, an argument linked to the right of establishment, which strikes down 'nationality clauses' in those particular 'Open Skies' agreements but has been contrary to Community law since the very beginning of bilateral agreements.

Although much more has been written on this second issue and the link between 'ownership and control' and liberalization, the issue of competence is of greater importance for whoever is willing to measure the impact of the instant cases on the emergence of the European Union as an international actor.

1. 'Nationality clauses': finally declared illegal[107]

"*While American administrations have, for years, promoted the concept of 'Open Skies', the reality is that U.S. skies are anything but 'open' to foreign airlines*" writes Jonathan Howe.[108] "*The law forbids more than 25% foreign ownership in US carriers. (...) This protectionism results from two things: national security and organized labor*" he adds before concluding: "*Had Singapore Airlines and Lufthansa, for example, been given access to United's domestic routes in exchange for ownership of United, there would never have been a bankruptcy.*" This statement, which echoes many others, sets the issues underlying the importance of airline ownership and control.

---

[107] [that argument concerned all eight Member States]

[108] [Howe, J., *Amidst uncertainties, what is the future for aviation?* in *Business briefing – Aviation strategies: challenges & opportunities of liberalization*, published in conjunction with the Air Transport Seminar of ICAO 22-23 March 2003, ICAO headquarters, Montreal, Canada.]

Although it very soon became obvious that traditional nationality clauses in bilateral agreements to which a Member State was party infringed EC law, it is only in the 'Open Skies' cases that they were declared illegal.

The international context in which the conflict arose

Although the Chicago Convention dealt with nationality of *aircraft*, it did not provide for anything in relation with the non technical and non operational issue of nationality of *airline*. Requirements linked with the later issue nevertheless were so present in the post World War II aviation relations that the IASTA and Transport Agreement gave birth to such nationality clauses.

Peter Haanappel sees two reasons for the appearance of such clauses: a political one: "*the international legal instruments, opened for signature by the Chicago Conference of 1944, were adopted at a time were only 'allied' and 'neutral' States were invited to participate in the Conference, with the intention to keep 'enemy' States and their airlines outside of the framework of 'Chicago'*"; and a commercial one: "*it would have seem to have made good sense to limit the benefits of multilateral grants of traffic rights to the 'corporate citizens', the airlines of contracting States and not to extend them to the airlines of non-contracting States.*"[109]

Among the reasons for nationality clauses, Peter van Fenema[110] also cites the following: "*national security and defense, trade and tourism, employment and the economy, safety, traffic rights and bilateral agreements, and finally, independence*". However, he insists on the fact that national pride must not be underestimated for the national airline is also a symbol of sovereignty. He concludes by writing: "*The slow process of a global adaptation of the ownership-and-control clauses to more modern thinking should be accompanied by an in-depth study of the other reasons States cited for*

---

[109] [Haanappel, P.P.C., *Airline Ownership and Control, and some related matters*, Air & Space Law, VOL. XXVI/2, April 2001]

[110] [Van Fenema, P., *National ownership and control provisions remain major obstacles to airline mergers*, ICAO journal Volume 57, Number 9, 2002, p.7]

rejecting foreign ownership of their national airlines" and appears in favor of the elimination of such clauses in bilateral agreements in order to "*(free) the international airline industry from what amounts to a cumbersome trade barrier.*"

As long as they were contained in multilateral agreements such as the IASTA and the Transport Agreement, nationality clauses were not really restrictive. Nevertheless, the system became unilateral with agreements such as Bermuda II. Peter Haanappel describes it as follows: "*Airlines must be designated pursuant to bilateral agreements (...). The designation may be refused by the foreign aeronautical authorities, if the designated airline(s) is (are) not substantially owned and effectively controlled by the designating State or its citizens.*"[111]

Witnessing more and more bankruptcies, the U.S. had ordered a report to see what the effects of relaxed ownership and control rules would be. Although the report showed that it would definitely help airlines get the necessary funds for their survival, the Government feared competition with airlines which were still subsidized[112]. Moreover, the U.S. Civil Reserve Air Fleet (CRAF) program stands as an obstacle to the amendment of ownership and control restrictions[113]. Finally, "*U.S. carriers already have unlimited third an fourth freedom rights between any two countries that have signed 'Open Skies' agreements with the U.S., effectively giving them seventh freedoms rights. Thus, providing the U.S. Government is able to establish a large enough number of 'Open Skies' bilateral agreements, there would appear to be little incentive for it to make its foreign ownership and control rules less restrictive*" write Yu-Chun Chang and George Williams[114].

---

[111] [Haanappel, supra note 109; he goes on by explaining the difference between 'substantial ownership', which refers to a de jure condition, and 'effective control' which is a de facto condition.]

[112] [With regards to subsidies, see Dempsey, supra note 24: "Regarding state aid, the objection of the United States seems somewhat hypocritical. For example, the U.S. objects to the government of France pouring billions of francs into Air France, and yet ATA repeatedly calls for rolling back taxes. Whether the government hands airline the money, or takes less away, the net effect is the same." at 92 -93.]

[113] [Thanks to this program, the U.S. Government can decide to use civil aircrafts to transport troops in times of war. If Air France had had a majority ownership in a U.S. airline, France might not have agreed to give those aircrafts for the war in Iraq for instance.]

[114] [Chang, Y.-C., and Williams, G., *prospects for changing airline ownership rules*, 67 Journal of Air Law and Commerce 233, 2002]

Is the situation any different in the European Union? Both the U.S. and the E.U. limit the investments of third countries in their national carriers. However, the notion of 'national carrier' bears a different meaning in the E.U than in the U.S. In the European Union, Community ownership and control substituted to national ownership and control. For instance, Regulation 2407/92, which replaced the national statutes dealing with licensing, does not follow the traditional approach of nationality and establishes an E.U. ownership system instead. Ownership and control rules therefore have an additional meaning within the E.U.: it prevents third countries from unilaterally taking advantage of the Community's liberalized air services market.

The liberalizing effect of the internal EC rule has led to the buying out of Deutsche BA by British Airways, and of Air UK by KLM. Moreover, Britannia has established a subsidiary in Germany and bought an airline in Sweden.

Abolition of ownership and control restrictions within the E.U. indeed runs parallel to the abolition of other barriers within the E.U. Community carriers have cabotage rights among E.U. countries. Moreover, the right of establishment allows a Community carrier to establish itself in another Member State, where it shall benefit from the same treatment as the carrier originally established in the Member State in question. All these advantages explain why while the E.U. abolished nationality rules only among its Members States, it intended to keep the benefits of the internal aviation market only among those very Member States.

Therefore the interrelationship between 'ownership and control' and the supranational status of the European Union carriers is fundamental to understand the issue behind the 'Open Skies' cases, i.e.:

- why the Commission could not let the U.S. benefit from advantages that should have been reserved for Member States (e.g. cabotage through multiple bilateral agreements);

- why each E.U. Member State was allowed to designate and required to accept the designation of an airline, even if not owned nationally by the designating State or its citizens as long as it was owned by citizens of any E.U. Member State;
- and therefore why the Court agreed that the bilateral system of 'Open Skies' ran contrary to the two key provisions of both national treatment and right of establishment.

The Court's reasoning on nationality clauses

"*By concluding and applying an Air Services Agreement (...) with the United States of America which allows that non-member country to revoke, suspend or limit traffic rights in cases where air carriers designated by the (Member State) are not owned by the (Member State) or its nationals, the (Member State) has failed to fulfill its obligations under Article 52 of the Treaty*" the Court ruled.[115]

In order to come to that conclusion, the Court went through a two-fold reasoning: first, it had to decide whether or not nationality clauses violate the right of establishment; second, the Court had to decide whether its response to that question applied to the 'Open Skies' agreements the eight Member States had concluded with the U.S..

The violation of the right of establishment by nationality clauses

The Court first follows the Commission's argument that Article 52 (now 43) of the EC Treaty[116] applies to air transport in general.

---

[115] [See case C-466/98 paragraph 61 for the U.K. for example]
[116] [Treaty establishing the European Community (Nice consolidated version)
Part Three: Community policies
Title III: Free movement of persons, services and capital
Chapter 2: Right of establishment
Article 43
Article 52 - EC Treaty (Maastricht consolidated version)
Article 52 - EEC Treaty
Article 43:

In other words, the freedom of establishment, "*which guarantees that nationals of the E.U. Member States who have exercised this right are treaded the same way as nationals of the host Member State*"[117] even applies to services provided between Member States and non Member States.

Consequently, the Court held that the nationality clauses in the 'Open Skies' agreements infringed Article 52 (now 43) of the EC treaty, since they provided that the U.S. may withhold or revoke operating permission from a carrier if it was not substantially owned and effectively controlled by the Member State, and only by that Member State, party to the agreement or its nationals. Such clauses, in order to satisfy Community law, should have allowed any other Member State or its nationals to operate under the same conditions.

As clearly stated in the Beaumont Bulletin, "*the Court dismissed arguments from the member States based on the fact that the clause only gives the U.S. a right; the fact that such clauses are traditionally incorporated in ASAs and are intended to preserve the rights of the non-EC State; and public policy considerations*"[118]. The Court indeed detected no "*genuine and sufficiently serious threat affecting one of the fundamental interests of society*"[119]. "*Nor was the illegality cured by unsuccessful attempts (eg, by Belgium) to persuade the US to agree to amend the clause, or by the special clause negotiated by Germany, under which the US agreed not to withhold or revoke operating rights from airlines from other member states having open skies agreements with the US in which German nationals hold less than 50% of the capital*" the bulletin underlines.

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State./ Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.]

[117] [Lavranos, supra note 78]

[118] [Beaumont Bulletin, *The European Court Judgment in the Open Skies Cases and the Future for European Aviation Relations with other States*, Special Issue, November 2002, http://www.beaumontandson.com]

[119] [See case C-466/98 paragraph 57]

All of the above led Loïc Grard to conclude that the importance of the 'Open Skies' cases as far as nationality clauses are concerned lies on three grounds which can be summarized as follows[120]:

(1) The Court determined the criteria for material and territorial applicability of Article 52 (now 43):
   - Air transport is governed by general Community rules such as the right of establishment[121];
   - Wherever the activity takes place, Community rules apply if it has economic effects on the territory of the Community.

(2) The Court set up the conditions for violation of Article 52 (now 43):
   - Whether the third country had used the right to discriminate or not is irrelevant since what matters is that it was given such a possibility by the nationality clause;
   - There is a precedent showing that discrimination can arise from an international agreement[122]

(3) The Court gave directions to evaluate potential exceptions to Article 52 (now 43): there has to be a certain amount of proportionality between the threat and the discrimination to face it. Although the Court indirectly recognized the necessity to fight the problem of flags of convenience, it refused to sacrifice the right of establishment to that purpose.

The application to the eight 'Open Skies' agreements

The next issue the Court had to deal with is that such nationality clauses existed even before the EC Treaty had recognized the right of establishment. The question therefore arose whether such clauses could be protected under Article 234(1) (now 307(1)) of the EC Treaty which provides that: "*The rights and obligations arising from*

---

[120] [Grard, supra note 104 at 717]

[121] [Loïc Grard notes the humor of the U.K. which argued that since the Commission had no external competence, it could not base its claim on the Treaty. The Court had answered that it was not because competence remained with the Member State that it could violate the Treaty.]

[122] [CJCE, 15 janvier 2002, *Elie Gottardo et INPS*, aff. C-55/00, Rec., I-413]

agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty."

Certain Member States have indeed argued that the nationality clauses in their 'Open Skies' were protected under Article 234(1) (now 307(1)) because they were identical to the nationality clauses in the bilateral they concluded and applied before the Treaty came into force.

The Court did not agree with that reasoning. In the case of the U.K. for instance, it argued: "*the Bermuda II Agreement was concluded 'for the purpose of replacing' the Bermuda I Agreement, in particular in order to take into account the development of traffic rights between the Contracting Parties. It thus gave rise to new rights and obligations between those parties. In those circumstances, it is not possible to attach to the Bermuda I Agreement the rights and obligations which, for the United Kingdom and the United States of America, have flowed from the clause in the Bermuda II Agreement concerning the ownership and control of air carriers since the entry into force of that latter agreement.*"[123]

In other words, the Court rejected the argument because it found that a new will had motivated the signing of 'Open Skies' (or Bermuda II for the U.K.) to replace previous agreements, thereby giving the nationality clauses a new legal existence, this time *after* the Treaty had created the right of establishment. From now on, bilateral agreements to which Member States are parties will have to include the Community clause. The question therefore is: who will negotiate to convince the third party to accept such a clause?

Allan Mendelsohn[124] discusses many approaches to redefining ownership and control such as Cargo Lion, APEC, OECD and ICAO before arguing that there is a direct

[123] [See case C-466/98 paragraph 29]
[124] [Mendelsohn, A.I., *The European Court of Justice Decision on Bilateral Agreements: Ownership and* control, 17 WTR Air & Space Lawyer 1, 1, Winter 2003]

relationship between them and the European Court of Justice decision. Although one does not necessarily need to detail those approaches to understand the Court's decision, Allan Mendelsohn indeed has a point when he writes: "*The European Commission seems to view the decision as a means to force the denunciation of all current EU Member States bilaterals that contain the old O & C clause, and thus to secure a Commission mandate to renegotiate all of these bilaterals.*", in order to conclude that it would have been better to avoid that many denunciations by proposing an amendment instead.

The question one might indeed ask after having understood why the Court declared that the ownership and control clauses in the agreements (although not their totality) were illegal is therefore the following: who will have competence to renegotiate with the U.S.? While the decision on ownership and control has no specific relation to the particular issue of 'Open Skies', the answer to that question can be viewed as the true issue in the instant cases.

2. External competence: another step forward in the common air transport policy[125]

Article 84 is not a legal basis for establishing the external competence

After the Court decided that Article 113 of the EC Treaty (now 133) was not applicable to air transport in the 1994 WTO case[126], it became obvious that there would be no explicit competence in that matter. Consequently, all international agreements related to air transport would fall under Article 84(2) of the EC Treaty (now 80(4)). The reason which led to that implicit type of competence is simple: the contrary would have resulted in a less democratic policy since the Parliament would not have been associated in the process. Therefore the Nice Treaty confirmed the Court's jurisprudence: Article 113 (now 133) was redrafted to explicitly exclude air transport from the external

[125] [That argument concerned all member States except the U.K.]
[126] [Opinion 1/94 was later confirmed in 1995 by opinion 2/92, also known as the OECD case]

commercial policy[127]; and the new transport section, i.e. Article 84(2) (now 80(4)) establishes the international competence of the Community.[128]

Nevertheless, the Court decided that: "*In relation to air transport, Article 84(2) of the Treaty merely provides for a power for the Community to take action, a power which, however, it makes dependent on there being a prior decision of the Council. Accordingly, although that provision may be used by the Council as a legal basis for conferring on the Community the power to conclude an international agreement in the field of air transport in a given case, it cannot be regarded as in itself establishing an external Community competence in that field.*"[129]

After having decided that Article 84(2) (now 80(4)) does not in itself establish Community competence, the Court turned to the question of implied competence.

The necessity argument based on opinion 1/76[130]

[127] [Treaty establishing the European Community (Nice consolidated version)
Part Three: Community policies
Title IX: Common commercial policy
Article 133
Article 113 - EC Treaty (Maastricht consolidated version)
Article 113 - EEC Treaty
Article 133(6): The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.]
[128] [Treaty establishing the European Community (Nice consolidated version)
Part Three: Community policies
Title V: Transport
Article 80
Article 84 - EC Treaty (Maastricht consolidated version)
Article 84 - EEC Treaty
Article 80(2): The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.].
[129][See case C-471/98 points 65 and 66]
[130] [Known as "Fonds européen de batellerie"]

In order to totally understand the reasoning of the Court, it is now time to make a difference between the implied powers doctrine and the AETR doctrine. Although they are closely linked, they indeed take their roots in two different Court decisions.

In opinion 1/76 of April 26, 1977, the Court established a principle that since then had been interpreted as follows: if the objective of the Community requires the conclusion of an international agreement, then the Community has competence to do so. It seemed like no internal competence was needed for this principle to apply, thereby appearing as a complement to the AETR doctrine which, in some cases, could not be considered a basis for external competence. The Commission had therefore relied on opinion 1/76 to argue that it had become a necessity to negotiate a unique bilateral agreement with the U.S. and that Council was bound to issue such a mandate allowing for those objectives to be fulfilled.

According to Loïc Grard, the Commission's view underestimated the consequences of the WTO case on the interpretation of opinion 1/76[131]: *"(L'Avis 1/94) donnait tort à ceux qui croyaient qu'il existait une compétence externe communautaire exclusive, à chaque fois que celle-ci se révélait nécessaire pour satisfaire un objectif assigné de la Communauté"* he writes.

Indeed, the Court clearly stated that: *"The hypothesis envisaged in Opinion 1/76 is that where the internal competence may be effectively exercised only at the same time as the external competence (Opinion 1/94, paragraph 89), the conclusion of the international agreement thus being necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules."*[132]

In other words:

- no international agreement can be concluded without necessity;

---

[131] [Grard, supra note 104 at.717]
[132] [See case C-471/98 point 68]

- there is necessity only if the international agreement expresses both internal and external competence;
- there is external competence only if it is impossible to exercise internal competence without an international agreement.

After having clarified this principle, the Court turned to its application to air transport and concluded that nothing in that field justified external competence. The Court noticed that the adoption of the Third Package had been possible without the exercise of external competence. "The ECJ concluded that the Council was able to liberalize the European air transport market without having recourse to conclude an 'Open Skies' agreement with the USA" summarizes Nikolaos Lavranos[133]. The Court therefore stated that the internal market could be built without conclusion of external agreements: "*This case, therefore, does not disclose a situation in which internal competence could effectively be exercised only at the same time as external competence*"[134].

Consequently, in the absence of necessity, Member States were not prevented from individually concluding 'Open Skies' agreements with the U.S. "*La Commission n'obtient pas devant la Cour ce que lui refuse le Conseil: la reconnaissance de la compétence exclusive en matière d'aviation internationale*" Loïc Grard writes[135].

Since the Council was not in favor of the exclusive competence of the Commission, it never granted a global mandate. One could have wondered why the Commission started proceedings against the Member States instead of bringing action against the Council for not having acted on that matter: the reasoning of the Court indicates that it probably would not have been a better alternative for the Commission. Following that ruling, it indeed seems clear that only the Council can decide whether or not there is necessity.

---

[133][Lavranos, supra note 78]
[134] [See case C-471/98 point 73]
[135] [Grard, supra 104 at 718]

Nevertheless, Loïc Grard warns that it does not mean that a mere Council decision creates necessity and thereby new competence for the Community. "*(Cela) entretient la confusion entre compétence subsidiaire et compétence implicite*" he writes before rightly concluding: "*La compétence implicite découle du Traité et non d'une prise de décision du Conseil.*"[136]

Then the Court went on analyzing the implied powers of the Community under the AETR doctrine.

The AETR principle

The application of the theory of implicit competence had been subjected to a couple of conditions by the WTO case. They can be summarized in a simplified fashion as follows:

- A common rule must have been introduced by the Community;
- Which is *affected* by the Member States.

Moreover, the WTO case set out three circumstances in which such affectation could take place, thereby making Community competence exclusive and denying States' competence:

- The internal act gives the Community explicit competence to negotiate with third countries;
- The internal act includes provisions dealing with the rights of nationals (and of carriers) of third countries;
- Harmonization of rules on the contemplated topic (air transport) has been completed within the Community.

[136] [Grard, supra note 104 p.719]

Nevertheless, it gave no definition of the word 'affectation' at the time. The European Court of Justice therefore took a major step forward in answering that question in the instant cases.

Although the Commission had argued the dispute took place under option (3), saying it had successfully established a Common air transport market which was now affected by 'Open Skies' agreements, the Court refused to see it this way, declaring that Common rules remained unaffected by 'Open Skies': *"There is nothing in the Treaty to prevent the institutions arranging, in the common rules laid down by them, concerted action in relation to non-member countries or to prevent them prescribing the approach to be taken by the Member States in their external dealings (Opinion 1/94, paragraph 79)."*[137]

According to Loïc Grard, the Court's position is that only proof of the most advanced degree of completion of legislation can justify a claim based on option (3). He regrets this interpretation of the AETR case for it sounds regressive to him: *"Ce qui semblait donc être une lecture régressive de la jurisprudence AETR est donc confirmé dans le sens qu'on craignait."*[138]

The Court nevertheless based its reasoning on option (2) and started looking for Community rules related to the treatment of third countries' carriers.

As summarized by Nikolaos Lavranos, *"the Commission argued that the exchange of the fifth freedom rights contained in the 'Open Skies' agreement would violate the provisions in Regulations No. 2408/92 and 2407/92. However, the ECJ swiftly rejected this argument by concluding that Regulation 2408/92 does not govern the granting of traffic rights on intra-Community routes to non-Community carriers, while Regulation 2407/92 does not govern operating licenses of non-Community air carriers*

[137] [See case C-471/98 point 99]
[138] [Grard, supra 104 at 721]

that operate within the EC."[139] In other words, the Court ruled that provisions not dealing with third parties' rights could not be affected by agreements dealing with such third parties' rights.

This, writes Loïc Grard, is very much subject to criticism. First, if the two Regulations do not mention third countries' carriers, it is because the Community did not intend them to benefit from intra-Community rights and freedoms, thereby dealing with those carriers' rights and freedoms. Second, the Court's interpretation of 'affectation' is far to narrow to evaluate the effects of 'Open Skies'. Finally, how could the Court make a difference between option (2), third parties' rights, and option (3), completion of legislation, if the absence of provisions regarding third parties' rights (option (2)) makes is impossible to bring a claim under the argument of completion of legislation (option (3))? Judicial self restraint is obvious he concludes[140].

The Court continued its reasoning by carefully analyzing what other Regulations might have been affected by the conclusion of 'Open Skies' agreements with the U.S. It did find some, which permitted authors to conclude that "*The Court upheld the Commission's claim, but only to a limited degree*"[141].

Only three provisions were found to be so affected:

- Article 1(3) of Regulation 2409/92 on fares;
- Regulation 2299/89 on CRSs;
- And Regulation 95/93 on slots.

Article 1(3) of Regulation 2409/92 on fares "*entitles only Community air carriers to introduce new products and fares that are lower than already existing identical products*" summarizes Nikolaos Lavranos[142]. Non-EC airlines operating within the Community are therefore prevented from introducing such new products and fares

---

[139] [Lavranos, supranote 78]
[140] [Grard, supra note 104 at 721]
[141] [See Beaumont Bulletin for instance, supra note 118]
[142] [Lavranos, supranote 78]

following that Regulation. In that matter, the Community had therefore already dealt with the rights of third countries' carriers. The Commission had obtained exclusive competence and Member States consequently acted illegally when concluding 'Open Skies' agreements.

Similarly, Regulation 2299/89 prevented the Member States from negotiating provisions on CRSs in their bilateral agreements since the Regulation "*also apply to non-EC nationals where they offer for use or use a CRS in the EC territory*"[143].

However, "*the finding as regards slots was not relevant in the present cases, because the Court found that none of the open skies agreements deals with the subject. The Commission had argued that the general provision in each of the agreements guaranteed fair and equal competition opportunities related to slot allocation, but the Court did not agree*"[144].

In a nutshell, the Court successfully denied the Commission's exclusive competence without having to explicitly say so. However, the fact that it only left crumbs for the Member States to negotiate did impact the aftermath of the judgment and very naturally led to the granting of a mandate by the Council to the Commission.

[143] [Lavranos, supranote 78]
[144] [Beaumont Bulletin, supra note 118]

Chapter 2: THE AFTERMATH

In its 17th report of 2002-2003[145], the House of Lords select committee on the E.U. seeks answers to the following questions:

(1) "What action should the E.U. Member States take to ensure that existing Bilateral Air Transport Agreements conform to the ECJ judgments?
(2) Should (...) the E.U. Member States be encouraged to give a mandate to the European Commission to negotiate an E.U.-U.S. air service agreements?
(3) What practical difficulties would the Commission face in undertaking such a mandate? How could they be overcome?
(4) Would an E.U.-U.S. agreement lead to improved air services and wider choice for (...) E.U. and U.S. travelers?
(5) What are the longer-term implications of the Court's decision (on nationality clauses) and a possible E.U. negotiating mandate on (...) air services agreements with states other that the U.S.?
(6) Will the relaxation of the nationality rule facilitate airline consolidation in Europe through cross-border acquisitions and mergers? Would such consolidation be in the interest of (...) E.U. air transport industry?

While some of these questions deal with the mandate issue and will therefore be considered and put up to date in the next chapter, one might be interested in looking at the reactions the judgments gave rise to in order to answer most of them.

---

[145] [House of Lords select committee on the E.U., *"Open Skies" or open markets? The effect of the European Court of Justice judgments on aviation relations between the European Union and the United States of America*, HL paper 92 published by authority of the House of Lords, London, The Stationery Office LTD, 8 April 2003]

1. Reaction of the critics

"*Politically correct is what may be expected to receive general public support as being in conformity with what the men in power and the man in the street consider to be the appropriate thing to do. (...) Nowadays, it is 'correct', socially, economically, financially, religiously and intellectually, to believe in 'one Europe', in one European 'nationality', and in the existence of European 'nationals', who, as such, have to be brought under one and the same centralized European government, Europe being one economically, socially, culturally, intellectually and politically. The fact that the reality is different is ignored. (...) The fact that nobody in the media criticizes the decision is proof of its political correctness*"[146]. This is how Henri Wassenbergh introduces his commentary of the 'Open Skies' cases. Even though he was not the only one to criticize the decision, he is certainly among those who most virulently did so.

According to him, neither did the decision of the Court take into account the application of international air law by non-EU countries, nor did it care about the actual problems the Member States would be faced with after it. He writes that the Court, while making it practically impossible for the Member States to exercise their competence, left the Commission itself in no better position to renegotiate for them. Although we now know that a mandate has been effectively granted to the Commission, it was not obvious at the time of publication of Wassenbergh's article. He places no better confidence in a potential mandate than in the too limited 1996 mandate anyways.

Moreover, while he qualifies the reasoning of the Court on nationality clauses as a clear abuse of power for it "*cleverly indirectly promote(d) a mandate*"[147], he writes the

---

[146] [Wassenbergh, H., *The Decision of the ECJ of 5 November 2002 in the 'Open Skies' Agreements Cases*, Air & Space Law, VOL. XXVIII/1 (February 2003)]

[147] [According to him, the right of establishment means that Member States can make a choice "as long as this choice is not based on the nationality of the carrier". Moreover, he thinks "the ECJ decision infringes the sovereignty of the Member States, by an extended interpretation of Article 43 of the Rome Treaty, as

following about the competence issue: "*Exclusive competence of the Commission in these areas (fares, slots and CRSs), in my opinion, can only mean here that no innovative arrangements as regards content may be agreed upon by the Members States, which are contrary to Community legislation, or that no arrangements may be made with an effect which affects the good functioning of the internal Common Market.*"

Finally, he suggest that the Member States "*approach the ECJ with a petition to suspend the implementation of the judgments*" until a mandate is granted and a policy is agreed upon, concluding that "*granting such petition (...) would be both legally and politically correct.*" Was there no other option for the Member States?

2. Reaction of the Member States

In order to rectify the violation of Community law, the Member States faced two alternatives: on the one hand they could decide to let the Commission negotiate a bilateral air services agreement for the European Union as a whole that would include a non discriminating clause. On the other hand, they could try to renegotiate and "*broaden*"[148] the illegal clause.

This second alternative was unfortunately not the one the Court seemed to point to although Rene Fennes advised the Member States to "*immediately start negotiations with the United States to delete the relevant offensive items from the bilateral agreements.*"[149]. He nevertheless recognizes that it would be easier for fares and CRSs than for nationality clauses, for which he proposes the following clause: "*carriers licensed and registered in accordance with applicable law*". Although he acknowledges that there is very little chance that a clause stating "*established and having principle*

---

the Council of Ministers so far did not agree on giving Commission competence in external air transport matters."]

[148] [See Norton Rose Briefing of November 7, 2002]

[149] [Fennes, R., supra note 103]

place of business" will be accepted, he views the possibility of simply "*deleting the article*".

The House of Lords[150], after having stated the traditional Ownership and control Clause[151], proposed the following clause to take into account the November 5, 2002 cases:

"(1) Each Contracting Party may designate in writing to the other Contracting Party one or more airlines for the purpose of operating the agreed services on the specified routes and may withdraw or alter such designations.

(2) On receipt of such a designation the other Contracting Party shall, subject to the provisions of paragraphs (3) and (4) of this Article, without delay grant to the airline or airlines designated the appropriate operating authorisations.

(3) The aeronautical authority of one Contracting Party may require an airline designated by the other Contracting Party to satisfy that authority that it is qualified to fulfil the conditions prescribed under the laws and regulations normally and reasonably applied to the operation of international air services by that authority in conformity with the provisions of the Chicago Convention.

(4) Each Contracting Party shall have the right to refuse to grant the operating authorizations referred to in paragraph (2) of this Article, or impose such conditions as it

---

[150] [House of Lords select committee on the E.U., supra note 145]

[151] **[Designation and Authorisation of Airlines:**

(1) Each Contracting Party may designate in writing to the other Contracting Party one or more airlines for the purpose of operating the agreed services on the specified routes and to withdraw or alter such designations.

(2) On receipt of such a designation the other Contracting Party shall, subject to the provisions of paragraphs (3) and (4) of this Article, without delay grant to the airline or airlines designated the appropriate operating authorisations.

(3) The aeronautical authority of one Contracting Party may require an airline designated by the other Contracting Party to satisfy that authority that it is qualified to fulfil the conditions prescribed under the laws and regulations normally and reasonably applied to the operation of international air services by that authority in conformity with the provisions of the Chicago Convention.

(4) Each Contracting Party may refuse to grant the operating authorisations referred to in paragraph (2) of this Article, or impose such conditions as it may deem necessary on the exercise by a designated airline of the rights specified in Article 3(2) of this Agreement, in any case where the said Contracting Party is not satisfied that substantial ownership and effective control of that airline are vested in the Contracting Party designating the airline or in its nationals.

(5) When an airline has been so designated and authorised it may begin to operate the agreed services, provided that the airline complies with the applicable provisions of this Agreement.]

may deem necessary on the exercise by a designated airline of the rights specified in Article 3(2) of this Agreement, in any case where:

(a) Country X is not satisfied that the said airline:

i) is incorporated and has its principal place of business in the territory of a Member State of the European Union or of an European Free Trade Association State party to the Agreement on the European Economic Area; and

ii) holds a current Air Operator's Certificate issued by the aeronautical authority of a Member State of the European Union or of an European Free Trade Association State party to the Agreement on the European Economic Area; or

(b) the United Kingdom of Great Britain and Northern Ireland is not satisfied that the said airline:

i) is incorporated and has its principal place of business in the territory of Country X; and

ii) holds a current Air Operator's Certificate issued by the aeronautical authority of Country X.

(5) When an airline has been so designated and authorised it may begin to operate the agreed services, provided that the airline complies with the applicable provisions of this Agreement."

Whether such a clause might be accepted or not, one can easily imagine the difficulties the cases led to for those of the Member States who were negotiating at the time they were decided (and that was precisely the case of the U.K. with Columbia for instance): in addition to the rights they were given, the Member States basically had to ask the country they were negotiating with to accept the Community clause. In other words, they were telling third parties that all the rights that they would give them would also have to be given to all other Member States.

What would happen if the Member States could not change ownership and control clauses? The Court left them with only one alternative: to terminate the 'Open Skies' agreements. In that case, notice of cancellation would have to be given and they would come to an end one year later.

The actual reactions of the Member States were "*neither clearly nor publicly expressed*" as underlined by Frederik Sørensen, Wilko Van Meert and Angela Cheng-Jui Lu[152]. They did not even respond "*to the Commission's request regarding denunciation*" they write. This is even more understandable that they were caught between the Commission indeed telling them to terminate on the one hand, and the U.S. quickly opening to further alternatives on the other hand.

3. Reaction of the U.S.

On November 5, the U.S. Mission to the E.U. reported the following: " *'The United States looks forward to discussing with EU member states and the European Commission the ruling of the European Court on the Open Skies agreements between European countries and the United States', State Department Spokesman Richard Boucher said November 5 in response to a journalist's question at the daily State Department press briefing"*[153]. *"The current agreements that we have remain in force as the legal basis for air services between the United States and individual European Union member states,"* Boucher added. *"So it shouldn't have any significant effect on airline operations,"* he said.

At first, the U.S. reaction was indeed that the bilateral agreements were still applicable to their aviation relations with the Member States, notwithstanding the fact that they violated Community law. Not only did they insist that not all in the agreements was illegal, but they also wanted to keep dealing with the Member States directly.

U.S. Assistant Deputy Secretary of Transportation Jeffrey Shane gave this comment which was transmitted through the U.S. Mission to the E.U.: "*The European Court of Justice rendered what American lawyers would call a 'surgical' decision.*

---

[152] [Sørensen, Van Meert and Cheng-Jui Lu, supra note 18]
[153] [*U.S. Comments on 'Open Skies' European Court Ruling*, November 5, 2002, http://www.useu.be]

Contrary to a great many headlines that appeared in the press, it did not strike down the bilateral agreements that were the subject of the Commission's complaint. Nor did the Court prohibit EU Member States from continuing to conduct negotiations with the U.S. in their own right. The Court certainly did not -- and indeed could not -- confer competence on the Commission to conduct negotiations with the U.S., a political decision that can only be taken by the EU Council of Ministers. And most importantly, the decision did not have any immediate impact on the rights of U.S. and European airlines to continue to conduct services pursuant to the challenged bilateral agreements."[154]

Most importantly, he underline that the U.S. was ready to reconsider the ownership and control clause in order to keep the agreements going: "*I hope that I have made clear here today that the United States is prepared to look creatively at nationality clauses. We certainly do not treat the traditional formula as sacrosanct*" he said.

In a subsequent document, the U.S. Mission to the E.U., in an effort to counter the Commission, insisted clearly that the Court decision did not call upon the Member States to denounce their agreements, and that the agreements were only inconsistent with three areas of Community law[155].

Although they were right in saying that not the totality of each and every agreement was illegal, but only those clauses which violated Community law, they soon realized that the Commission would not let the Member States negotiate with them. Were the U.S. reluctant to negotiate with the Commission or did they simply not want to have to redraft all its 'Open Skies' with the Member States? The question is now irrelevant since the Commission indeed won the wrestling match which opposed it to the U.S.

---

[154] [*U.S. Official Comments on E.U. 'Open Skies' Ruling*, November 8, 2002, http://www.useu.be]
[155] [*U.S. Calls for discussion of the 'Open Skies' Agreements in Europe*, November 20, 2002, http://www.useu.be]

4. Reaction of the Commission

Throughout two successive Communications, the Commission has managed to impose its will both to the U.S. and to the Member States.

Commission's Communication of November 19, 2002[156] insisted the 'Open Skies' cases not only had implications for the agreements between the Member States and the U.S., but also between the Member States and other countries. It demanded the Member States follow two guidelines: it underlined that "*Member States are prevented not only from contracting new international commitments, but also from maintaining such commitments in force.*" In other words, in the aftermath of the judgments, the Commission ordered all Member States, i.e. those parties to the cases and the seven others to:

(1) "*Activate the provisions for denunciation contained in their agreements with the United States in order to ensure at the earliest possible date compliance with the judgments of the Court of Justice.*"

(2) "*Refrain from making international commitments of any kind in the field of aviation before having clarified their compatibility with Community law.*"

The Commission also indicated that it, of course, had "*urged the Council of the European Union to agree a mandate as soon as possible for negotiations to replace the existing bilaterals with the United States with an agreement at Community level.*"

Following its argumentation, only the Commission itself has the competence to remedy the infringements in existing agreements. Many have qualified its demands as ambitious, and therefore resisted them. After the U.S. had circulated a text to replace the ownership and control clause in an attempt to still negotiate bilaterally, the Commission issued a second Communication on February 26, 2003[157].

---

[156] [EM 14663/02 COM(2002) 649 final: Communication from the Commission on the consequences of the Court Judgments of 5 November 2002 for European air transport policy]

[157] [2003/0044 (COD) – COM(2003) 94 final: Communication from the Commission on relations between the Community and third countries in the field of air transport – Proposal for a European Parliament and

Authors have found the following passage to be the most precise on the Commission's intentions: "*The Commission envisages that the outcome of the negotiations could take several forms. The simplest would be a short stand-alone agreement in which the parties agreed to a revised definition of the beneficiaries that would override the relevant clauses in the existing bilateral agreements. Such an agreement should also contain new provisions covering other matters of Community competence as identified by the Commission in its previous Communication of 19 November 2002. This agreement would be the subject of Community signature and conclusion. Member States would maintain their own agreement with the country concerned dealing with matters of national competence. This situation would be maintained until such time as a mandate is granted for a full negotiation on a Community agreement. For most countries, this is likely to remain some time in the future.*"

Although the House of Lords had told the U.K. to resist the demand of the Commission with regards to the denunciation of its bilateral with the U.S., it agreed with the Commission's proposal this time, saying it recommended "*that the Government accede to the approach proposed by the Commission, namely that the Commission, assisted by Member States, negotiate in the first instance with the United States, to remedy those breaches of Community law identified by the ECJ judgments in existing ASAs with the United States.*"[158]

Frederik Sørensen, Wilko Van Meert and Angela Cheng-Jui Lu[159] have an excellent point when they notice that although the Commission's Communications made it clear what it would do under a negotiating mandate, the Commission did not give a hint about how it intended to allocate traffic rights among Community carriers once obtained from the U.S.

Council Regulation on the negotiation and implementation of air service agreements between Member States and third countries.]

[158] [House of Lords select committee on the E.U., supra note 145]
[159] [Sørensen, Van Meert and Cheng-Jui Lu, supra note 18]

Nevertheless, many Member States were of the opinion of the U.K. as set up in the House of Lords' report, and although the Commission had probably foreseen the difficulties of allocation of rights and had not said a word about it, Member States were so much under its pressure that they did not object to that embarrassing lack of information on the part of the Commission.

The lack of freedom of action the Member States faced in the aftermath of the judgments shows what numerous authors have criticized as forcing them to grant the Commission with a mandate. Although all witnessed the progressive pressure put on the Member States by both the Court and the Commission toward the granting of a mandate, very few knew when it would come and what its scope would be.

After having gathered the reactions of the various players[160] in the aftermath of the cases, one may try to analyze the mandate the Commission was finally granted.

[160] [For reactions of the airlines, see House of Lords, supra note 145, at 17]

Chapter 3 THE MANDATE

1. The scope of the mandate

Difficulties in foreseeing the scope of the mandate

It was no easy task to try to evaluate the scope of the mandate the Commission would be given. Although it was quite obvious that a mandate would be granted, there were arguments pointing to a limited mandate on the one hand, and arguments pointing to a broad mandate on the other hand. The European Court of Justice refused to transfer general competence to the Union with regards to air transport, only granting little bits of exclusive competence to the Commission here and there. As a consequence of which the Commission could have felt forced to only claim a limited negotiation mandate. At the same time, the Court left the Member States with so little freedom to conduct negotiations, that it also already forced them to grant the Commission a global mandate.[161]

When analyzing the granting of the 1996 mandate, Benoit M.J. Swinnen writes that the cabotage issue under the 'Open Skies' policies, the difference between U.S. and E.U. antitrust policies, foreign ownership matters, as well as the Commission's desire to "*keep control over the pace of the liberalization of the European civil aviation market*" comprised "*the underlying forces that led the European Union Member States to grant the mandate to the Commission. Nonetheless, the same considerations viewed in the light of self-serving interests led to the limitations imposed on the authority of the Commission*

[161] ["*The Council of Ministers is a hybrid body with both executive and legislative powers. The Council is composed of a representative from each Member State with authority to bind the government of that State. Collectively, the Council is responsible for carrying out the goals and objectives of the Treaty. It can act by non-binding recommendations or binding decisions, and regulations or directives. In this respect, the Council has the last word in the law-making process, but the first word, or right of initiative, in principle, belongs to the Commission.*" [Swinnen, supra note 3]]

under the mandate."[162] Were the 'Open Skies' cases therefore such a step forward that the solution could be any different in 2003?

Two questions arose according to the House of Lords report[163]:

- *Has the Commission the capacity to conduct negotiations satisfactorily?*
- *What additional benefits would flow from a successful UE bloc negotiation?*

Although authors did not expect it to come so soon, most Member States agreed that the Commission was capable of conducting this type of negotiation satisfactorily, and it was granted a mandate no later than June 5, 2003.

The three measures in the mandate

The Transport Council indeed finally agreed on "*a package of measures that passes responsibility for conducting key air transport negotiations to the European Commission*" announced the press release on the Europa website. "*This is an historic decision. Today we have reached a deal that will enable the European Union to assert itself at international level and to work for the benefit of its consumers and its aviation industry*" said Loyola de Palacio, vice-president in charge of Transport and Energy. "*We aim to launch negotiations with the US within a month on an agreement that will bring together the two largest aviation markets in the World.*"[164]

The two-fold goal of the U.S.-E.U. negotiation was both to redress the legal problems in existing bilateral agreements and to establish an open aviation market including the removal of restrictions on foreign investment in each other's airline. The package agreed upon therefore contained:

---

[162] [Swinnen, supra note 3]
[163] [House of Lords select committee on the E.U., supra note 145]
[164] [*New Era for Air Transport: Loyola de Palacio welcomes the mandate given to the European Commission for negotiating an Open Aviation Area with the US*, IP/03/806 Brussels, 5 June 2003]

- The authorization for the Commission to begin negotiations on a new transatlantic air agreement;
- The authorization for the Commission to open negotiations with other foreign states on airline ownership restrictions;
- A proposal for a Regulation of the European parliament and of the Council on the negotiation and implementation of air service agreements between Member States and third countries.

While dealing with the negotiation of an open aviation area with the U.S., the replacement of bilateral agreements with Community agreements, and the change of nationality restrictions, coordination between the European Commission and the Member States was not left aside: Member States are to be permitted to continue bilateral negotiation subject to a degree of Community control.

Memo/03/124[165] focused on the following questions:

- What is going to happen with the current agreements?
- What effect will a renegotiation have on the industry?
- How will the negotiation system work?

When analyzing the answers to those questions, one must keep in mind that they are given by the Commission and therefore tend to minimize potential difficulties. Nevertheless it is quite interesting to give a look at the official position before criticizing it.

Firstly, one can notice that the agreements with the U.S. will not have to be systematically denounced: they will indeed "*remain in force until they are superceded by a completely new EU-US agreement.*" Regarding other agreements, they will have to be "*amended to comply with Community law*". Secondly the result which is expected from the relaxation of ownership and control rules is as follows: "*This should pave the way for*

[165] [memo/03/124 of 05/06/2003 http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/806|0|RAPID&lg=EN&display]

more cross border investment activity, airline mergers and the expansion of successful carriers outside their home Member State." Thirdly, with regard to the negotiation process, although the Commission will negotiate, this will be done "*in close consultation with Member States, (...), the European aviation industry and other interested parties such as airports and trades unions.*" Moreover, a complete feedback process will enable the Member States to "*report back to the Commission and the other Member States so that the outcome can be checked.*"

Particular attention is given to the E.U.-U.S. negotiation: in order to achieve a "*single comprehensive EU/US agreement*", negotiations will "*the rules governing market access (routes, capacity, frequency), how air fares are set, how to ensure effective application of competition rules, and how to ensure maintenance of high standards of airline safety and aviation security.*"

Finally, a free trade area for air transport is envisaged although not discussed in further details, and the Commission seems to reserve the right to make more proposals for another set of "*full mandates*". These provisions have of course led to a certain amount of skepticism, part of which had already been witnessed at the time of the 1996 mandate.

2. Implications of the mandate

Evaluation of a Community approach

Here is what Benoit Swinnen[166] indeed wrote in 1997: "*The internal liberalization of the European market was initiated well before the first Open Skies agreement was entered into between the Netherlands and the United States. The E.U. Commission, therefore, did not anticipate that the very implementation of the liberalization packages would lead to the erosion of substantive bargaining chips in*

[166] [Swinnen, supra note 3]

future negotiations of multilateral agreements. Forty percent of trans-Atlantic routes are subject to existing Open Skies agreements. Furthermore, thirty percent of the routes represent traffic between the U.S. and the United Kingdom (...). The impact that a multilateral agreement would have is therefore no greater than thirty percent. It is hardly enough to make the Commission, on its face, a valid interlocutory to negotiate traffic rights to E.U. countries." The reason behind the 'Open Skies' cases was nevertheless closely linked to the Commission's mandate.[167]

On the other hand, an argument in favor of a joined negotiation was already described by Henri Wassenbergh in 1981 in the following terms: "*the advantage of multilateral (plurilateral) agreement will be that the parties obtain wider access to the markets of their co-parties, the combined markets of the other parties being bigger than their own individual market (...), while the full fifth freedom rights between the parties obviate the risk of open-ended fifth freedom rights and capacity/traffic restrictions to the level of the smaller or weaker airline.*"[168]

What did this argument become in 2003? The issue of negotiating weight is still very present in the Commission's argumentation indeed. According to the House of Lords report, it should aim at "*balancing the advantages which US airlines currently enjoy in being able to operate from their own large home market into the single Community market with the disadvantages the EU Member States currently face in being excluded from the US domestic market.*"[169] The report also concludes that an additional benefit could result in a successful negotiation: "*non-EU States might be persuaded to liberalise their own agreements with the EU*".

But how will the Commission practically make the U.K., Greece, Ireland and Spain adopt 'Open Skies'? Specific to the U.K. is one of the very reasons why this Member State did not have an 'Open Skies' with the U.S.: the scarcity of slots at

---

[167] [See Wassenbergh, supra note 4]
[168] [Wassenbergh, supra note 31]
[169] [House of Lords, supra note145]

Heathrow airport. Will the Commission be able to take into account specificities while negotiating for all?

However, the Commission itself has underlined certain problems inherent in a joined negotiation. One of them is the complication of allocating rights among carriers from different Member States. Although the Commission knows it will face this problem

Moreover, Henri Wassenbergh insists on the fact that the main obstacle will concern those aspects of the negotiation that will require the U.S. to modify its legislation. Among those aspects he cites:
"(1) the 'nationality' of US air carriers to enable internationalization of US air carriers without them losing their US citizenship (US labour, for one, may be against);
(2) opening the possibility of access by Community air carriers to US cabotage;
(3) ending the US Fly America policy."[170]

Last but not least, what will the status of the Commission be? The answer to that question is the basis for answering many others. There are two alternatives before the Commission: it can either merely represent the Member States and act as their spokesman, or behave as a supranational entity representing the E.U. as a "*cabotage area*". Here again that issue relates to sovereignty. Henri Wassenbergh rightly underlines that "*any result will be subject, not to a 'ratification' by the Community, but to the 'approval' by the Council, i.e. the Member States*". Moreover the problem will grow bigger with twenty five Member States. "*The mandate (...) will require a delegation of the Community under the leadership of the Commission*" concludes Wassenbergh, "*if an agreement is reached, ratification of the agreement takes the form of Council approval, followed by ratification in conformity with the national legislations of the Member States.*"[171]

---

[170] [Henri Wassenbergh, H.A., *5 June 2003, A Historic Decision by the EU Council of Transport Ministers*, 214 Air & Space Law, vol. xxviii/4-5 (September 2003)]
[171] [Wassenbergh, supra note 170]

Linked to that last issue, one can easily picture the difficulties which will arise when competence will be mixed[172]: will the Member States let the Commission negotiate alone although they two have competence? Any negotiation of matters for which Member States have competence (e.g. traffic routes) may not easily be separated from matters for which the Community has competence (e.g. CRSs, slots, etc.) In order to achieve successful negotiations, the Commission and Member States will have to coordinate their efforts for the 1996 mandate has proved way too limited when the Commission tried to negotiate some aspects of a bilateral agreements without having the authority to negotiate them all. In Henri Wassenbergh's opinion, "'*exclusive competence' only means that only the Community can regulate the subject concerned, i.e. the Community has to approve the result of negotiations by a MS on such subject; it does not mean that only the Community may negotiate the subject. Mixed competence means that the Community and the MS together may regulate, and therefore also together negotiate on the subject(s) of the mixed competence ('co-ordination'), and here the Community has to co-approve the result of negotiations on these subjects, while all the MS's have to ratify the result.*"[173] So much depends on the way the system will work in practice that only once started will the negotiations prove whether or not efficient.

The talks begin

However, the U.S. seems to welcome the beginning of the negotiations[174]. On June 25, the following statement was issued by President Bush, Greek Prime Minister Konstandinos Simitis, President of the European Council, and Romano Prodi, President of the European Commission: "*We are pleased to announce our agreement to begin comprehensive air service negotiations between the United States and the European*

---

[172] [For a complete summary of the external competence of the Community, see House of Lords report, Appendix 6, supra note 145]
[173] [Wassenbergh, supra note 170]
[174] [*For a fact sheet on the U.S. expectations with regards to the beginning of negotiations, see U.S.-E.U. agree to begin comprehensive aviation negotiations*, June 25, 2003 http://www.useu.be]

Union in early autumn, following the early June decision of the European Transport Council of the European Union to approve a negotiating mandate for the Commission. This is an historic opportunity to build upon the framework of existing agreements with the goal of opening access to markets and maximizing benefits for consumers, airlines, and communities on both sides of the Atlantic. The United States and the European Union will work together in a spirit of cooperation to develop a mutually beneficial approach to this crucial economic sector in a globalized economy."[175]

The success of negotiations will therefore depend not only on cooperation between the E.U. and the U.S. but also between the Commission and the E.U. Member States: two aviation powers with two different levels of federalism, but with the same will "*to reach a mutually satisfactory agreement representing an overall balance of reciprocity in objectives, interests, rights and opportunities*". Which, in Randolph Gherson's opinion, is a good start, for "*the essence of negotiation is negotiability: the translation of the negotiable to the mutually acceptable*"[176].

---

[175] [*U.S., EU Leaders Comment on Transatlantic Aviation Talks*, June 25, 2003 http://www.useu.be]

[176] [Gherson, R., *Practical implications of "1992" for the re-negotiation of Bilateral Air Services Agreements with the European Commmunity*, in *EEC Air Transport Policy and Regulation, and their Implications for North America,* Kluwer Law and Taxation Publishers Deventer – Boston (1990)]

PART THREE:

BILATERALISM, REGIONALISM AND MULTILATERALISM:

Will the U.S. and the E.U. be able to show the way towards liberalization?

Chapter 1: From bilateralism to multilateralism

"It looks as if the future of air transport regulation will see a development from bilateralism, possibly via trilateralism, towards regionalism and plurilateralism to multilateralism and globalism" Henri Wassenbergh writes[177]. The shift from bilateralism to multilateralism is indeed the trend that all authors witness and analyze in order to draw an accurate portrait of tomorrow's air transport[178]. Although bilateralism is still dominant, many hints, such as the European Court of Justice 'Open Skies' cases show the way towards multilateralism. Whether taking place within certain regions or via international organizations, it may indeed be both desirable and necessary to now switch to multilateralism. However, intermediary ways have to be found for air transport might not yet be ready for full multilateralism.

1. Bilateralism

In its manual on the regulation of air transport, ICAO defines bilateral regulation as *"regulation undertaken jointly by two parties, most typically by two States, although one or both parties might also be a group of States, a supra-State (i.e. a community or other union of States acting as a single body under authority granted to it by the Member States), a regional governmental body or even two airlines (for example, in the determination of capacity or prices)."*[179]

One will notice that the text already takes into account the possibility of a "supra-State" having authority thanks to and negotiating for several member States. The

---

[177] [Wassenbergh, supra note 4]

[178] [See Lievain, J.C., *L'introduction du multilatéralisme dans le droit aérien des Communautés Economiques Européennes"*, McGill, 1993]

[179] [ICAO, *Manual on the regulation of International Air Transport,* AT Conf/4-WP/5 APPENDIX, Doc 9626]

negotiation mandate granted by the European Council to the Commission therefore seems to enable the E.U. to fit the ICAO definition perfectly, especially since the text does include many forms of such "*supra-State*" i.e. community or union.

The ICAO manual also describes four levels of involvement. The Commission's mandate places it on the fourth level which is described as "*conduct of the bilateral consultation or negotiation by a representative of the regional group where the two signatory parties are or would be the extraregional State and the regional group as a single entity*". One of the advantages of such a level of negotiation is rightly stressed as the "*greater negotiating leverage*" which flows from such a body. That argument is closely linked to the 'encirclement policy' many have warned the Member States against: without the authority the Commission now has over bilaterals, third countries, and most specifically the U.S., have been able to compare the advantages offered by the various Member States, thereby viewing them merely as different ways of accessing the Common market without having to grant reciprocal rights (e.g. cabotage).

Thanks to the mandate the Commission received in June 2003, an E.U.-U.S. negotiation will involve the U.S. on the one hand and a group of States on the other (i.e. the Member States)[180] instead of a State on the one hand and a mere organization of States on the other hand[181].

The main advantage of bilateralism is that it gives maximum protection to the national interests of States. After having explained how rights are exchanged through bilateral agreements (i.e. "*equal access to a part of equal value of the national market*"), Henri Wassenbergh concludes that bilateralism is the best way to arrange for reciprocity and that it protects the weaker States[182]. However, he agrees that regionalism such as in the E.U. takes away that reason for bilateralism, although only internally. Finally, he

[180] [See ICAO type 6]
[181] [See ICAO type 4]
[182] [Wassenbergh, H., *Policy statements on international air transport*, Air & Space Law, VOL.XXV, Number 6, 2000]

writes what he thinks should be the contents of a liberalized bilateral agreements such as 'Open Skies' agreements. One will not be surprised when analyzing those contents that they are far more liberal than the contents of the actual bilaterals which were the subject of the European Court of Justice 'Open Skies' cases. For instance, Henri Wassenbergh draws a definition of 'Ownership and Control' that is much closer to the clause agreed upon at the ICAO Conference of March 2003 than to a U.S. 'Open Skies' agreement. In a nutshell, although the reason behind the adoption of the bilateral system after World War II (i.e. State sovereignty and equality of opportunity) is a valid one, bilateralism will have to follow the trend of liberalization.

However, other authors seem to be of the opinion that the system itself cannot be updated but has to be replaced for it has too many flaws. "*The patchwork of bilateral agreements between countries has created substantial barriers to trade in international air transport. Nations are free to negotiate any level of liberalization in air services, and inevitably, protectionist influences creep into the process. The impediments to free trade take several forms, ranging from overt acts, such as restricted landing rights or state subsidies of national airlines, to more subtle discrimination against foreign competitors, such as the imposition of burdensome domestic regulatory systems*" Randall D. Lehner writes[183]. Among the reasons he cites as justifications for the prevailing bilateral system are:

- The bilateral system has a status quo position, an "*inertial force*";
- The bilateral system is viewed as the only viable solution by many;
- The bilateral system "*can better account for the wide-ranging sociopolitical, geographic, and ethnic differences between States and global regions*".

[183] [Lehner, R.D., *Protectionism, Prestige, and National Security: The Alliance Against Multilateral Trade in International Air Transport*, Duke Law Journal, November 1995]

He nevertheless stresses the fact that "*the real justification for bilateralism rests on national fears of the direct and collateral consequences of open airline competition on domestic carriers*" which, according to him, "*merely a thin veil for protectionism*".

Therefore it seems that although some authors still see enhanced bilateralism as a viable mode of exchanging rights, others press to turn to another way of exchanging those rights.

2. Multilateralism

Although it has long been secondary because of the success of bilateralism, the issue of multilateralism came back on the front scene when the U.S. deregulation led to increased liberalization throughout the world.

When discussing what negotiations with the European Commission as one party would be, one must not think we are dealing here with multilateralism. Indeed, as long as there is no binding relationship of each party to each other party, negotiations remain bilateral or joint bilateral but in no way multilateral. In order to negotiate under a multilateral system, parties have to depart from reciprocity, i.e. "*the balanced quid-pro-quo between sovereign States*" as Henri Wassenbergh puts it[184].

Multilateral regulation would therefore be "*regulation undertaken jointly by three or more States, within the framework of an international organization and/or a multilateral treaty or agreement, or as a separate specific activity, and may be broadly construed to include relevant regulatory processes and structures, outcomes or outputs written as treaties or other agreements, resolutions, decisions, directives, or regulations, as well as the observations, conclusions, guidance and discussions of multinational bodies, both intergovernmental and non-governmental*"[185].

---

[184] [Wassenbergh, note supra doc 182]
[185] [ICAO, supra note 179]

Unfortunately, its enforceability is more difficult than under a bilateral system. Multilateral agreements are therefore less used to exchange market access than bilateral agreements. Moreover, many fear that multilateral negotiations will only benefit States with strong economies and important airlines. On the other hand, powerful States fear that only an agreement with the 'least common denominator' can be reached. Finally, it is simply much more difficult to achieve multilateral than bilateral agreement.

Nevertheless, multilateralism does present advantages: once a multilateral agreement is reached, it regulates many bilateral behaviors which, if negotiated one after the other, might have taken more time in total that the amount of time spent to negotiate on a multilateral basis. Moreover, multilateral regulation is the best way to put an end to incompatibilities between the numerous regimes: that idea is now well know to the European Member States. "*From an efficiency standpoint, the nature of a bilateral negotiation and agreement hampers the advancement of international air transport*" Randall D. Lehner writes. It forces "*countries to negotiate and supervise compliance with a wide array of restrictions*" he adds before concluding: "*The bilateral system also lacks uniformity of regulation, causing airlines to spend extra time and money in an attempt to comply with their differing and unequal requirements*"[186]. Finally, necessity is often cited as a factor pointing towards multilateralism: this new system is viewed as a means to reach free development of routes and capacities.

With regards to the specific issue of 'Ownership and Control', Richard Janda and Joseph Wilson write, in the aftermath of the 'Open Skies' cases, that "*the most obvious way to overcome the incoherence of placing liberalized ownership and control within bilateralism is to seek instead to accomplish it within a multilateral framework*". According to them, the new context in the E.U. is an opportunity for multilateralism which would start between the E.U and the U.S. but would surely develop with the extension to many others: the ten candidates to the E.U., members of the E.U. aviation

[186] [Lehner, supra note 183]

regime and Switzerland on the one hand, but also the NAFTA and APEC countries on the other hand[187].

The question remains whether to invent a new framework or benefit from an already existing one.

3. What kind of multilateralism?

Whether organizations dealing specifically with aviation (i.e. ICAO) or not (i.e. WTO), fora already do exist which could well suit multilateralism. Nevertheless they might reflect a much too advanced multilateral framework for air transport. One must therefore look for alternative solutions in the meantime. In the aftermath of the European Court of Justice judgments and of the new mandate the Commission has been granted by the Council, the idea of a Common Aviation Area is stressed by many authors as the step towards multilateralism, although not as frightening as pure multilateralism.

There is indeed fear that an international organization will not be able to assess the interests of all. Rather, some think of the extension of regional solutions as a better way move towards multilateralism. Ulrich Schulte-Strathaus puts it as follows: "*A TCAA with the US and the EU as initial parties should have sufficient critical mass to facilitate a progressively broader geographical coverage, with the ultimate objective of creating on this basis a worldwide aviation regime. Moving in incremental steps toward a globally applicable agreement appears to me to be more efficient than attempting to overcome the enormous hurdle of dealing multilaterally with the heterogeneous interests of a UN organization.*"[188]

---

[187] [Janda, R., and Wilson, J., *Has Europe kick-started the global liberalization of airline ownership and control?*, in *Business briefing – Aviation strategies: challenges & opportunities of liberalization*, published in conjunction with the Air Transport Seminar of ICAO 22-23 March 2003, ICAO headquarters, Montreal, Canada.]

[188] [Schulte-Strathaus, U., *COMMON AVIATION AREAS: THE NEXT STEP TOWARD INTERNATIONAL AIR LIBERALIZATION*, Air and Space Lawyer, summer, 2001]

In summary, almost all agree that bilateralism does not solve everything (e.g. the difference between the competition regulations of the parties), and that multilateralism could correct the flaws of bilateralism while not necessarily aiming at pure universality: differences of regulations worldwide make the creation of a common air transport policy a utopia. Differences have to be taken into account, even within a multilateral framework.

Whatever the option States will take to move towards multilateralism, they must not miss this opportunity a second time: "*The dangers of bilateralism as an end in itself now threaten the future ability of nations and their airlines to provide their service effectively and efficiently to the market*" Randall D. Lehner writes. "*The future of multilateralism, however, has reached another turning point. Almost fifty years after the failure to establish a multilateral regime, States and the industry have another chance to secure the benefits of a multilateral agreement for trade in international air service for themselves and for the public*" he concludes.[189]

Because some believe that multilateralism can only be reached progressively by gathering various regional agreements while some think that air transport is ready for a somehow more radical approach under the auspices of an international organization, one needs to address both possibilities.

Chapter 2: A Transatlantic Common Aviation Area

1. The proposition

When addressing the December 1999 international conference entitled 'Aviation in the 21st century, beyond open Skies' and convened by US Transportation Secretary Rodney Slater, Loyola de Palacio, Vice-President and Commissioner for Transport and

[189] [Lehner, supra note 183]

Energy of the European Commission delivered her views on the future of E.U.-U.S. aviation relations. She proposed an open civil aviation market for both Europe and North America: in other words, a 'Transatlantic Common Aviation Area". Loyola de Palacio explained that what she reffered to meant "*combining the concept of the U.S. open skies and the European concept of the open internal market in the framework of harmonization and convergence*"[190].

"Combining the concept of the U.S. open skies and the European concept of the open internal market"

The TCAA indeed presents many of the features of the U.S. model 'open skies' agreement. Nevertheless, it goes beyond that model when associated with the characteristics of the E.U. internal market. "*In addition to allowing full pricing freedoms and providing alliances with operating flexibility, the TCAA identifies four core areas for liberalization*" Ulrich Schulte-Strathaus writes. Among them he cites:
(1) the freedom to provide services between any points in the Area, including two points in a single country;
(2) unrestricted airline ownership and the right of establishment;
(3) the harmonization of standards for the evaluation of airline competitive behavior; and
(4) elimination of restrictions on the use of leased aircraft and the reservation of the carriage of government-financed traffic to national carriers.

Indeed, the TCAA "*contemplates the elimination of all restrictions on ownership and control for carriers within the Area*" he writes. The relaxation of 'ownership and control' rules is inevitably one of the main advantages presented by the intra-European model and should, according to many authors, be exported through the TCAA: "*The underlying raison-d'être of the initiative was precisely that: to reinvigorate the process of liberalization. The above-mentioned core areas are designed to go beyond traditional*

[190] [De Palacio, L., *The TCAA – a blueprint for the 21st century*, Air & Space Europe, Vol.2, No 2, 2000]

open skies agreements that are inherently bilateral, and could be complemented by other issues" Ulrich Schulte-Strathaus concludes[191].

"Harmonization and convergence"

Talking about both 'harmonization' and 'convergence' necessarily means a multi-step process for air transport might not yet be ready for harmonization of competition rules for instance. Authors who believe in the TCAA therefore favor convergence as a means to achieve the goals of the TCAA[192]. This is what Loyola de Palacio underlines when proposing "*a broad framework of harmonization and policy convergence*".

Among the regulatory issues which need to be addressed are:

- Computer Reservation Systems;
- Code-sharing;
- Slots;
- State aid;
- Bankruptcy protection, and
- Leasing

Moreover, competition deserves special attention here. As stressed by René Fennes, "*competition issues were part of the regulatory issues listed in the first mandate*" (i.e. the 1996 mandate the European Council granted the Commission). "*It explicitly covered 'appropriate measures enabling application of US and EC competition legislation to converge'.*"[193] Because of the "*need to make the world safe for globalization and alliances*"[194], this issue will require most of the E.U. and U.S. cooperation. Procedures of 'comity' and of 'positive comity' had already been provided

[191] [Schulte-Strathaus, supra note doc 188]
[192] [E.g. Folliot, M.G., *Le siècle du multilateralisme?*, Revue française de droit aérien et spatial, No2, 2000, p.83]
[193] [Fennes, R., *The European Community and the United States; expanding horizons and clipped wings*, European Air Law Association conference papers 15, 11th annual conference in Lisbon 5 November 1999, edited by P.D. Dagtoglou, A. Zinckedosreis and J.M. Balfour]
[194] [De Palacio, supra note 190]

within the framework of the September 23, 1991 cooperation agreement between the U.S. and the E.E.C., which had been deeply revised in 1998 after the Boeing and McDonnell Douglas case[195]. In a nutshell, while the U.S. promotes U.S. carrier concentration as a means to strengthen their position on the international air transport market, the E.U. as a stricter policy as it does not require the alliance, merger or acquisition to reduce competition in order to declare it illegal. Therefore, competition is one of those examples which show how difficult it would be to harmonize certain areas of U.S. and E.U. policy. The TCAA proposition therefore only aims at harmonizing 'policies' and not 'rules': harmonization of the later would not only be unrealistic but would also make the whole TCAA proposition sound foolish. "*I am not saying that we need to have the same policies on all issues. We are all sovereign nations and we want to remain so*" Loyola de Palacio declared, "*I am just saying that we should have convergence of policy, ensuring compatibility and effectiveness.*"[196]

According to her blueprint, parties should seek policy convergence on the following issues:

- Assurance of high safety standards as a "*main priority*"
- Coordination on "*effective and advanced measures to protect the environment*"
- Establishment of "*shared and effective consumer protection measures*"
- Coordination on "*social policies that could affect the TCAA market*"
- Establishment of a "*strong, effective and swift dispute settlement mechanism*"

While this speech was an attempt to simplify the issues at stake, the AEA policy statement of October 1999, which was therefore issued two months before, was more precise about the three stages procedures the U.S. and the E.U. would face:
"(a) working towards harmonization, in casu in respect of market entry, capacity and pricing and selling/purchasing of air transport, ownership and control of air carriers and right of establishment, competition policy, aircraft wet-leasing;

---

[195] [For a complete analysis of the case, see Luz, K., *The Boeing-McDonnell Douglas merger: competition law, parochialism, and the need for a globalized ant-trust system,* 32 Geo. Wash. J. Int'l L. & Econ. 155, 1999]
[196] [De Palacio, supra note 190]

(b) working towards convergence (mutual recognition), in casu in respect of safety, security, environmental protection, local facilities, liability; and
(c) leaving matters to national discretion, in casu accident investigation, labour and consumer issues."[197]

After the TCAA was proposed, many authors have tried to stress what it would have to include and how it would have to include it. Among them are Henri Wassenbergh, Jeffrey N. Shane, and Brian F. Havel.

While Brian F. Havel[198] establishes a set of principles for the E.U. and the U.S. to follow in order for their cooperation to be successful[199], Jeffrey N. Shane is confident that the TCAA will work if parties do not make the mistake of trying to harmonize rules instead of focusing on convergence of their application. With regards to competition he writes: "*whereas harmonization of US antitrust law and Community competition law would be both undesirable and unrealistic, it was equally obvious that the US and EU would have to achieve substantial convergence on the application of competition policy in such a CAA, in order to ensure the continued effectiveness and viability of the CAA, and to prevent conflict.*"[200] Finally, Henri Wassenbergh insists on the participation of Canada and perhaps Mexico to the Common Aviation Area[201], which is one of the most awaited effects of the project.

---

[197] [See Wassenbergh, supra note 182]
[198] [Havel, B.F., *In search of Open Skies: law and policy for a new era in international aviation*, Kluwer law International, the Hague-London-Boston, 1997]
[199] [He cites (1) the end of managed trade; (2) the end of cabotage and Chicago's contrivance of freedoms; (3) the end of the Nationality doctrine; (4) the end of tariff approval protocols; (5) the need for competition policy; (6) the end of public subsidy; (7) the new regulation of slots and CRS; (8) the strategy for third countries outside the plurilateral]
[200] [Shane, J.N., *EU-US aviation relations: the search for a new model*, European Air Law Association conference papers 15, 11th annual conference in Lisbon 5 November 1999, edited by P.D. Dagtoglou, A. Zinckedosreis and J.M. Balfour]
[201] [See Wassenbergh, supra note 182]

2. The potential effects

As mentioned earlier, the concept of E.U.-U.S. cooperation is not new since it was already included in the 1996 mandate. Nevertheless, the TCAA goes a step further in challenging the concept of a mere bilateral agreement. First encompassing the E.U. and the U.S., the TCAA would quickly be open to more by including a "*'plurilateral' mechanism to allow other groups of likeminded States to adhere to the pact as their economic circumstances (or the force of outside economic circumstances) evolved*"[202]

Based on the assumption that the present "*patchwork system of bilateral agreements significantly distorts competition and constrains the ability of air carriers to adjust to market conditions*", the European Commission asked the Brattle Group to analyze the effects of an E.U.-U.S. 'Open Aviation Area', which main conclusions are summarized by James Reitzes and Dorothy Robyn[203].

They start by stressing the restrictions imposed upon the carriers and therefore the consumers by the present system. They witness a limitation on competition for the following reasons:

- E.U. carriers can fly directly to the U.S. only from their own country;
- E.U. carriers from countries having concluded 'Open Skies' agreements with the U.S. cannot merge with other E.U. carriers without loosing U.S. traffic rights;
- Mergers of E.U. and U.S. carriers are prohibited;
- Cross border investment is limited.

What did the study highlight as impacts from an E.U.-U.S. liberalization on this system? Not only did the report provide for quantitative analysis (it projected an increase in transatlantic travel, a boost in intra-E.U. travel, expected the benefits resulting from it to be of US$5.2 billion not including benefits from related industries), but it also

---

[202] [See Havel, supra note 198 at 126]

[203] [Reitzes, J., and Robyn, D., *An analysis of the economics effects of an EU-US Open Aviation Area*, in *Business briefing – Aviation strategies: challenges & opportunities of liberalization*, published in conjunction with the Air Transport Seminar of ICAO 22-23 March 2003, ICAO headquarters, Montreal, Canada.]

anticipated efficiency effects such as "*cost reductions from increased competition*", "*price reductions from improved coordination on transatlantic interline routes*", and "*output expansion from replacement of restrictive bilateral agreements*"[204].

Particular attention has been given to specific issues such as national security, workers and airline safety.

With regards to national security, the U.S. was concerned with the effects of liberalization on the CRAF program. Although it acknowledges that the U.S. air carriers were more dependable in the sense that government's leverage with foreign carriers was far more limited, the report draws a parallel with the maritime equivalent of CRAF to show that many companies can meet the U.S. citizenship requirement while being foreign owned. The issue of 'Ownership and Control' nevertheless remains a major obstacle according to many authors such as Michel Dupont-Elleray just to name him[205]. Moreover, a question arose whether "*elimination of market access restriction (Fly America requirements and the ban on cabotage) would make the CRAF more costly*". After having reminded its readers about the amount of criticism which surrounded those restrictions imposing costs on users, the report addresses this concern in details to better conclude that not only would the CRAF program not be affected, but that it could actually also be enhanced through an 'Open Aviation Area'.

As far as workers were concerned, the problem was as follows: many labor groups feared that such liberalization would facilitate the replacement of expensive workers by less expensive workers (e.g. pilots). The report therefore compares the different levels of wages among workers in the aviation field and draws three conclusions:

---

[204] [Reitzes, and Robyn, supra note 203]

[205] [Dupont-Elleray, M., *La politique communautaire de l'aviation civile, de la libéralisation du transport aérien au ciel unique européen,* Revue Française de Droit Aérien et Spatial, Vol. 224 N°4, octobre-décembre 2002]

- Insufficient E.U.-U.S. wage disparity shows a very limited potential for direct substitution (E.U. pilots only earn 15% less than U.S. ones and although candidate States to the E.U. constitute cheaper labor force, they are not numerous);
- Indirect substitution could be greater (low wage carriers, e.g. Virgin Atlantic, could take over the share of both U.S. and E.U. high wage carriers);
- Even if 'Reflagging' happens, which is very unlikely, (e.g. carriers would not even need to anyways), "*it would not pose a threat to safety or labor conditions, given the high standards in place in Europe and the U.S.*"[206]

Finally, the report witnesses that safety standards are indeed "*astoundingly close to perfect*" and that since deregulation never led to lowering of such standards, nothing leads to the conclusion that it should happen with the creation of an 'Open Aviation Area'.

James Reitzes and Dorothy Robyn therefore conclude that "*although an open aviation area would challenge regulators, it would not harm aviation safety, given the generally high level of regulatory oversight in Europe and the U.S.*"

3. Chances of success

One must analyze the obstacles to the TCAA in order to evaluate its chances of success. 'Ownership and Control', cabotage, and wet leasing are often cited as the most important of those obstacles. Nevertheless, analysts, such as the authors of the Brattle report, have already addressed those concerns and have subsequently been able to demonstrate that liberalization should not be feared. Mock negotiations have been conducted by experts under the direction of Henri A. Wassenbergh which results confirm that idea[207]. On the issue of cabotage for instance, it looked like the question whether to include it in the freedoms exchanged posed no particular problem: although present U.S.

---

[206] [Reitzes, and Robyn, supra note 203]

[207] [Wassenbergh, H.A., *External aviation relations of the European Community*, Kluwer Law and Taxation Publishers Deventer – Boston, 1992]

legislation forbids the grant of cabotage rights to E.U. airlines (and to any other foreign airline) the U.S. delegation[208] in the mock negotiations had no problem granting cabotage rights to the E.U. delegation[209]. Following those analyses and mock negotiations, it seems like no obstacle will slow down the liberalization process.

Nevertheless, not all authors are so enthusiastic about the future of E.U.-U.S. aviation relations. Not only do many remind their readers about the fact that the TCAA was indeed already behind the 1996 mandate[210] as stressed earlier, but some simply think it is not yet time for a TCAA. E.g. Onno Rijsdijk describes it as "*just a step too far*"[211] and Henri A. Wassenbergh writes "*it is too great a step, for the time being, for there is bilateralism, regionalism and plurilateralism, but not yet globalism or universalism to regulate international air transportation in the economic field.*"[212] However, those comments were all written before the Commission was granted a new mandate.

Many have stressed that the mandate was a sine qua non condition for the realization of the TCAA.

In the aftermath of the 'Open Skies' cases, the Beaumont bulletin presented the future of the TCAA as follows: "*a liberal EC/US agreement, along the lines of the TCAA, becomes more likely, but probably not in the short term*"[213].

At the same time, the Norton Rose bulletin insisted on the importance of the Commission's mandate, though not yet granted: "*Commission negotiating authority would facilitate negotiations with the U.S. concerning a TCAA which would unite the two jurisdictions under the same air transport regulatory regime. Regarded by many as the*

---

[208] [Mr. Sørensen played the representative of the European Commission, Mr. Schreurs acted as the spokesman of the national civil aviation authorities of the Member States, and Mr. Ebdon represented the major airlines]
[209] [Mr. Shane embodied the U.S. Government spokesman, Mr. Levine represented U.S. communities and consumers, and Mr. Trinder played the role of defendant of the interests of the airline industry]
[210] [See Fennes, supra note 193]
[211] [Rijsdijk, supra note 85]
[212] [Wassenbergh, supra note 146]
[213] [Beaumont bulletin, supra note 118]

next phase of the continuing air transport liberalization process, a TCAA in place between the EC and US would form a formidable trading block and would be attractive to third countries that may seek membership in their own right."[214]

Finally, after having described the E.U.'s single aviation market as an "*unprecedented opportunity for a plurilateral integration*", Brian F. Havel deplores the fact that the European Commission's competence in external aviation relations was unsettled and the consequent absence of comprehensive discussions therefore. However, this was his opinion before the European Court of Justice's cases and the grant of a new Commission's mandate[215]. The question therefore is: will the June 2003 mandate make the TCAA sound like nearest future?

Michel G. Folliot balances the advantages and disadvantages of the TCAA in order to evaluate whether or not it is likely to be realized: he believes that the TCAA is a great opportunity to converge on competition policies without giving up sovereignty, and without any ideological debate. Nevertheless, divergence in those policies and strong resistance to sovereignty changes might jeopardize the whole process, he writes. According to him, the greatest flaw is more political than it is legal: he fears that the value of the rights given is not well enough defined to make the parties engage in the process[216].

Let us hope that this will not stop the parties who will certainly propose a more precise framework for the project. Two things in the TCAA could however be a guarantee that it is not just another proposition with no real substance: first, it is the first time that a proposition emerges from the European side of the ocean, and second, it came from the industry, and not the governments.

---

[214] [Norton Rose, supra note 148]
[215] [Havel, supra note 198 in 5.2.2.2.]
[216] [Folliot, supra note 192]

Chapter 3: looking for international fora

As of the time of writing of this comment, E.U.-U.S. negotiations are underway and yet not much has been revealed to the public about how they are going. Transport commissioner Loyola de Palacio said she was "*reasonably optimistic*" about reaching an open skies agreement with the USA, after the first round of talks on October 9, 2003. Whether or not those negotiations are a success, one must not leave aside the possibility of a true multilateral framework for air transport. However, this remains a long term plan and many questions remain unsolved with regards to this issue.

In the aftermath of the 'open Skies' cases, Allan I. Mendelsohn foresees four alternative ways to solve the problem of illegal bilaterals[217]:

1. *"Unilaterally by the United States acting alone;*
2. *Unilaterally by the United States acting and signing alone, but with blank signature blocks allowing adherence by any other states;*
3. *Multilaterally, with the United States first reaching agreement on specific provisions with its five APEC partners; or*
4. *Multilaterally through an international organization that enjoys an appropriate mandate."*

Although the first proposed solutions sound outdated today, particular attention must be drawn to the last proposal. However, it is not yet quite clear which international organization *"enjoys an appropriate mandate"*. It seems that only after having answered the question of whether air transport is part of trade or not, will one be able to analyze the delimitation of roles of the two main potential appropriate international organizations: ICAO and the WTO. Only then will one be able to conclude on the role of the E.U. as an international actor in air transport liberalization in the light of the recent events.

---

[217] [Mendelsohn, supra note 124]

1. Is aviation part of trade?

The question whether aviation is part of trade is in fact two fold: indeed underlying this first issue is the following question raised: is free trade adaptable to aviation?

Answering the first question will allow one to decide whether or not air can be included in the GATS and therefore fall under the authority of the WTO, thereby leading to the subsequent issue of division of competence among ICAO and the WTO.

While some authors maintain that air is no normal activity and should therefore not be considered part of trade, others are ready to treat it as a trade matter with no specificity. Henri Wassenbergh[218] stresses that air transport is not like any other industry. Not only is the Most Favored Nation (MFN) principle inapplicable to international air transport, but also "*the national public interest of air transport is still too great*". "*It is accepted that cicil aviation is not a matter of trade, but a matter of State sovereignty*" he writes[219]. Moreover, he writes that air transport "*still is a national public utility, a national public service industry, for which governments carry a heavy responsibility towards the own public*"[220].

Nevertheless, other authors detect a change in opinion from certain governments with regards to that issue. It seems that the E.U., for instance, renounced the specificity of air transport when it decided to reform Article 84(2) of the EC treaty after the Single European Act entered into force. So does Michel Dupont-Elleray indeed interpret the decision of the Member States to give up on unanimity with Council decisions regarding air transport. "*C'est le veto d'un seul Etat sur la multilatéralisation qui disparaît. C'est la*

---

[218] [for an analysis of the issue by the same author before the Uruguay round, i.e. the difficult analogy between air and goods, see Wassenbergh, H.A., The application of international trade principles to air transport, Air law, volume XII, number2, 1987]
[219] [Wassenbergh, supra note 146]
[220] [Wassenbergh, supra note 4]

négation définitive de la spécificité du transport aérien " he writes.[221] Brian F. Havel also admits that "*aviation indisputably qualifies under the general GATS definition of 'trade in services.* "[222] Finally, even ICAO indirectly pleads in favor of not considering air as a specific matter. It stresses that "*air transport is a service industry increasingly affected by the same forces changing other service industries*", and that it "*does not require distinctive regulation because, having developed, it is not now a 'special' industry*"[223].

However, the main reason why authors wonder about the status of air is to conclude whether or not it should be included in the GATS, i.e. whether or not the Annex on air transport should be extended or not. As of today, the Annex only applies to aircraft repair and maintenance, the selling and marketing of air transport, and computer reservation systems; i.e. it excludes traffic rights. The text itself foresees the extension of its scope. Nevertheless, no such decision has yet been adopted.

While some argue in favor of such an extension[224], others say it is not yet practicable. According to I.H. Diederiks-Verschoor, "*traffic related rights will not come under the GATS*"[225]. A more optimistic view is shared by others such as Brian F. Havel, for whom GATS extension, though impossible for now, might become a reality when regional agreements lead to it: "*A global multilateral instrument is currently unattainable. The bilateral system, centered in national sovereignty, is ideally suited to those states that continue to assert the well being of their national carriers as the highest priority in aviation policy. Any attempt to corral these states into a wider multilateral framework would have GATT-like consequences: agreement may result, but it would be pitched to the 'lowest common denominator' –l'harmonisation à la baisse- embracing areas of general consent that could prove even less liberal than current bilateral practice*"[226]. Moreover, he considers the E.U.'s emerging single aviation market "*an unprecedented opportunity for a plurilateral integration with U.S. federal airspace*".

---

[221] [Dupont-Elleray, supra note 205]
[222] [Havel, supra note 198]
[223] [ICAO, supra note 179]
[224] [See the arguments gathered by Lelieur, I., *Law and policy of substantial ownership and effective control of airlines: prospects for change*, McGill, 2002]
[225] [Diederiks-Verschoor, I.H., *An introduction to air law*, Kluwer Law International, 2001]
[226] [Havel, supra note 198]

That thought is confirmed by Wolfgang Hubner and Pierre Sauvé for whom also extension of the GATS Annex is a step further after the TCAA. They nevertheless warn that "*because national governments have been used to participating directly in both the regulation and operation of air services, a GATS-centered approach may in the current environment represent too great a step forward.*"[227] They therefore recommend that a "*gradual transition*" be sought rather than a "*full GATS regime*", i.e. "*to allow substantial liberalization initially between a core group of like-minded WTO Members, with a view towards the fuller application of the GATS at a later stage*". They also concluded that clarification and expansion of the current GATS Annex on Air transport is anyhow needed.

Whether optimistic about such an expansion or not, all agree that there is one main obstacle to the global integration of air to trade: the MFN principle.[228] "*The U.S. has opposed substantive inclusion of aviation in a GATS setting (...), in large part because of the nonreciprocal nature of the liberalization under the GATS 'most favored nation' approach*" Brian Havel writes.[229]

Now, the remaining question seems to be: is free trade good for aviation? Although not many authors deal with that issue after having answered the question 'is aviation part of trade?', Peter Forsyth attempts to clarify it. He analyzes the economic and non economic reasons for restrictions of that trade, and points at the causes of such restrictions: the pressures from different interest groups such as consumers, home tourism industries, governments, workforce, and airline industry. "*While incorporation of air transport into the arrangements such as the GATS has some potential, it is likely to be achieved only in the longer term*" he concludes. He stresses the fact that aviation trade is so closely related to tourism for instance that States have to be ready to include it the negotiating framework as well, and that explain why "*for the short-to-medium term, the*

---

[227] [Hubner, W., and Sauvé, P., *Liberalization scenarios for international air transport*, Journal of World trade 35(5): 973-987, 2001]
[228] [For a complete analysis of the GATS principles to air transport services, see Janda, R., infra note 235]
[229] [Havel, supra note 198]

regional or club basis probably provides the greatest scope for progress towards liberalization of trade, especially if trade in other sectors is included"[230].

2. ICAO vs. WTO?

Commentators very often point at the WTO and ICAO as adversaries fighting for competence over aviation. Although it could be understandable that ICAO would not like to see the WTO slowly take its place, nothing shows that these roles could actually be overlapping. Here is how Brian F. Havel describes ICAO's role: "*the ICAO is dedicated virtually entirely to technical cooperation among its contracting member states (...). The ICAO has not, however, played a role in the economic regulation of the air transport industry*"[231]. This does not mean that ICAO is unfit for the liberalization process, only that the WTO might be a better suited forum for economic aspects of aviation. ICAO will always remain the best discussion forum even though the WTO presents mechanisms, such as the dispute settlement system, that are quite effective.

Henri Wassenbergh recommends that "*a link between the individual States' interests and the exploitation of the global air traffic market (...) be maintained*". That link, which is two fold, could therefore be looked after by both ICAO, as far as the "*technical / operational / environmental*" link is concerned, and by another supra-national organization, as far as the "*economic / financial*" link is concerned. Although Wassenbergh writes there is no such organization dedicated to aviation, the WTO could very well play that role one day[232]. As Richard Janda and Joseph Wilson stress, "*the EU Commission (...) ultimately seeks the inclusion of the aviation sector within the WTO 'or another equivalent arrangement at the global level'. Rather than invent a new framework, the General Agreement on Trade in Services ought to consider multilateralism in the exchange of traffic rights.*" They conclude that "*ICAO's key role as*

---

[230] [Forsyth, P., *Promoting trade in airline services*, Journal of air transport management, 7 (2001) 43-50]
[231] [Havel, supra note 198]
[232] [Wassenbergh, supra note doc 146]

the world custodian of aviation safety and security would be entirely consistent with such a development"[233].

Moreover, although he doubts that multilateralism under the WTO will come in the near future, Jacques Naveau agrees and insists that very close collaboration between the two international organizations is fundamental[234].

Finally, Richard Janda analyzes why economic regulation should be given to the WTO. He is of the opinion that there is no reason why air transport should not be part of the GATS because not only is aviation a key element of international business, but also because national restrictions are contrary to both consumers and airlines interests in the long term. He pleads in favor of the extension of the Annex to hard rights, for a "*patchwork of bilateral air services agreements*" will not lead to any progress. He recognizes that a specialized organization like ICAO fears that aviation falls into the hands of a general one such as the WTO and underlines the reasons why ICAO should not, cannot and does not want to deal with economic aspects of aviation. First, many of the ICAO Member States are actually not members of the WTO. Second, ICAO delegates represent civil aviation authorities and Richard Janda explains that liberalization does not first benefits carriers but passengers. Therefore ICAO resisted the expansion of the Annex. One possible consequence of that he writes is that "*it may convince States favoring multilateral liberalization to attempt it in a forum more sympathetic to that goal*". He goes on by demonstrating that the WTO is such forum and exposes arguments of opponents to that idea to better contradict them. First, it is often said that reciprocity does not exist under the GATS although it has always been the basis for air transport negotiation. Nevertheless, nothing forbids that a special regime be put in place under the GATS to allow for such reciprocity with regard the aviation. Second, many have wondered whether is would be possible to depart from the MFN clause. Richard Janda therefore explains that although one will have to be careful with the application of that rule to aviation, nothing seems impossible to realize as long as the differences of air are

[233] **[Janda, and Wilson, supra note 187]**
[234] [Naveau, supra note 58]

taken into account, "*this would mean that every WTO member must offer to every other member the equivalent of the most favorable bilateral arrangement into which it is currently prepared to enter on the basis of mirror reciprocity*" he stresses. "*The approach proposed here would therefore combine existing bilateralism with the MFN principle, thereby meeting the main objection against inclusion of hard rights within the GATS*" he writes. Still he admits that this solution does not solve the problem of the inappropriate dispute settlement mechanism, nor does it take into account the interests of developing countries. He answers those critics the following way: first, countries can always decide to exclude hard rights from the dispute settlement mechanism; second, he stresses that the situation of developing countries will not get better if nothing is done either. Although one might think of this argument as his weakest, Richard Janda nevertheless underlines that developing countries could benefit from derogations to MFN, obtain preferential treatment under the dispute settlement mechanism, and that they would be given time to adjust anyways.[235]

3. The E.U. as an international actor?

Whichever forum would be at stake, the recent developments in European air law seems to point at the E.U. as an emerging power whose organization and structure might be a first step to follow towards multilateralism but whose involvement in international organizations as a supra-national authority might be the source of difficulties.

"*The Community Commission is already exercising an indirect influence on ECAC via the 12 Community members of ECAC, which form a majority among the 23 ECAC members. Subject to existing directives of the Community, the 12 may be forced to vote accordingly. Furthermore, a direct influence may stem from the observer status of*

[235] [Janda, R., *Passing the torch: why ICAO should leave economic regulation of international air transport to the WTO*, Annals of Air and Space Law, Vol. XX-I, p.409-429, 1995]

the Commission (as in ICAO and Eurocontrol)" writes former director of the Swiss Federal Office for Civil Aviation Werner Guldimann in 1990.[236]

Apart from the influence the E.U. has among international organizations is the question of its direct participation as a member itself, through the E.U. Commission. Some authors are of the opinion that the E.U., so represented, will have to become a member of such organizations in the light of the recent developments, e.g. the 'Open Skies' cases. This is the case of Armand de Mestral who writes that "*the EC, represented by the Commission, will have to enter the International civil Aviation Organization (ICAO) in order to exercise its external powers.*"[237]

However, what will the consequences of such membership be? "*This can happen while the existing 15 EC Member States (and ultimately 10-13 more new entrants) retain their membership, but they will lose the central role that they currently enjoy in negotiating for their exclusive national interests*" Armand de Mestral concludes.[238]

One might wonder what difficulties an E.U. membership will lead to. Richard Senti has analyzed the consequences of the role of the E.U. as an economic actor within the WTO and delivers the following conclusions: first, he notices that "*as far as the WTO is concerned, instead of the predominance of the USA, there are now two, more or less equally strong partners at the forefront of the WTO*" as a consequence of the increasing strength of the E.U. as a trading block; second, "*the EU has become not just a more important trading partner but also a more difficult one*". He underlines that the E.U. might become "*increasingly skeptical vis-à-vis a liberal world trade regime*" "*given the background of the current social and fiscal policies of the EU Member States*". Although his article does not exclusively deal with the air transport industry, it poses the question

---

[236] [Guldimann, W., *Changing relations between the European Community and International Civil Aviation Organizations*, in *EEC Air Transport Policy and Regulation, and their Implications for North America,* Kluwer Law and Taxation Publishers Deventer – Boston (1990)]

[237] [De Mestral, A., The consequences of the European Court of Justice's 'Open Skies' decisions, in *Business briefing – Aviation strategies: challenges & opportunities of liberalization,* published in conjunction with the Air Transport Seminar of ICAO 22-23 March 2003, ICAO headquarters, Montreal, Canada.]

[238] [De Mestral, supra note 237]

of a European mandate, and describes how difficult it can be to get one (the air transport is indeed a good example in that matter). "*The lack of transparency as well as the difficulties posed therefore by the negotiations has given rise to criticism of the EU by the WTO*" Richard Senti writes. He regrets that the situation will stay the same and even will deteriorate as long as European Treaties remain as they are[239]. Let us hope that the mandate obtained by the Commission in June with regards to Air Transport will prove a great step forward for the E.U. within as many international organizations as possible.

One thing is certain, the E.U. must not waste this historic chance to play an important role in the liberalization of air transport. According to Michel Dupont Elleray, the reason behind the weakness of the E.U. when facing the U.S. is the constant struggle for competence which is the core matter of the 'Open Skies' cases[240]. Although the June mandate seems to reflect a change of position from the part of the E.U. and its Member States, the Commission itself will have to settle down the internal battle between the various divisions in order to secure an agreement with the U.S.

Everything seems to point at the U.S. and the E.U. as leaders towards a multilateral framework for international aviation. In order to achieve that result, parties will have to adapt. The creation of transnational carriers might be a necessary step to that end Michel Dupont Elleray stresses, and the E.U. also seems to have understood that[241].

Successful negotiations between the E.U. and the U.S., whether achieved in this round or the next, i.e. in February 2004, would be a formidable starting point for multilateralization of air transport. *"We believe that a U.S.-EU agreement has the potential to alter fundamentally the framework for transatlantic and global aviation and provide the benefits of a market-oriented approach,"* chief negotiator for transportation at the U.S. State Department Byerly said on September 29, 2003 at the U.S. Mission to the

---

[239] [Senti, R., *The role of the EU as an economic actor within the WTO*, European Foreign Affairs Review 7: 111-117, 2002]

[240] [Dupont Elleray, supra note 205]

[241] [For a detailed review of the recent Air France KLM agreement, see: *La fusion entre Air France et KLM officiellement signée*, LE MONDE | 16.10.03]

EU in Brussels. *"As a central U.S. objective, we will aim to expand Open Skies in all of Europe, including member and accession states with which we have no agreement or only a restricted agreement."*[242] The E.U. will nevertheless want to go beyond the Open Skies model. Since that may require the amendment of U.S. legislation on ownership and control of U.S. carriers[243] and cabotage, we can only wait for the results of negotiations with great impatience.

---

[242] [*Byerly: U.S. aims for comprehensive accord in air services talks with E.U.*, September 29, 2003 http://www.useu.be]

[243] [On the ownership and control issue, it seems that the U.S. government is more and more open to change; see *Bush Seeks More Foreign Ownership of U.S. Airline Stock*, June 2, 2003, http://www.useu.be]

CONCLUSION

Europe was built on Court decisions, and the 'open Skies' cases did not contradict that principle Member States are now getting used to.

In the aftermath of the of European Court of Justice judgments of November 5, 2002, the political struggle that led to the granting of the Commission's mandate made it easy to foresee that more than a mere European restructuring was to take place.

It seems today that the European Commission has been given the means to prove it can participate in the next step towards liberalization of civil aviation side by side with the U.S., who, until now, has been leading the deregulation process.

Although it is very hard to predict what will emerge from the U.S.-E.U. negotiations which are taking place as of the date of writing of this thesis, let us hope that errors of 1996 will not be repeated an that those two powers will be able to show the way forward to other countries. This is an unprecedented opportunity to perfect and allow for the aviation industry to complete its task for consumers from all aver the world.

BIBLIOGRAPHY

I. Primary Materials

A. United States

Department of Transportation, Order in the Matter of Defining 'Open Skies', DOT Order No. 92-8-13, (August 5, 1992).

B. European Union

EU, Treaty establishing the European Economic Community, March 25, 1957, (Nice consolidated version) http://europa.eu.int/eur-lex/en/search/treaties_founding.html

EU, Council Regulation 3975/87 Laying Down the Procedure for the Application of the Rules on Competition to Undertakings in the Air Transport Sector, [1987] O.J. L374/1

EU, Council Regulation 3976/87 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector, [1987] O.J. L374/9

EU, Council Directive 87/601 on Fares for Scheduled Air Services between Member States, [1987] O.J. L374/12

EU, Council Decision 87/602 on the Sharing of Passenger Capacity between Air Carriers on Scheduled Air Services between Member States and on Access for Air Carriers to Scheduled Air Services Routes between Member States, [1987] O.J. L374/19

EU, Council Regulation 2299/89 on CRSs, [1989] O.J. L.220

EU, Council Regulation 2342/90 on Fares for Scheduled Air Services, [1990] O.J. L. 217/1;

EU, Council Regulation 2343/90 on Access for Air Carriers to Scheduled Intra-Community Air Services Routes and on the Sharing of Passenger Capacity between Air Carriers on Scheduled Air Services between Member States, [1990] O.J. L217/8

EU, Council Regulation 2344/90 Amending Regulation 3976/87 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector, [1990] O.J. L217/15

EU, Commission Regulation 83/91 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements between Undertakings Relating to Computer Reservation Systems for Air Transport Services, [1991] O.J. L10/9

EU, Commission Regulation 84/91 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices Concerning Joint Planning and Coordination of Capacity, Consultations on Passengers and Cargo Tariffs Rates on Scheduled Air Services and Slots Allocation at Airports, [1991] O.J. L10/14

Commission's proposal of October 23, 1992 published in C 216/1993

EU, Council Regulation 2407/92 on Licensing of Air Carriers, [1992]O.J. L240/1

EU, Council Regulation 2408/92 on Access for Community Air Carriers to Intracommunity Air Routes, [1992] O.J. L240/8

EU, Council Regulation 2409/92 on Fares and Rates for Air Services, [1992] O.J. L240/15

EU, Council Regulation 98/93 on Slots, [1993] O.J. L14

Memo/03/124 of 05/06/2003
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/806|0|RAPID&lg=EN&display

C. Cases

ECJ, Judgment of April 30, 1986, in joined cases 209 to 213/84, Ministère Public v. Asjes, (1986) ECR 1425

ECJ, Case 66/86, Ahmed Saeed Fluereisen and Silver Line Reiseburo v. Zentrale zur Bekampfung unlauteren Wettbewerbs EV, (1989) reprinted in 38 Zeitschrift Fur Luft- Und Weltraumrecht [ZLW] 124 ; ECR 803, 822

ECJ, Judgments of November 5, 2002, Cases C-466/98- C-469/98, C-471/98- C-472/98, C-475/98- C-476/98, Commission v. UK, DK, S, FIN, B, L, AUS, G ECJ, case C-466/98

D. Government Materials

House of Lords select committee on the E.U., *"Open Skies" or open markets? The effect of the European Court of Justice judgments on aviation relations between the European Union and the United States of America*, HL paper 92 published by authority of the House of Lords, London, The Stationery Office LTD, 8 April 2003.

E. International Materials

Convention on International Civil Aviation, December 7, 1944, 15 U.N.T.S. 295, ICAO Doc. 7300/6

International Air Services Transit Agreement, December 7, 1944, 84 U.N.T.S. 389, 394, ICAO Doc. 7500

ICAO, *Manual on the regulation of International Air Transport,* 1996 AT Conf/4-WP/5 APPENDIX, Doc 9626.

II. Secondary materials

A. Books

Dagtoglou, P.D., *Air transport after the Nouvelles Frontières Judgment,* in *Toward a community air transport policy: the legal dimension,* edited by P.J. Slot and P.D. Dagtoglou, Kluwer Law and Taxation Publishers, Deventer – Boston, 1989

De Connick, F., *European Air Law: new skies for Europe*, Les presses de l'institut du transport aérien, Paris (1992)

De Mestral, A., The consequences of the European Court of Justice's 'Open Skies' decisions, in *Business briefing – Aviation strategies: challenges & opportunities of liberalization*, published in conjunction with the Air Transport Seminar of ICAO 22-23 March 2003, ICAO headquarters, Montreal, Canada.

Diederiks-Verschoor, I.H., *An introduction to air law*, Kluwer Law International, 2001

Estienne-Henrotte, E., *L'application des règles générales du Traité de Rome au transport aérien,* Etudes européennes, Editions de l'université de Bruxelles, 1988

Fennes, R., *The European Community and the United States; expanding horizons and clipped wings*, European Air Law Association conference papers 15, 11th annual conference in Lisbon 5 November 1999, edited by P.D. Dagtoglou, A. Zinckedosreis and J.M. Balfour

Gherson, R., *Practical implications of "1992" for the re-negotiation of Bilateral Air Services Agreements with the European Commmunity*, in *EEC Air Transport Policy and Regulation, and their Implications for North America,* Kluwer Law and Taxation Publishers Deventer – Boston (1990)

Grard, L., *Droit communautaire des transports aériens*, étude extraite du Joly communautaire, rédigée le 30-06-1995

Guldimann, W., *Changing relations between the European Community and International Civil Aviation Organizations*, in *EEC Air Transport Policy and Regulation, and their Implications for North America,* Kluwer Law and Taxation Publishers Deventer – Boston (1990)

Haanappel, P.P.C., *Canadian International Development Agency Teaching Materials* (1987)

Haanappel, P.P.C., *Changes in Bilateral Air Transport Agreements Between EEC Member States and Countries Outside Europe,* in *EEC Air Transport Policy and Regulation, and their Implications for North America,* Kluwer Law and Taxation Publishers Deventer – Boston (1990)

Havel, B.F., *In search of Open Skies: law and policy for a new era in international aviation*, Kluwer law International, the Hague-London-Boston, 1997

Howe, J., *Amidst uncertainties, what is the future for aviation?* in *Business briefing – Aviation strategies: challenges & opportunities of liberalization*, published in conjunction with the Air Transport Seminar of ICAO 22-23 March 2003, ICAO headquarters, Montreal, Canada.

Janda, R., and Wilson, J., *Has Europe kick-started the global liberalization of airline ownership and control?*, in *Business briefing – Aviation strategies: challenges & opportunities of liberalization,* published in conjunction with the Air Transport Seminar of ICAO 22-23 March 2003, ICAO headquarters, Montreal, Canada.

Lenz, C.O., *The decisions of the European Court of Justice on the applicability of the rules of the Treaty of Rome to air transport*, in *EEC Air Transport Policy and Regulation, and their Implications for North America,* Kluwer Law and Taxation Publishers Deventer – Boston (1990)

Loewenstein, A., *European Air Law, towards a new system of International Air Transport Regulation*, Nomos Verlagsgesellschaft, Baden Baden, (1991)

Naveau, J., *Droit aérien Européen, les nouvelles règles du jeu*, Les presses de l'institut du transport aérien, Paris (1992)

Reitzes, J., and Robyn, D., *An analysis of the economics effects of an EU-US Open Aviation Area*, in *Business briefing – Aviation strategies: challenges & opportunities of liberalization*, published in conjunction with the Air Transport Seminar of ICAO 22-23 March 2003, ICAO headquarters, Montreal, Canada.

Shane, J.N., *EU-US aviation relations: the search for a new model*, European Air Law Association conference papers 15, 11th annual conference in Lisbon 5 November 1999, edited by P.D. Dagtoglou, A. Zinckedosreis and J.M. Balfour

Slot, P.J., *Civil aviation in the Community: an overview*, p.25 in *Toward a community air transport policy: the legal dimension*, edited by P.J. Slot and P.D. Dagtoglou, Kluwer Law and Taxation Publishers, Deventer – Boston, 1989

Sörensen, F., *EEC Internal and External Aviation Policy,* in *External Aviation Relations of the European Community,* Kluwer Law and Taxation Publishers Deventer – Boston (1992)

Sundberg, J.W.F., *Inter-governmental Relations in Air Transport between EEC and non – EEC countries: General aspects,* in *EEC Air Transport Policy and Regulation, and their Implications for North America,* Kluwer Law and Taxation Publishers Deventer – Boston (1990)

Wassenbergh, H.A., *External aviation relations of the European Community*, Kluwer Law and Taxation Publishers Deventer – Boston, 1992

Wassenbergh, H.A., Principles and Practices in Air Transport Regulation, Paris ITA, (1993)

B. Thesis

Grard, L., *Du marché unique des transports aériens à l'espace aérien communautaire*, Thèse, Université de Bordeaux I, (1992)

Göppert, A.R., *The Liberalization of International Air Transport Services: Developments in the U.S.-German Bilateral Relations and their Implications on Future Regulatory Approaches Towards Aviation*, McGill University, (1998)

Hagelüken, A., The impact of EC law and WTO law on domestic law: a critical analysis of the case law of the European Court of Justice, McGill, (1998)

HU, H., *Open Skies and its recent impact on the Asia Pacific Region*, McGill University, (1997)

Lapointe, H., *Regional Open Skies Agreements: Law and Practice*, McGill University, (1995)

Lelieur, I., *Law and policy of substantial ownership and effective control of airlines: prospects for change*, McGill, 2002

Lievain, J.C., *L'introduction du multilatéralisme dans le droit aérien des Communautés Economiques Européennes"*, McGill, 1993

C. Articles

Abeyratne, R.I.R, *The Air Traffic Rights Debate, A Legal Study*, 18 Annals of Air & Space Law3, 27 (1993)

Balfour, J., *A question of competence: the battle for control of European aviation agreements with the United States*, 16-SUM Air & Space Lawyer 7(2001)

Balfour, J., *EC aviation scene*, Air & Space law, VOL.XXVIII/4/5 (September 2002) p.259

Balfour, J., *EC Aviation Scene*, Air & Space Law, VOL. XXVIII/2 (April 2003), p.116

Böhmann, K., *The Ownership and Control Requirements in U.S. and European Union Air Law and U.S. Maritime Law Policy*, 66 Journal of Air Law and Commerce 689 (2001)

Chang, Y.-C., and Williams, G., *prospects for changing airline ownership rules*, 67 Journal of Air Law and Commerce 233, 2002

De Palacio, L., *The TCAA – a blueprint for the 21st century*, Air & Space Europe, Vol.2, No 2, 2000

Dempsey, P.S., *Airlines in Turbulence: Strategies for Survival*, 23 Transportation Law Journal 15 (1995)

Dupont-Elleray, M., *La politique communautaire de l'aviation civile, de la libéralisation du transport aérien au ciel unique européen,* Revue Française de Droit Aérien et Spatial, Vol. 224 N°4, octobre-décembre 2002

Elek, A., Findlay, C., Hooper, P., Warren, T., *"Open Skies" or open clubs? New issues for Asia Pacific Economic Cooperation*, Journal of Air Transport Management 5 (1999) 143-151

Fennes, R., *The European Court of Justice decision on Bilateral Agreements: the future of relations*, 17-WTR Air & Space Lawyer, 1, (Winter, 2003)

Folliot, M.G., *Le siècle du multilateralisme?*, Revue française de droit aérien et spatial, No2, 2000, p.83

Forsyth, P., *Promoting trade in airline services*, Journal of air transport management, 7 (2001) 43-50]

Grant, T.D., *An end to "Divide and Conquer"? EU may move toward more united approach in negotiating "open skies" agreements with U.S.A.*, 67 Journal of Air Law and Commerce 1057 (2002)

Grard, L., *Le nouvel accord franco-américain relatif aux échanges aériens transatlantiques: compromis et transition avant un traité bilatéral Communauté Européenne / Etats-Unis*, Annuaire Français de Droit International XLIV – 1998 – CNRS Editions, Paris

Grard, L., *La Cour de Justice des Communautés Européennes et la dimension externe du marché unique des transports aériens*, Cahiers de Droit Européen, n°5-6 p.695 (2002)

Guillaume, G., L'arrêt de la Cour de Justice des Communautés Européennes du 30 avril 1986 sur les transports aériens et ses suites, RFDA, 1987, n°1, p.13 et s.

Haanappel, P.C., *Recent European Air Transport Developments: 1992-1993,* annals of Air &Space law, Vol. XVIII, p.134-135

Haanappel, P.P.C., *Airline Ownership and Control, and some related matters*, Air & Space Law, VOL. XXVI/2, April 2001

Hedlund, D.C., *Toward Open Skies: Liberalizing trade in International Airline Services*, 3 Minnesota Journal of Global Trade 259 (1994)

Hefferman, D., *'So, when can you start?': A New Approach to Allocating International Air Service Rights*, Air & Space LAW, VOL. XXIV NUMBER 2, 1999

Hubner, W., and Sauvé, P., *Liberalization scenarios for international air transport*, Journal of World trade 35(5): 973-987, 2001

Janda, R., *Passing the torch: why ICAO should leave economic regulation of international air transport to the WTO*, Annals of Air and Space Law, Vol. XX-I, p.409-429, 1995

Kaduck, R.J., *Canadian carrier strategies and the 1995 open skies* agreement, Journal of Air Transport Management 4 (1998) 135-144

Lavranos, N., *European Court of Justice, 5 November 2002, Cases C-466/98- C-469/98, C-471/98- C-472/98, C-475/98- C-476/98, Commission v. UK, DK, S, FIN, B, L, AUS, G,* Legal Issues of Economic Integration 30(1): 81-91, 2003.

Lehner, R.D., *Protectionism, Prestige, and National Security: the Alliance against Multilateral Trade in International Air Transport*, Duke Law Journal, November 1995

Lenz, C.O., *The European Court of Justice and European Air Transport Law*, Droit Européen des Transports No. 2, p. 307-314 (July 1999)

Li, M.Z.F., *Air transport in ASEAN: recent developments and implications,* Journal of Air Transport Management, vol.3, No.3, pp145-153, (1997)

Luz, K., *The Boeing-McDonnell Douglas merger: competition law, parochialism, and the need for a globalized ant-trust system,* 32 Geo. Wash. J. Int'l L. & Econ. 155, 1999

Mazzarella, D., *The integration of aviation law in the EC: Teleological jurisprudence and the European Court of Justice,* 20 Transportation Law Journal 353, (1992)

Mendelsohn, A.I., *The European Court of Justice Decision on Bilateral Agreements: Ownership and* control, 17 WTR Air & Space Lawyer 1, 1, Winter 2003

Rijsdijk, O., *EC Aviation Scene,* Air & Space Law, VOL. XXVI/6 (2001) p.336

Schless, A.L., *Open Skies: Loosening the Protectionist Grip on International Civil Aviation,* 8 Emory International Law Review 435 (1994)

Schulte-Strathaus, U., *Common Aviation Areas: the Next Step Toward International Air Liberalizaton,* Air and Space Lawyer, summer, 2001

Senti, R., *The role of the EU as an economic actor within the WTO,* European Foreign Affairs Review 7: 111-117, 2002

Sörensen, F., Van Meert, W., and Cheng-Jui Lu, A., *ECJ Ruling on Open Skies Agreements v. Future International Air Transport,* Air & Space Law, VOL. XXVIII/1 (February 2003)

Swinnen, Benoit M.J., *An opportunity for Trans-Atlantic Civil Aviation: from Open Skies to Open Markets,* 63 Journal of Air Law and Commerce 249 (1997)

Tae Hoon Oum, *Overview of regulatory changes in international air transport and Asian strategies towards the U.S. open skies initiatives,* Journal of Air Transport Management 4 (1998) 127-134

Van Fenema, P., *National ownership and control provisions remain major obstacles to airline mergers,* ICAO journal Volume 57, Number 9, 2002, p.7

Wassenbergh, H.A., *Aspects of the Exchange of International Air Transport Rights,* April 16, 1981

Wassenbergh, H.A., The application of international trade principles to air transport, Air law, volume XII, number2, 1987

Wassenbergh, H. *Common Market, Open Skies and Politics,* Air & Space LAW, VOLXXV NUMBER 4-5, 2000

Wassenbergh, H., *Policy statements on international air transport,* Air & Space Law, VOL.XXV, Number 6, 2000

Wassenbergh, H., *The Decision of the ECJ of 5 November 2002 in the 'Open Skies' Agreements Cases*, Air & Space Law, VOL. XXVIII/1, February 2003

Wassenbergh, H.A., *5 June 2003, A Historic Decision by the EU Council of Transport Ministers*, 214 Air & Space Law, vol. xxviii/4-5, September 2003

D. Press Releases

United States., France reach open skies aviation agreement, October 19, 2001, http://www.useu.be

U.S., France sign open skies aviation agreement, January 22, 2002, http://www.useu.be

U.S. Comments on 'Open Skies' European Court Ruling, November 5, 2002, http://www.useu.be

U.S. Official Comments on E.U. 'Open Skies' Ruling, November 8, 2002, http://www.useu.be

U.S. Calls for discussion of the 'Open Skies' Agreements in Europe, November 20, 2002, http://www.useu.be

Bush Seeks More Foreign Ownership of U.S. Airline Stock, June 2, 2003, http://www.useu.be

New Era for Air Transport: Loyola de Palacio welcomes the mandate given to the European Commission for negotiating an Open Aviation Area with the US, IP/03/806 Brussels, 5 June 2003

Fact sheet on the U.S. expectations with regards to the beginning of negotiations, see U.S.-E.U. agree to begin comprehensive aviation negotiations, June 25, 2003 http://www.useu.be

U.S., EU Leaders Comment on Transatlantic Aviation Talks, June 25, 2003 http://www.useu.be

Byerly: U.S. aims for comprehensive accord in air services talks with E.U., September 29, 2003 http://www.useu.be

E. Websites

Beaumont Bulletin, *The European Court Judgment in the Open Skies Cases and the Future for European Aviation Relations with other States*, Special Issue, November 2002, www.beaumontandson.com

European Union www.europa.eu.int

Hill & Knowlton Newsletter
www.hillandknowlton.be/docs/pdf/openskies.pdf+open+skies+agreements&hl=en&ie=UTF-8

La fusion entre Air France et KLM officiellement signée, LE MONDE | 16.10.03
www.lemonde.fr

Norton Rose Briefing
www.nortonrose.com

F. Other

Neil Kinnock, *letter addressed to Finnish transport and Communication Minister Johan Norrback*, on February 28, 1995.