AIR TRANSPORT LAW AND POLICY IN THE EUROPE OF THE EEC AND ECAC: NOW AND BEYOND 1992

by

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TO MY FAMILY

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ABSTRACT

Poor results have been obtained until the end of 1987 in the field of scheduled air transport in Europe, especially in the EEC environment, because of the fact that the EEC Member States feared loss of control over such a sensitive sector of the economy as is air transport.

The EC Council opted in 1987 for a three step liberalization in a way similar to ECAC in order to allow Member States to adapt to a more competitive market.

The first step of the air transport liberalization process has some important consequences for the air transport industry, even though additional measures should have been adopted.

The European Court of Justice having challenged the Council of Ministers may accelerate the process of integration so that Europeans meet their deadlines with respect to the 1992 target, date of creation of the single market. Such an acceleration will prove to be beneficial for the wider European aviation community as represented by ECAC since all EEC Member States being members of ECAC, they have a large opportunity to determine the course of events.

RESUMÉ

Le manque de résultats jusqu'à la fin de 1987 dans le secteur de l'aviation civile en Europe, spécialement en ce qui concerne la Communauté Européenne, a été causé par la crainte des états membres de la CEE de perdre le contrôle sur un secteur de l'économie aussi sensible que celui du transport aérien.

Le Conseil des Communautés, de manière similaire à la CEAC, a opté en 1987 pour une liberalisation en trois étapes, afin de permettre aux états membres de s'adapter aux besoins d'un marché compétitif.

La première étape du processus de liberalisation a des conséquences pratiques importantes pour l'industrie du tranport aérien malgré le fait que des mesures aditionnelles auraient dû être adoptées.

La Cour de Justice Européenne ayant incité le Conseil des Ministres à agir, il est à espérer qu'une accelération du processus d'intégration vers un marché unique, prévu pour 1992, sera réalisée. Une telle accelération bénéficiera non seulement à l'Europe de la CEE mais à une communauté Européenne aéronautique plus étendue telle que représentée par la CEAC puisque les états membres de la CEE, tous membres de la CEAC, ont des opportunités accrues pour déterminer la politique Européenne future en ce qui concerne l'aviation civile.

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LIST OF ABBREVIATIONS

AEA	Association of European Airlines
AF	Air France
ATC	Air Traffic Control
BA	British Airways
BCal	British Caledonian
CAB	Civil Aeronautics Board
CRS	Computerized Reservation Systems
EAEC	European Atomic Energy Community
EC	European Communities
ECAC	European Civil Aviation Conference
EEC	European Economic Community
ECJ	European Court of Justice
ECOSOC	Economic and Social Committee
ECSC	European Coal and Steal Community
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICC	International Chamber of Commerce
ICJ	International Court of Justice
LEA	London European Airline
OA	Olympic Airways
SEA	Single European Act

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INTRODUCTION

Despite the development of international air transport after World War Two, dissatisfaction has been growing among passengers with the services provided on scheduled routes within Europe, and with fares in particular. The reason for this unrest can be found in the system which governs international air transport.[1] This system has been shaped by the facts that each State has complete and exclusive sovereignty over the airspace above its territory[2] and that international civil aviation has developed into a world-wide activity with important political and economic aspects.[3]

In the mid-1940s the International Civil Aviation Conference held at Chicago agreed on a broad array of safety and technical issues but failed to reach agreement on the economic issues, the first of which being the right to carry traffic. The Conference tried to remedy this situation by

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1. See E.E. Tegelberg-Aberson, "Freedom in European Air Transport: The Best of Both Worlds?", (1987) 12 Air L., p. 282 at 282-284.

2. Convention on International Civil Aviation, signed at Chicago on Dec. 7, 1944, entered into force April 4, 1947, 160 State Parties in 1988, ICAO Doc. 7300, 6th ed., 1980 (hereinafter Chicago Convention), Article 1; The Chicago Convention is not, however, entirely based on the principle of national sovereignty. For the internationalism of the Chicago System, see J. Naveau, L'Europe et le Transport Aérien, Bruylant, Brussels, 1983, pp. 60-61.

3. For an account of how different political and economic forces are at work in this field, see B. Boyd Hight, "A Hard Look at Hard Rights", address given in International Aviation Law Seminar, Tobago, West Indies, March 16-19, 1981, Lloyd's of London Press Ltd., pp. 18-25.

the adoption of two multilateral agreements, the International Air Transport Agreement and the International Air Services Transit Agreement.[4] Article 6 of the Chicago Convention testifies to the inability of the Conference to deal with the problem of exchanging rights between airlines of the contracting States in order to operate scheduled commercial international air services either through or into one another's country.[5]

As a result the aviation world became one of bilateral agreements between individual States, since countries of the world realized that the use of their airspace as an exclusive national resource would isolate them from the rest of the world. Consequently, States had to agree to give to all States an equal opportunity to establish international air services.[6] Therefore, the Chicago Convention created thousands of bilateral agreements between

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4. International Air Transport Agreement, signed Dec. 7, 1944, U.S. Dept. of State Publ. No. 2282; Avi. 22,725. The agreement did not receive the necessary support (entered into force on Feb. 8, 1945). International Air Services Transit Agreement, signed Dec. 7, 1944, U.S. Dept. of State, 1 Proceedings of the International Civil Aviation Conference (1948), Final Act, p. 113 (entered into force on Jan. 30, 1945).

5. Art. 6 has been characterized by J. Naveau as the charter of bilateralism. See J. Naveau, "L'arrière plan international de l'application du Traité CEE au transport aérien européen", (1986) 21 Europ. Transport L., 1986, p. 508 at 510; F. Deak, "The Balance Sheet of Bilaterals" in the Freedom of the Air, E. McWhinney /M.A. Bradley, (eds.) Leyden/Dobbs-Ferry, N.Y., 1968, p. 159; and N.M. Matte, Treatise on Air Aeronautical Law, ICASL, McGill University, Montreal 1981, pp. 151-161.

6. For the equal opportunity doctrine, see H.A. Wassenbergh, "Aviation Policy and a New International Legal Order", International Aviation Law Seminar, op. cit., Intro. fn. 3 at 151-161.

interested governments, for the determination of all possible procedures for the exchange of traffic rights.[7]

The existing system of granting rights has been heavily criticized. Bilaterals are considered as nothing more than "negotiations in which both sides hope to have something to gain in the end from the transaction"[8] since every State seeks first and foremost to further its own political and economic interests. Bilaterals also lead to very wide diversifications in the field of air transport. For example, the U.S. agreement with Thailand provides that "each party shall have the right to designate as many airlines as it wishes" to take advantage of the rights granted under the bilateral agreement,[9] while at the other extreme the 1977 Bermuda II Agreement between the United Kingdom and the United States specifies, for some of the routes that each contracting party may designate only one airline to operate the services agreed on in the Agreement.[10]

States avoid the incorporation of clauses providing for multiple designation because national airlines are, in most cases, wholly or partly owned by governments. If one considers that many other airlines apart from the nationals have been created since World War Two, it becomes obvious that avoidance of multiple designation results in severe

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7. To ensure some uniformity among such bilaterals the Final Act of the Chicago Convention incorporated recommendations on a Form of a Standard Agreement for Provisional Air Routes.

8. Boyd Hight, op. cit., Intro. fn. 3, at p. 18.

9. Agreement between the USA and Thailand, signed Dec. 7, 1979, entered into force Dec. 7, 1979, ICAO No. 3009.

10. Agreement between the USA, UK and N. Ireland, Concerning Air Services, July 23, 1977, 28 UST 5367, TIAS No. 8641.

restraints on competition due to the absence of pressure on the airlines to monitor their costs, something that generates high-level fares. Also, this anti-competitive policy, followed virtually by all States, prohibits the realization of the virtues of competitive markets, which are by no means negligible.[11]

Even though international fares are established by IATA[12] at levels high enough to assure a reasonable return even to the least efficient carrier, restricted entry and pricing policies, while doing nothing for the consumers, generally fail to provide substantial benefit to the industry, due to over-capacity, lack of competition and recession.[13]

As a result, many bilaterals were under review in 1976. There appeared to be a consensus among governments that seeking more restrictive agreements, especially with the United States, would prevent a probable crisis.[14]

From the study of various bilaterals, it is obvious that, while States seem to agree on certain matters, their attitudes on several issues, such as routes and pricing, are more divergent than ever.

For these reasons, some scholars have proposed the

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11. For the virtues of competitive markets, see E.E. Bailey & W.J. Baumol, "Deregulation and Theory of Contestable Markets", (1983) 1 Yale J. on Reg., No. 1, p. 111 at 115.

12. International Air Transport Association, created in Havana in 1945.

13. Marvin S. Cohen, "Competition in International Aviation", International Aviation Law Seminar, op. cit., Intro. fn. 3, p. 48 at 49.

14. The Bermuda II Agreement, for example, is a very restrictive one.

creation of a stable, multilateral legal framework in which opposing forces would be contained and reconciled.[15] It seems practically impossible, however, for the different States to reach an agreement regulating such controversial issues as capacity, tariffs or routes. Whether a State is in favour of freedom of the air or order in the air, of deregulation or regulation, of protectionism or liberalization, depends mainly on its economic position and on its competitiveness in air transport.

The system of the Chicago Convention no longer responds to the needs of the different regions of the world.[16] Furthermore, differences exists between the needs of each region, since the same level of development is not reached everywhere. Consequently, a solution to the problem could be the search for regional solutions.[17]

From this general overview of the air transport situation in the mid-1970s, it can be concluded that the aviation system completely sacrificed the interests of the consumers in order to protect the air carriers. As people gradually became more aware of this situation, the question arose as to how, more regard could be paid to the consumer's needs without allowing the important benefits of the exis-

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15. Bin Cheng, "A Bilateral-Multilateral Approach to the Legal Regulation of International Air Transport", International Aviation Law Seminar, op. cit., Intro. fn. 3, p. 26.

16. This can be deduced from the Preamble to the Chicago Convention, op. cit., Intro. fn. 2.

17. This argument is also supported by Naveau, op. cit., Intro. fn. 2.

ting system to slip away.[18] Gradually, tendencies toward a more liberalized air transport system can be observed.

Nineteen seventy-eight was a turning point in international air policy. The United States, the biggest and most influential aviation country, declared a new aviation policy of deregulation. This policy, with substantially less governmental control, was supposed to lead to an open liberal system for capacity, routes, frequencies and especially tariffs.[19] It was the market-driven reality which forced the U.S. Government to deregulate the air transport market. The sheer volume of the traffic made it necessary to allow airline managements the greatest possible flexibility in determining where and how they would meet the demand for their services and at what price.[20] The same tendency can also be observed in Japan, Australia and New Zealand.[21]

Europe, therefore, had no other choice. European carriers must face their U.S. and Asian competitors, who have become lean and efficient in the more competitive

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18. Member States to the Chicago Convention recognized in 1977 that the old system should be modernized. ICAO Doc. A22-WP/89, 22/9/77, p. 22.

19. As far as tariffs are concerned, the US liberal approach was supported by the desire in the United States not to continue to grant immunity under US anti-trust legislation to the IATA tariff agreements. Storm van's Gravesande, Reports of the Session, "Recent Developments in Air Law", Utrecht, Oct. 18, 1984, (1985) 10 Air L., No. 3, p. 183.

20. H.A. Wassenbergh, "Air Transport Regulation Towards the Turn of the Century", The Hague, March 8, 1988, p. 1.

21. Id.; P.P.C. Haanappel, "Air Transport Deregulation in Jurisdictions other than the USA", (1988) 13 AASL, 1988, p. 79 at 88-95.

environment. While the U.S. mega-carriers, created by U.S. deregulation, are a threat in a divided Europe,[22] they will seek to expand their operations in the international market when room for further growth in the United States is no longer possible. Therefore, Europe must present a unified front to its competitors. Consequently, Europe had to deregulate air transport and allow more competitors into the market, while avoiding an anti-competitive consolidation of the airline industry due mainly to the relationship between the European Economic Community (EEC) and the European Civil Aviation Conference (ECAC). Even if Europe is bigger than the 12 countries of the EEC,[23] member States of the EEC form part of ECAC.[24] However, EEC members must be cautious not to infringe their obligations arising from the EEC Treaty.[25] As creation of mega-carriers in Europe could contravene the competition philosophy of the EEC Treaty, co-ordination could be necessary between EEC and ECAC policy on air transport.

Efforts to liberalize the intra-European air transport market demonstrate that national self-interest is still

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22. The four big groups, Texas Air, United, American and Delta/Western, have 70% of the national traffic in the U.S., ITU Bull., No. 44, July-August 1987, p. 1.

23. The EEC was created by the Treaty of Rome (Intro. fn. 25) EEC Member States are Belgium, Denmark, France, Great Britain, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain and West Germany.

24. ECAC was created at the (ICAO) Conference for the Coordination of European Air Transport, April 1954, Res. (53) 2-19 March 1953, ref. ECAC 7447-C/868.

25. Treaty Establishing the European Economic Community, signed March 25, 1957 Rome, entered into force Jan. 1, 1958, 289 UNTS 11 (English), 294 UNTS 17 (French) [hereinafter Rome Treaty].

too strong to allow for free international airline competition, because States fear that their national presence in the air may diminish or totally disappear. Another reason for the delay in liberalizing air transport in Europe arises from its multi-state nature. Air transport development in Europe is "à deux vitesses", since Europe is not one country as is the United States. For some European countries, air transport has always been a public service with an uncertain profitability; no government of such a country would therefore abandon its control. For other countries, air transport has been considered a commercial operation, no different from any other commercial operation.

Keeping in mind that the Treaty of Rome is calling for a gradual elimination of disparities between member States, no liberalization would ever have been possible in Europe if the EEC, had not started an integration process. Integration trends in Europe began outside the EEC, first within the Council of Europe and then within the ECAC. In the EEC, the start of the integration process[26] can be attributed partly to the Commission of the EC. Formally, this process commenced in the European Court of Justice which, by its decision of April 4, 1974,[27] declared the general rules of the EEC Treaty applicable to sea transport and, by analogy therefore, to air transport, thereby allowing or even more ordering the member States to begin the process of gradual integration. The idea was born that air transport within the EEC should not be regarded as "international", but should, in principle, be open to all member

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26. The term "integration" has no generally accepted meaning. See P. Pescatore, 13 The Law of Integration: European Aspects, Leyden 1974, pp. 1-3; and L. Weber European Integration and Air Transport, LL.M. thesis, IASL, McGill University, Montreal 1976 at 9-17.

27. Case 167/73 Commission v. French Republic, 1974, 1 ECR 357.

States' airlines, since the EEC constitutes one community.[28]

After the EC Commission decision of 1985 to fix 1992 as the target date for removal of all the economic barriers and for the creation of a single market,[29] it became obvious, not only to the institutions of the Communities but also to the member States, that efficient and inexpensive air transportation services were necessary. The provisions for competition between airlines is a means to this end. Unless air transport policy is planned and executed on a European level, many opportunities of a large single market will be foregone. A primary goal of the Community, the free movement of persons, services and goods, depends for its success on the efficiency of air transportation.

Creation of a Single European Market also requires the development of a common strategy in relation to States which are not members of the EEC and the adoption of common rules for dealing with the rest of the world. Until now, member States of the EEC have evidenced a negative attitude toward this issue. For example, little support was found for a proposal of the EEC Commission to establish a consultation procedure "concerning international action",[30] The only case where Europe has shown a united front is in the adoption of the ECAC-USA Memorandum of Under-

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28. Proposal for a Council Resolution concerning priorities and the timetable for decisions to be taken by the Council of the EEC in the transport sector during the period up to the end of 1983. O.J. Eur. Com., Nov. 1980, No. C294/6.

29. Single European Act, done at Luxembourg, Feb. 17, 1986, and at The Hague, Feb. 28, 1986, (1987) 2 CMLR 74 (hereinafter the Single Act).

30. Wassenbergh, op. cit., fn. 6, at p. 156; see infra Ch. I, p. 29, Ch. III, p. 212.

standing.[31]

In conclusion, the reader must always keep in mind two specific issues of the European Community law. First, the principle of sovereignty is of secondary importance. It is the notion of supra-nationality which is paramount. Second, European Community law includes strong and extensive judicial control, in contrast to the Chicago Convention system where there is a marked absence of such control.

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31. Memorandum of Understanding USA-ECAC on North-Atlantic pricing, Feb. 13, 1987. NAP/11-Report 13/9/87.

CHAPTER I

TOWARD THE LIBERALIZATION OF AIR TRANSPORT IN EUROPE

Poor results have been obtained, at least until 1987, after the signature of the Treaty of Rome in the field of air transport in Europe, especially in the EEC environment. This failure is probably due to the fact that Member States of the EEC did not really want integration. Resistance by governments was reinforced by the fact that community projects have been seen as an attempt to transfer decision-making powers of States to the Commission of the Community. The integration process has been slowed down by provisions in the EEC Treaty itself - more precisely, from the reticence by States to include in the text provisions clearly binding either air or sea transport.

It is the European Court of Justice(ECJ) that gave the green light to the Commission to begin efforts on a common transport policy, the deregulation of air transport in the United States having forced Europeans to advance their plans.

SECTION 1: THE DEVELOPMENT OF TRANSPORT POLICY IN THE AIR SECTOR

Seventeen years elapsed after creation of the EEC before the Court of Justice of the Communities declared that the general rules of the Rome Treaty were applicable to air transport. Yet, the institutions of the EEC are still reticent regarding the adoption of a common air transport policy.

1. Provisions of the Treaty of Rome Related to Air Transport

The Treaty of 1957 has given rise to an enormous doctrinal disagreement concerning its applicability to the air transport sector.

a. The Rome Treaty

The Treaties setting up the EEC, the ECSC and the EAEC[1] have as their aim the merging into one common market of the national economies of their Member States. However, the process of integration has not been implemented to any great extent in certain areas, the air transport sector being one such area. Nevertheless, due to its nature, air transport would seem to offer itself as one of the first activities to be integrated.

Although the report of the Belgian Foreign Minister Paul Henri Spaak, an important document of the EEC, proceeds on the assumption that establishment of the common market will carry with it a gradual liberalization of air traffic,[2] the framers of the Rome Treaty did not catch up with this statement, most probably because they considered that air transport was a very difficult and complicated

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1. There are three European Communities: The European Coal and Steel Community established on April 18, 1951 in Paris; The European Economic Community, op. cit., Intro. fn. 25; and The European Atomic Energy Community established on March 25, 1957 at Rome. See, Treaties establishing the European Communities Abridged Edition, Luxembourg: Office for Official Publications of the EC, 1987.

2. Report of the Heads of the Delegation to the Ministers of Foreign Affairs, Intergovernmental Committee established by the Conference of Messina (Brussels - April 21st, 1956) Part III, Chap. 2.

issue. Henceforth, they confined themselves to the text of Article 84(2), raising thereafter the controversy concerning the applicability of the Rome Treaty to the air transport sector.[3]

Article 2 of the Rome Treaty states the goals to be achieved by the Community, while Article 3 lists the instruments which will be used to achieve these goals. One such instrument is the establishment of a common commercial policy towards third countries[4] and the adoption of a common agricultural[5] and a common transport policy.[6] The agricultural, commercial and transport sectors are included in Article 3 because they were seen as indispensable to the success of the primary goal, the establishment of a common market.[7] Transport finds its place in Part II of the Rome Treaty, entitled Foundations of the Community. This part contains four titles, the fourth one being reserved to transport. Title IV contains articles 74 to 84. Article 84 stated at that moment that:

> 1. The provisions of this Title shall apply to transport by rail, road and inland waterway;

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3. See E.A.G. Verploeg, The Road Towards a European Common Air Market, LL.M. Thesis, IASL, McGill University, Montreal, 1963, pp. 229-249; Weber, op. cit., Intro. fn. 26 at pp. 102-115/9-21; and Naveau, op. cit., Intro. fn. 2 at pp. 198-199.

4. Rome Treaty, op. cit., Intro. fn. 25, Art. 3(b).

5. Ibid., Art. 3(d).

6. Ibid., Art. 3(e).

7. There are many differences in success between the common transport and common agriculture policies. See P.J. Kuyper, "Legal Problems of A Community Transport", Legal Issues of European Integration 1985/2 pp. 69-75; and conclusion of Advocate-General Lenz in case 13/83 European Parliament v. Council of the European Communities, (1985) 2 ECR 1556, conclusion delivered on 28 Feb. 1985 at 1515.

> 2. The Council, acting by means of a unanimous vote, may decide whether, to what extent and by what procedure appropriate provisions might be adopted for sea and air transport.

This article, precludes application of Title IV to the air transport sector,[8] creates a procedure for the adoption of rules to govern air transport.

b. The Doctrinal Discussions on Article 84

Article 84 gave rise to an enormous doctrinal disagreement. This disagreement focused on whether air transport was governed exclusively by Article 84 or by the general rules of the Rome Treaty as well.[9] This legal dispute was part of a broader dispute as to whether Title IV had to be regarded as the only and exhaustive set of rules on transport, or as an additional set of rules supplementing or modifying other applicable rules of the Rome Treaty.

A first opinion called for the inapplicability of the general rules of the Treaty to air transport unless the Council took action under Article 84(2). This view was based on the argument that Title IV contained all the regulations applicable to the transport sector under the Treaty.[10]

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8. Other forms of transport are also excluded. See G. Close, "Article 84 EEC: The development of transport policy in the sea and air sectors", (1980) 5 Europ. L.R., p. 189; and T. Henkels, J.S. van den Oosterkamp, The 24th annual joint meeting of the British Institute of International and Comparative Law and the Europa Institute of the University of London, 29 June 1985, Rep. of Conference in (1985) 22 CMLR 815.

9. On this dispute, see Weber, op. cit., Intro. fn. 26, pp. 124-132.

10. Ibid., pp. 126-127.

A second opinion considered that: (i) the general rules of the Treaty were applicable to air transport; (ii) Title IV was not applicable to air transport; and (iii) the provisions of articles 59 to 66, related to the free movement of services, were not applicable due to Article 61(1).[11] The aim of Article 84, according to this view, was to give power to the Council to adopt provisions fulfilling the special needs of air transport.[12]

Others considered that implementation of the common policy for transport by road, rail and inland waterway had already been given its basis because the special provisions for transport were superimposed on the general rules of the Treaty. Article 84 was thought to be a means for unifying national policies for air transport by bringing them within the scope of the Treaty.[13] This view proceeded from the idea that Article 84(2) was a complete legal rule which did not depend on other rules.[14]

As far as the institutions of the Community are concerned, the Commission and the European Parliament supported the principle of the universality of the Treaty,

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11. Article 61(2) provides that "the free movement of services in respect of transport shall be governed by the provisions of the Title relating to transport". However, those provisions (Title IV) are not applicable to air transport (Article 84(1). In this respect, see infra, Ch. III, p. 198-201.

12. Weber, op. cit., Intro. fn. 26, p. 127.

13. Id.

14. See W. Stabenow, "The International Factors in Air Transport Under the Treaty Establishing the EEC", (1967) 33 JALC, p. 117, at 119; "Les Transports Aériens dans le Cadre de l'Intégration Européenne", (1969) 4 Europ. Transport L., no. 2-3, pp. 423-445; and L. Weber, "The Application of European Community Law to Air Transport", (1977) 2 AASL, p. 233 at 235-237.

while the Council remained inactive for a long period of time, the views of the Member States' representatives being divided.[15] The Commission expressed the view, in its Memoranda of November 12, 1960 and April 10, 1962,[16] that the EEC Treaty applied to air transport also, regardless of Community Legislation.[17] Moreover, the Commission pointed out the advantages that the airlines of the Member States could derive from implementation of the general provisions of the Treaty. In the Commission's view, further delay in making suitable Community arrangements for air transport could be detrimental to the harmonious development of the economic union provided for by the EEC Treaty. The Commission made reservations only to the rules of competition and made known its intent to submit a draft regulation on competition, which would provide for the procedures, decision-making powers and penalties needed to enforce the competition rules. The European Parliament expressed similar views in its resolutions of December 20, 1961 and May 14, 1965.[18]

As a result of this disagreement the Member States of the EEC kept air transport out of the integration process for as long as it was legally possible. Between 1959 and 1965, negotiations were held with the aim of merging the

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15. Stabenow, ibid., p. 119.

16. P.D. Dagtoglou, "Air Transport and European Economic Community", (1980) 5 Europ. L.R., p. 335 at 348.

17. Council Memorandum on the Applicability to Transport of the Rules of Competition set out in the EEC Treaty and on the Interpretation and Application of the Treaty in Relation to Sea and Air Transport, 12 Nov. 1960; and Memorandum on the General Lines of a Common Transport Policy 38-39, 10 April 1961.

18. Dagtoglou, op. cit., Ch. I fn. 16; and Stabenow, op. cit., Ch. I fn. 14 at 120-121.

five flag-carriers of Belgium, France, Germany, Italy and the Netherlands. These negotiations took place strictly outside the EEC framework.[19] In 1964 the Commission attempted to bring these activities into the Community framework, but only obtained a promise from the Member States to keep the Commission informed.[20]

Despite these political efforts to resolve this issue, the problem was resolved in 1974 by the European Court of Justice.

It should also be pointed out, however, that the expected driving effect of the European Customs Union on the commercial policy of Member States had not materialized by that time and that a community policy for transport had not appeared as technically essential particularly with regard to air transport.[21]

2. Case Law Relating to the Transport Sector

a. Importance of the Jurisprudence of the European Court of Justice

The decisions of the European Court of Justice (ECJ) play a central role in the creation of the European Community law.

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19. Naveau, op. cit., Intro. fn. 2, pp. 176-186; and Weber, op. cit., Ch. I fn. 14 at 234; J.M. Amirault, "Air Union, Une Tentative de Coopération Européenne", ITA Magazine, No. 43, May-June 1987, p. 31. Another effort to fight against protectionism was the planning of "Airopia" an international European company with a monopoly on European routes. "Airopia" was a project of the British Labor Party; see Verploeg, op. cit., Ch. I fn. 3, p. 198-210.

20. Report Noë. E.P., Work Doc. 195/72 of Session 1972/73 P.E. 30, 248/fin.

21. ITA Magazine No. 12, Jan. 1984, p. 9.

The principal legislator in the EEC, the Council of Ministers, is of little effect, while the secondary legislator, the Commission of the European Communities, has insufficient powers to fill the gap. Legislation is, therefore, broad and incomplete. As a result, the case law of the Court is very important, since it is taken for granted that the ECJ will follow its precedents. In fact, the Court has never expressly overruled its previous decisions.[22]

The ECJ, while staying within the limits of proper judicial function, has fully used its powers and has been able to contribute considerably to the progressive development of Community law. The authority of its judgments is not based on narrow legal rules, but on the shared belief of the Member States in the cohesive force of law as a major instrument of European integration.

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system. On entry into force of the Treaty, this system became an integral part of the legal structure of the Member States, which their courts are bound to apply.[23] The Community constitutes a new legal order of international law,[24] which became an integral part of the national legal order of the Member States on which it is superimposed. At the same time, Community law creates rights and obligations directly for individuals who are able to invoke them before their

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22. In this respect, see A.G. Toth, "The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects", (1984) 4 Yrbk. Europ. L., p. 1 at 3.

23. Case 6/64 Costa v. ENEL 1964, ECR 585, at 593.

24. Case 26/62 Van Gend en Loos 1963 ECR 1. See also F.E. Dowrick, "A Model of the European Communities' Legal System", (1983) 3 Yrbk. Europ. L., pp. 169- 237.

national courts.[25]

b. The General Rules of the Treaty Are Applicable to Air Transport

Due to the Commission, the Court ended the doctrinal disagreement over application of the general rules of the EEC Treaty to air transport. In the case 167/73,[26] the Commission brought an action against the French Republic because of a provision in the French "Code du Travail Maritime",[27] which provided that a certain proportion of the crew of French merchant ships were required to be French nationals. The Commission considered that this provision contravened the provision of Community law relating to the free movement of workers. The Republic of France argued that the general rules of the Treaty did not apply because the Council had not unanimously taken appropriate measures according to Article 84(2).

For the first time, the ECJ had to face the question of the applicability of the general rules of the Rome Treaty to the maritime sector and, consequently, interpret Article 84(2). The Court said: (19) "The establishment of the common market thus refers to the whole of the economic activities in the Community." The Court added that Part Two of the Treaty was (21) "conceived as being applicable to the whole complex of economic activities[;] these basic rules can be rendered inapplicable only as a result of express

25. Case 106/77 Simmenthal 1978 ECR 629, Ground 17.

26. Case 167/73 Commission v. French Republic, op. cit., Intro. fn. 27. The case is also known as French Seamen's case or Merchant Seamen's case or Seafers case. For an extensive analysis of the decision see Weber, op. cit., Intro. fn. 26, pp. 168-207; ITA Magazine 1986, no. 37, p. 25-38.

27. Code of Maritime Labour.

provisions in the Treaty."

The Court found that Article 74 and the Transport Title do not contain such an exception. In respect to Article 84(2) the Court stated:

> 30. Article 84(2) provides that as regards sea transport, the Council may decide whether, to what extent and by what procedure appropriate provisions may be laid down.
>
> 31. Far from excluding the application of the Treaty to these matters, it provides only that the special provisions of the Title relating to transport shall not automatically apply to them.
>
> 32. Whilst under Article 84(2), therefore, sea and air transport so long as the Council has not decided otherwise, is excluded from the rule 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.[28]

While this case is directly relevant to the free movement of workers,[29] it becomes relevant to air and sea transport, due to the finding of the Court that Article 84(2), far from excluding application of the Treaty to sea and air transport, provides only that the specific rules of the Title on Transport shall not apply automatically to them. Consequently, sea and air transport are subject to

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28. Case 167/73, op. cit., Intro. fn. 27, at 369-731.

29. Articles 48-51 of the Rome Treaty, op. cit., Intro. fn. 25. On the question of the free movement of workers as well as for an analysis of the consequences of the application of the general rules of the Treaty on air transport see infra, Ch. III, p. 188-201.

the general rules of the Treaty.[30] Due to the Court's ruling, the doctrine of the Treaty's universality finally prevailed in legal theory.[31] The Council's discretion under Article 84(2) refers, thus, only to the question of whether Title IV applies to air transport and not to the applicability of the remaining Treaty provisions, while the application of these rules to air transport is obligatory for the Member States.[32]

The Court maintained its position in the Defrenne cases, where it applied Article 119 of the Treaty to the field of air transport.[33] It also confirmed in case 156/77 that the land transport sector, in reference to State aid, was subject to the general rules of the Treaty.[34] It would follow that the maritime and air sectors are also

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30. See Weber, op. cit., Ch. I, fn. 14 at 240; P.D. Dagtoglou, "Air Transport After the Nouvelles Frontières Judgment" in P. Pescatore, Du Droit international au Droit de l'Intégration, Baden Baden, Nomos Verlagsgesellschaft 1987, p. 115 at 116; Close, op. cit., Ch. I, fn. 8, at 190; Kuyper, op. cit., Ch. I fn. 7, at 71,72; G. Guillaume, "La CEE et le Transport Aérien", (1988) 13 AASL, p. 65 at 70; C. Stanbrook, "Progress Towards a Community Policy on Air Transport", (1984) 9 Europ. L.R., p. 52.

31. See P.H. Sand, "Marché Commun et Libéralisation du Transport Aérien", (1960) 23 Revue Générale de l'Air, No. 2, p. 87, pp. 101-102; Kapteyn and VerLoren Van Themaat, Introduction to the Law of the EEC, London, Sweet and Maxwell, 1973, pp. 321-322.

32. This follows from paragraph 32 and 33 of the judgment.

33. Defrenne cases, 80/70 Defrenne v. Belgium 1971 ECR 445.; 43/75 Defrenne v. Sabena (I) 1976 ECR 455; 149/77 Defrenne v. Sabena (II) 1978 ECR 1365.

34. Case 156/77 Commission v. Kingdom of Belgium 1978 ECR 1881.

subject to the provisions of the Treaty relating to State aid, considering the Court's conclusion in case 167/73 on the interpretation of Article 84(2). This finding of the Court created a complex and interesting problem, related to the meaning of the phrase "general rules of the Treaty".[35] Did the Court intend to apply to air transport all the rules of the Treaty, except those provisions designed for exclusive application to specific activities;[36] or did it mean that only Parts 1 and 2[37] of the Treaty were applicable to air transport, with the important result of non-applicability of the anti-cartel rules contained in articles 85 to 94 of the Treaty? This question[38] will not be discussed, since the ECJ gave its answer in 1986,[39] rendering this issue a moot point.

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35. On this question see L. Weber, op. cit., Intro. fn. 26 at 173-175.

36. Special provisions are the rules on "Agriculture" contained in Articles 38 to 47, on services contained in Articles 59 to 66 and the rules on Transport contained in Articles 74 to 84, unless the Council decided otherwise with respect to Title IV.

37. The Court only mentioned Parts I and II in its decision.

38. On the question of the applicability of the competition rules on air transport see A.L. Merckx, "Air Fare Fixing and the EEC Competition Rules", (1986) 21 Europ. Transport L., pp. 57-65; ITA Magazine No. 0-18, Sept. 1984, p. 17; Dagtoglou, op. cit., Ch. I fn. 16 at 351-355.

39. See infra, Ch. I, p. 61-70.

3. Community Action in the Air Sector Within the Framework of the Common Transport Policy

The institutions of the Community must respect the Treaty of Rome and the ECJ decisions, when adopting measures on common transport policy.

a. Nature of the Action

The provisions adopted on the basis of Article 84(2) must be regarded as special rules which set aside, derogate from or supplement the general rules, just as articles 75 to 83 do for transport by rail, road and inland waterways.[40] The Council must act, therefore, on the basis that the Treaty applies to air transport where such application is not excluded by the Treaty itself.[41]

The Council can limit the effect of its own legal acts but not the effect of the Treaty. This reasoning accounts for the use by the Council of Regulation 142/63[42] to exclude air transport from the application of Regulation 17[43] on competition, but not from the Treaty provisions on competition.

Applicability of the general provisions of the EEC Treaty to air transport, while the Treaty provisions on

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40. Dagtoglou, op. cit., Ch. I fn. 16 at 349-350.

41. Rome Treaty, op. cit., Intro. fn. 25, Article 61(1) for example provides that the freedom of services in the field of air transport is subject to the Council's discretion under Article 84(2). See infra, Ch. III, p. 198-201.

42. Regul. No. 141 of Nov. 26, 1962, O.J. Eur. Com., English Special Ed. 1959-1962, p. 291.

43. Regul. No. 17 of Feb. 6, 1962, O.J. Eur. Com., English Special Ed. 1959-1962, p. 87.

transport are not applicable, results in a "regulative deficit".[44] For a reasonable and adequate application, the general provisions are to be adapted to the structural characteristics of air transport and to the aims of the EEC Treaty under its articles 2 and 3, in particularly Article 3(e), which provides for introduction of a common transport policy. The Council has duties to establish new provisions, and to implement the general rules of the Treaty and adapt them to the special characteristics and needs of air transport.[45] These powers flow from general rules of the Treaty, such as Article 90(2) on public undertakings,[46] and articles 54(2) and 55(2) on freedom of establishment.[47]

Although Article 84(2) establishes the Council as the principal institution for creation of a common air transport policy, it does not infer that the Council must draw up legislation immediately. However, the Council cannot decide that no further provisions for air transport are to be laid down, thereby giving effect solely to application of the general rules.[48] The Council had to trace two kinds of rules: (1) rules similar to those in the special provisions for transport by rail, road and inland waterways;

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44. L. Weber, Die Zivilluftfahrt im Europäischen Gemeinschaftsrecht, N.Y., Springer-Verlag, 1981, p. 373 (summary in english).

45. On the special characteristics of air transport see Dagtoglou, op. cit., Ch. I fn. 16 at 342-348.

46. See infra Ch. II, p. 183-187.

47. Id., Ch. III at 193-198.

48. Weber, op. cit., Intro. fn. 26, at 132-142.

and (2) procedures needed to implement these measures.[49]

Finally, it should be noted that the Treaty envisages co-ordination between these measures and measures taken for the other modes of transport.[50]

Due to the applicability of the general rules of the Treaty to air transport certain tasks and powers were transferred from Member States to the Community.[51] This transfer is found in (1) articles 49, 54 and 87(2)(c), which provide the Community with the power to legislate; (2) articles 2, 3(c), 6(1), and 155, which give administrative control to the Community; (3) articles 2, 3(c), and 169, which give judicial control over to the ECJ; and (4) Article 84(2), which gives the right to the Community to establish a common air transport policy.

While no action may be taken by the Member States, they continue to exercise their competence. The Member States have, however, some obligations under Article 5 of the EEC Treaty:

> Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims. They shall abstain from any measures likely to jeopardize the attainment of the objectives of this Treaty.

Another important question to consider is what legal authority the Council will invoke when it conceives

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49. Stabenow, op. cit., Ch. I fn. 14 at 117-131; Dagtoglou, op. cit., Ch. I fn. 16 at 348-351.

50. This results from a comparison between Articles 3(e) and 74.

51. In this respect see Weber, op. cit., Ch. I fn. 14 at 251.

rules concerning the common air transport policy - Article 84(2) or some other article. Three kinds of articles in the EEC Treaty could provide the legal basis of action in the field of air transport: the articles of Title IV, the general powers of action (articles 100 and 235) and those articles which afford a basis for action as regards particular matters, other than those of a specifically transport nature. If Council adopts a measure that applies to all economic activities, it should be based on one of the general rules of the Treaty. However, when a measure is limited to the air sector, the matter becomes more complicated.

If the Council renders the transport Title applicable to air transport by a decision under Article 84, it will be able to adopt air transport measures on the basis of the articles of Title IV and, more specifically, on the basis of Article 75.[52] In the absence of such a decision, measures may be adopted on the basis of the general rules of the Treaty. This method of adoption has the disadvantage that it gives to the Member States the right to veto, pursuant to the unanimity requirement of articles 100 and 235.

Measures on specific matters, other than those of a specifically transport nature, should be adopted according to the appropriate provisions of the Treaty. Consequently, measures for the free movement of workers should be based on Article 49; measures for the right of establishment, on Article 57; measures for State aid, on articles 92 and 94; and measures for competition, on Article 87.

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52. Article 75 confers to the Council a wide legislative power. This was the ruling of the Court of Justice in case 97/78 Schumalla (1979) ECR 2311; see Close, op. cit., Ch. I fn. 9 at 202.

b. Action Taken

For many years after permission had been given by the Court for adoption of a common transport policy, little action was taken by the institutions of the Community. In 1970, when still no measures had been introduced by the Council, the President of the European Parliament requested that the Transport Committee draw up a report on the problems related to European air transport.[53]

In May 1971 the rapporteur presented his report, asking the Commission and the Council to assume the responsibilities for air transport. Since the Council took no action once again, the Parliament passed a resolution on 25 September 1973,[54] in which it requested that the Council apply Article 84(2) without delay. Still no action was forthcoming.

In October 1975 the Commission submitted to the Council a communication on an Action Programme for the European Aeronautical Sector,[55] which included, inter alia, references to the creation of a European airspace managed at Community level. In the Commission's opinion, action taken in the field of air transport should be parallel to action taken in the aeronautical sector. This project was abandoned because the Council never accepted it.[56]

The first time the Council of Ministers made a

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53. Report Noë, op. cit., Ch. I fn. 20.

54. Resolution on the principle of the common transport policy of 25 Sept. 1973, O.J. Eur. Com., 1974, No. C127/24 (of Oct. 18, 1974).

55. Oct. 1, 1975. Com. (75) 475 final; ICAO Doc. No. 13, 15 Dec. 1978, Ref: E.C. 2/20.5-78/201; see also Naveau, op. cit., Intro. fn. 2 at 202-206.

56. Naveau, id.

decision on this matter was at its meeting of 28-29 June, 1977. The Council of Ministers agreed on a proposal from the Presidency (then held by the United Kingdom) to examine, within the framework of the Council bodies, certain matters related to the aviation sector. It also requested that the Permanent Representatives Committee study what provisions the Council should adopt for air transport under Article 84(?). Furthermore, the Council asked for an opinion on what subject it should ask the Commission to study in relation to a priority list of items for examination.[57] Following the scanty results obtained from these initiatives, the Council created a joint States/Community group for transport. The first task of this group was to determine priority objectives.[58]

The Council agreed on June 12, 1978 to the establishment of a working programme covering the following priority items:[59] common standards restricting aircraft engine emissions; simplification of formalities (facilitation), particularly those relating to air freight; implementation of technical standards; provisions regarding aids; provisions regarding competition; mutual recognition of licences (air crew and ground staff); working conditions; right of establishment; possible improvements of inter-regional services; and search, rescue and recovery operations and accident inquiries.

In 1977 the Commission finally published a report on Competition Policy, in which it indicated that the special aspects of air transport should be taken into account, but not in such a way as to jeopardize the direct

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57. ICAO Doc., op. cit., Ch. I fn. 55 at 139.

58. A. Tanguy, "1985: A Choice for Europe" ITA Magazine No. 22, Feb. 1985, p. 16; "A Common Air Transport Policy", ITA Magazine No. 26, June/July 1985, p. 3.

59. (1986) 21 Europ. Transport L., p. 283.

operation of articles 85, 86 and 90 of the Treaty.[60] In December 1979 the Council set up 2 consultation procedures on relations between Member States of the EEC and non-Member States in the field of air transport, and on action relating to such matters within international organizations.[61] Also in the same year, the Council adopted Directive 81/51 on the limitation of noise emissions from subsonic aircraft. This directive harmonizes national legislation on the matter, and is based on standards fixed by ICAO.[62]

SECTION II: U.S. DEREGULATION AND ITS IMPLICATIONS FOR THE EUROPEAN LIBERALISATION OF AIR TRANSPORT

In the Europe of the EEC and ECAC, - interest in a reorientation of air regulation has reached its peak. This interest is due largely to U.S. deregulation of air transport which has forced the European States to advance more rapidly toward a more cohesive and liberalized air transport.

European States are not seeking, however, to imitate the United States but to find their own solutions in the context of the particularities and special characteristics of air transport in Europe.

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60. 4 IATA Regul. Affairs R., No. 2, 1979, p. 141.

61. Decision 80/50, O.J. Eur. Com., 1980, L18/24.

62. Directive 81/51, O.J. Eur. Com., 1980 L18/26.

1. Deregulation of Air Transport in the United States: A Threat to Europe

a. U.S. Deregulation

A.E. Khan has pointed out that the defects of air transport regulation include a heavily protectionist character, a tight limitation on entry coupled with a clogged line-up of applicants for new entry, and restrictions on carrier operation and price competition.[63] Defects of air transport regulation include a tendency for service competition (especially in the field of scheduling), an adjustment of costs upward to price rather than the reverse, the limited availability of low price and cost options to travelers and shippers, and the inefficiencies and inflexibilities forced on carriers by the pervasive protectionist restrictions to which they are subject.[64]

The United States opted for a deregulated air transport system in order to change this unfavourable environment. De facto deregulation started in 1975[65] with some decisions taken by the Civil Aviation Board (CAB) on, inter alia, liberalized charter rules, approval of domestic deep-discount fares and expedited route entry proceedings.[66] The Congress adopted in 1977 the Air

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63. A.E. Kahn, "Deregulation of Air Transport: Getting From Here to There", Paper presented at Northwestern University, Evanston, Illinois, Nov. 6, 1977, p. 2.

64. Ibid., pp. 3-4.

65. Council of Europe, Parliamentary Assembly, AS/EC (36) 3, Strasbourg 21 May 1984 "An Analysis of U.S. Deregulation of Air Transport and Its Inferences for a More Liberal Air Transport Policy in Europe", by Prof. P.P.C. Haanappel, p. 11.

66. Ibid., pp. 12-13.

Cargo Reform Act, which liberalizes air cargo services;[67] in 1978 it adopted the Airline Deregulation Act.[68]

Deregulation denies that air transport is a traditional public utility as well as its oligopolistic nature.[69] It treats the air transport industry as similar to any other free enterprise industry, that is, an industry which should be governed by the laws of supply and demand, and which should be free from governmental economic control.[70]

The Airline Deregulation Act[71] rested on such a degree of confidence in the inherent structural competitiveness of the domestic U.S. airline industry that it went further in deregulating than any other piece of recent legislation. Regulatory barriers to entry were removed within three years of its passage;[72] the Act gave airline managements complete freedom in the structuring of their route networks[73] and complete freedom of pricing.[74] The only exception to the deregulatory tone was for air services involving small communities, where the Act provided

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67. Ibid., p. 13.

68. Pub. L. No. 95-504, 92 Stat. 1705, codified as amended in scattered sections of 49 USC.

69. Haanappel, op. cit., Ch. I fn. 65, p. 3.

70. Id.

71. For a complete analysis of the Act see S. Breyer, Regulation and Its Reform, Cambridge, Mass., Harvard University Press, 1981.

72. Airline Deregulation Act, op. cit., Ch. I fn. 68 s. 1551(a).

73. Ibid., para. 1302(a)(4).

74. Ibid., para. 1551(a)(2)(B).

direct subsidies for a ten-year period.[75]

As a result of the Airline Deregulation Act, the domestic aviation industry in North America now operates in an environment of unrestrained competition and low-cost operation. U.S. deregulation has also produced the following developments: a wave of mergers and consolidations; domination of hub-and-spoke route systems; a much more complicated fare structure; importance of frequent flier programs; increased importance of travel agents; dominant role of major computer reservation systems (CRSs); importance of controlling airport slots; and success of predatory pricing.[76]

Because freedom of entry means that only the most efficient airlines will survive, U.S. carriers sought partnerships with other members of the industry.[77] In 1988 seven main airlines carried 95 per cent of air traffic, new mergers are expected to cut the number of carriers to five.[78] In this way, the U.S. oligopolistic regulated industry has become an oligopolistic deregulated one.[79]

One effect of mergers was the creation of hub and spoke operations. An airline or a commuter feeds traffic into its major hub and then to its ultimate destination, when the hub is not the ultimate destination of the

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75. Ibid., para. 1389.

76. M. Levine, "Airline Competition in Deregulated Markets: Theory, Firm Strategy and Public Policy", (1987) 4 Yale J. on Reg., No. 2, pp. 393-494.

77. AWST, Nov. 3, 1980, p. 113; for the rest of the reasons leading to mergers see infra Ch. II, p. 133-139.

78. EUROPE, Friday, 26 February 1988, No. 4731 (new series) p. 10.

79. Air et Cosmos, NO. 1157, Sept. 26, 1987, p. 54.

traffic.[80] This "hubbing technique" has had a considerable effect on route patterns. There has been an increase of air traffic between hubs and between non-hubs and hubs, accompanied by a big decrease in traffic between non-hubs.[81] As well, service in small communities has been taken over by commuter carriers.

The idea of free competition mainly was motivated and justified by the fact that it would reduce the costs of air travel and shipment of goods.[82] In this respect, air fares generally have been lowered thanks to a massive reduction in costs,[83] with deregulation savings for consumers estimated at US$5 billion.[84] However, fares on less frequented (low density) routes have increased, while the quality of service has diminished, since discounted fares have been offered in certain cases without interline facilities or with conditions of limitation of time attached to them.[85] The new lower tariffs are, therefore, applicable to different products than the ones prior to deregulation. The new products are the result of fewer direct flights and

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80. Haanappel, op. cit., Ch. I fn. 65, p. 19.

81. Ibid., pp. 20-22.

82. A.A. Majid, "Impact of Current U.S. Policy on International Civil Aviation", (1983/4), 32 ZLW, p. 295 at 304.

83. Avi. Mag. 929 (1-12-86) p. 28; Richard de Neufville, "Les Leçons de l'Expérience Américaine", ITA Magazine No. 44 Juillet-Août 1987, p. 4; M.E. Levine, "Déréglementation: Bilan de huit ans d'expérience", ITA Magazine No. 44, pp. 4, 5.

84. Europe, op. cit., Ch. I, fn. 78, p. 12.

85. Id.; Haanappel, op. cit., Ch. I, fn. 65, pp. 22-24; Majid, op. cit., Ch. I fn. 82, p. 305; J. Villiers, "L'Expérience Américaine de la Déréglementation", 162 RFDA, No. 2, p. 195 at 210-211.

consequently greater elapsed travel time for travellers,[86] more seats in aircraft and a reduction in the cost of service on board by 14 per cent.[87]

It has been concluded that it is businessmen, travellers who cannot satisfy the time limitation conditions attached to lower fares and residents of small communities who have supported deregulation by paying higher fares or by spending more travel time than they used to.[88] On the contrary, Levine considers that residents of small communities have benefited from deregulation. These travellers can fly to a hub and take a connecting flight to reach their final destination non-stop; before deregulation they had to make more stop-overs.[89] It should be kept in mind, however, that fares in such cases are quite expensive, except for fares established by new entrants on some short-haul routes.[90]

The wide variety of fares has increased the importance of travel agents and CRSs. Without their help, the average consumer would have to shop around for the best

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86. "Mergers, Take-Overs and Cooperative Arrangements Between Airlines Outside Europe", study prepared by P.P.C. Haanappel and T. Kuijper, p. 15.

87. J. Villiers, "Quel enseignement tirer de l'expérience américaine?", ITA Magazine No. 44, Juillet-Août 1987, p. 17 at 20.

88. F. Lafaye, "La Déréglementation Américaine: Historique et Conséquences pour l'Europe", ITA Magazine No. 44, 1987, p. 15; Haanappel, op. cit., Ch. I fn. 65, p. 28.

89. M. Levine, "Le fonctionement du marché des transports aériens aux Etats-Unis après la déréglementation: bilan de huit ans d'expérience", (1987) R. Int. de Droit Économique, No. 3, p. 425 at 431.

90. Haanappel, op. cit., Ch. I fn. 65, p. 28.

available fare.[91]

The sudden discrepancy between its free-market domestic policy and controlled international policy led the United States to seek a more open market for international aviation.[92] The International Air Transportation Act of 1979[93] gave the CAB and, after January 1, 1985, its successors the power to enforce a system of free competition in international air transport[94] in order to facilitate the conclusion of liberal bilaterals between the United States and other nations.

All but one of the effects of deregulation of international air transport in the United States are outside the scope of this study. The one effect to be considered is the invasion of U.S. carriers in Europe and the threat they produced.

b. American Carriers: A Threat for European Ones

Through the conclusion of new bilateral air services agreements and the renegotiation of existing ones, the United States injected so much liberalism into international civil aviation that the resultant international regulatory regime has become unrecognizable.[95] Economically it became impossible for the airlines of many States to carry on their business on affected routes by any rules

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91. Id.

92. See V.J. Clarke, "New Frontiers in EEC Air Transport Competition", (1987) 8 Northwestern J. of Int'l L. and Bus., No. 2, 1987, p. 455 at 460.

93. International Air Transportation Competition Act, Pub. L. No. 96-192, 94 Stat. 35 1980.

94. Haanappel, op. cit., Ch. I fn. 65, p. 39.

95. Majid, op. cit., Ch. I fn. 82, p. 295.

differing from those prescribed by market forces.

The main conflict in the deregulated environment took place on the North Atlantic routes.[96] Foreign Carriers permits were granted by the United States to those airlines which presented the most competitive tariffs. Consequently, airlines had to submit the lowest possible fares,[97] thereby forcing European airlines to follow, out of commercial necessity. Furthermore, the liberal bilaterals did not permit any reduction in capacity beyond a certain point.[98] By offering highly competitive budget fares, the result of the US carriers' invasion of Europe has been over-capacity. Capacity rose by 80 per cent in 1985 against a traffic increase of only 14 per cent,[99] meanwhile, European carriers were facing a gradual decline in their market share on the North Atlantic.[100] In 1986 US carriers could serve from 37 US gateways to virtually all European airports. European carriers were only entitled to fly to 18 US cities.[101] Moreover, none of these carriers had, at least until 1987, the potential traffic necessary for persuading a local US carrier to co-ordinate its schedules with them.[102] As well, the US carriers were

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96. Avi. Mag, op. cit., Ch. I fn. 83 at 29.

97. Majid, op. cit., Ch. I fn. 82, p. 301.

98. Id.

99. 28000 empty seats were crossing the Atlantic every day, ITA Magazine No. 36, June-July 1986, p. 20; Majid, op. cit., Ch. I fn. 82, p. 301.

100. Air France's market share on its N. Atlantic routes fell from 45% in summer 1984 to 33% of the total market in summer 1985. Swissair's share dropped by 7% and Lufthansa's by 6%, ITA Magazine, id.

101. Id.

102. Lafaye, op. cit. , Ch. I fn. 88 at 13-14.

broadening their attack on Europe by combining their fifth freedom rights with their transatlantic services.[103]

Another important factor is the size and strength of the US mega-carriers created after deregulation. Never before did European carriers have to compete with such strong and well-financed competitors.[104] Europeans cannot neglect the existence of the "megas". Due to their quality as low price suppliers, they will be fixing the fares in every contestable market. Europeans had to adapt to the realities of deregulation. Otherwise, they would not have been able to continue to provide services on the North Atlantic, one of their preferred markets.[105]

Concurrent to US deregulation, Sir Freddie Laker, after a successful lawsuit against the Government of the United Kingdom,[106] obtained an unconditional licence for a scheduled "skytrain" between London and New York at an extremely low fare. The established scheduled airlines on the London-New York route put pressure on IATA to change the air fare structure so that they could compete with Laker. An IATA resolution of 1978 reorganized IATA membership so

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103. INTERAVIA 8/1986, p. 86; ITA Magazine, op. cit., Ch. I fn. 99 at 20.

104. United Airline's domestic traffic is five times bigger than the total intra-EEC traffic of the four biggest european companies, Villiers, op. cit., Ch. I fn. 87, p. 26; The advertissement of Continental Airlines in Paris reads as follows: "nous ferons tout pour vous conquérir", ibid., p. 26.

105. Neufuille, op. cit., Ch. I fn. 83, p. 7, 9.

106. Laker Airways Ltd. v. Department of Trade, 1977, Q.B. 643; P.P.C. Haanappel, Pricing and Capacity Determination in International Air Transport; A Legal Analysis, Deventer, Kluwer Law and Taxation Publishers, 1984, p. 58.

that it became possible for a member not to be bound by the IATA fare-fixing mechanism.[107] At the same time, the United States started to negotiate with the European countries, such as Belgium or The Netherlands, in order to conclude liberal bilaterals and counterbalance the very protectionist agreement with Britain. In this way, U.S. deregulation was exported to Europe.[108]

As a result European States had to surrender some of their traditional individual prerogatives for the good of the whole. They had to come together and jointly identify how the imbalance of individual bilaterals with the United States could be readjusted. Especially after the formation of the U.S. "megas", European airlines realized that they had to move toward a unity of their own. In the late seventies nearly all European carriers rejected the idea of a European policy for air transport. While, carriers based in the West Pacific countries stretching from Japan through South East Asia to Australia responded to the consumer's call for high quality, low-cost operations,[109] Europe's scheduled aviation sector was characterized by high cost of operations, subsidies, restraints on competition and protectionism. As a result Europe lagged behind in competitiveness. In the eighties, however, after the European consumer's reaction led to calls for operating practices similar to the ones adopted in the United States for the North Atlantic and intra-European routes, Europeans not only started to accept the idea of a European air transport policy,

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107. Dagtoglou, op. cit., Ch. I fn. 16, p. 338.

108. Id.

109. C. Thaine, "The Way Ahead from Memo II: The Need for More Competition a Better Deal for Europe", (1985) 10 Air L., No. 3, p. 90 at 91.

but they were actively asking for such a policy.[110]

Europeans always kept in mind that deregulation represented fewer economic and social risks for the United States than for Europe, given the dimension of the US market, the higher personal income in the United States than in Europe, and the greater opportunities for new employment in the US market in case of air carrier bankruptcy. Europeans had, therefore, to try to find solutions adapted to the special characteristics of both European air transport and the European socio-economic situation in general.

2. Implications of US Deregulation for Europe

The division of Europe into many sovereign States has been a major source of problems from the very beginning of the development of aviation,[111] since a multitude of States corresponds to a multitude of formalities, procedures and permits, when operating in separate and distinct economic, legal and monetary systems.[112] Unlike the United States, Europe has many sovereign authorities to consider when contemplating "decontrol". While the United States has one aviation agency, one registry, one transport department and one air traffic control system, in Europe there are several of each entity.[113] The multisovereign nature of Europe also means that the law of international

110. ITA Magazine No. 36, p. 21; this is the reason for the creation of a joint operation on the route Bruxelles-London-Atlanta of British Caledonian and Sabena, ITA Magazine No. 43, p. 29.

111. Weber, op. cit., Intro. fn. 26, pp. 22-23.

112. Id.

113. U. Nordio, "Europe and Globalization", ITA Magazine No. 49, May-June 1988, pp. 21-23, at 23.

aviation applies. Consequently, a particular aviation system can be set up in a particular country, without preventing others from adopting a different system.[114]

It was therefore thought necessary to set up ECAC as a forum where these problems could be tackled cooperatively by all European States.[115] Since the beginning of the seventies, the Council of Europe[116] and ECAC have shown their desire, in a broad European scale, to avoid waste of European tax dollars and to make air transport accessible to larger parts of the population in Europe.[117] The European Communities, on a narrower scale than ECAC, but with more sovereign effect, have demonstrated their interest in a better developed air transport system, which would be better adapted to the consumer's needs. This interest became more apparent after the deregulation movement in the United States, as discussed previously.

It was obvious that US-style deregulation would simply not work in Europe, given the existing differences between the US and European aviation environments.[118] Moreover, it became apparent that there could be no "big bang" approach to "decontrol" under the realities of the

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114. ITA Magazine No. 4, Oct. 19, 1984, p. 3.

115. See Stage, "The European Civil Aviation Conference", LL.M. Thesis, IASL, McGill University, Montreal, 1960.

116. For integration attempts in the Council of Europe see Weber, op. cit., Intro. fn. 26, pp. 38-53; Naveau, op. cit., Intro. fn. 2, pp. 186-195.

117. Weber, op. cit., Intro. fn. 26, p. 24.

118. The Belgian Minister of Communications, Herman de Croo, had said: "il n'y aura pas en Europe de déréglementaion sauvage à l'américaine", Air et Cosmos, 4 avril 1987, no. 1137, p. 24.

European air transport system.[119] Liberalization in Europe had to be adjusted to the specific European situation, a view held by the European Parliament. In its opinion of September 10, 1985, the Parliament favoured "a very cautious liberalization of the conditions governing the organization and operation of air transport in order to avoid the negative effects of deregulation such as those which obtained in the U.S.A."[120]

Many European nations perceive the provision of air services to be essentially a public-utility type of enterprise[121] which must be available to all on a non-discriminatory basis. The right to operate commercial air services across frontiers in Europe, on the other hand, is negotiated between governments bilaterally,[122] since most European airlines are either State-owned or-subsidized.

The ban on new entrants and price competition is a characteristic of this system and creates excess costs which are passed on to passengers in the form of higher fares. Governments argue that the higher fares and various restrictions imposed are part of the price to be paid for the internal cross-subsidy necessary for serving unprofitable

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119. G.H. Lipman, "Which Type of Deregulation for Europe", ITA Magazine, No. 27, Sept. 1985, pp. 3-5, at 3.

120. O.J. Eur. Com., No. C262/38 (Oct. 14, 1985).

121. P.S. Dempsey, Law and Foreign Policy in International Aviation, N.Y., Transnational Publishers, Inc., Dobbs Ferry, 1987, p. 94.

122. There are some 325 separate bilaterals between 26 European countries which regulate all the questions related to routes, capacity, fares, Commission on European air transport: Cloudy horizons with silver linings, Address by P.D. Sutherland, Association des Compagnies Aériennes de la Communauté Européenne, Amsterdam, 27 March 1987.

routes and providing a high level of safety.[123] This system is a unique anti-competitive system of commercial activity, which prevents free trade in services across European frontiers, and is, therefore, an anathema to the economic principles upon which the Treaty of Rome is based.[124]

Fares charged in Europe in 1984 were, on average, 2.6 times higher than those charged on comparable flights in the United States.[125] An ICAO survey found that, while US internal air fares were 46 per cent of the world average, European fares were 112 per cent.[126] Another study by the UK Civil Aviation Authority (CAA) in 1983 concludes that domestic fares in the United States were 35 per cent lower than intra-European fares, not 50 per cent as was sometimes claimed.[127] However, any comparison between US and European air fares is risky due to the wide diversity of US fares after the deregulation. Nevertheless, differences do exist between US and European fares. These differences become even greater if the lower standard of living in Europe is taken into account. Consequently, European fares are much higher than the US ones, in comparison to the average income. The current high level of European air fares is a handicap to the movement of travellers. Liberal-

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123. Dempsey, op. cit., Ch. I fn. 121, p. 94; however, European passengers put confort and cabin services first in their preferences before safety and schedules, INTERAVIA, Nov. 1987, p. 1179.

124. Sutherland, op. cit., Ch. I fn. 122, p. 2.

125. Ibid., p. 3. For an extensive comparison between European and U.S. fares see, F. McGowan and C. Trengove, European Aviation: A Common Market?, London, The Institute for Fiscal Studies, 1986 at 19-79.

126. Id.

127. ITA Magazine No. 4, 19 October 1984, p. 4.

ization would benefit consumers and increase the airlines' efficiency.[128]

A reason for the higher European air fares is the higher operating costs of air companies in Europe. European costs are two times higher than US costs. Consider the following factors: (1) The average distance in the United States is 29 per cent longer than in Europe.[129] For short-haul traffic, take-off and landing fees are higher, consumption of fuel is greater, wear of tires is more rigid and use of aircraft and crew is low.[130] In other words, average costs are lower in the United States. (2) Fuel prices are about 50 per cent higher in Europe.[131] (3) Social charges and employee fees[132] are higher in Europe, while airport charges paid by European carriers flying in Europe are 15 times higher than charges paid by US carriers at US airports.[133] (4) Use of smaller aircraft in Europe

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128. AWST, June 30, 1980, p. 29.

129. Naveau, op. cit., Intro. fn. 2, p. 109; the average stage length is 1370km in the U.S. while it is 776 km. in Europe, U. Schulte-Strathaus, "The Realities of the European Airline Environment", ITA Magazine, No. 36, June-July 1986, pp. 19-22, at 20.

130. Aircraft utilization in the U.S. is increased by 24% compared to European utilization, ITA Magazine No. 36, op. cit., Ch. I fn. 99.

131. Naveau, op. cit., Intro. fn. 2, p. 109.

132. Fees constitute 1.5% of the total costs of U.S. carriers, 11% of the costs of European carriers, ITA Magazine, op. cit., Ch. I fn. 99 at 20; A solution could be a reduction in labour costs. This could raise, however, serious questions of labour principles and law, which in many European countries could have political as well as economic consequences, Lipman, op. cit., Ch. I fn. 119, p. 4; see also Haanappel, op. cit., Ch. I fn. 65, pp. 62-63.

133. See Air et Cosmos, No. 1139, 18 avril 1987, p. 38.

makes the cost-per-seat higher.[134] (5) European carriers are bound to a high fuel consumption because, in respecting the various restricted military zones in European air space, they must fly greater distances. (6) Carriers in Europe face very high costs for the use of the European Air Traffic Control Services.[135] (7) An international operation is more costly than a domestic one and, as already pointed out, flights between European countries are international flights.

Another significant feature of European air transport is the importance of charter traffic. Charters represent 57 per cent of the total intra-EEC international traffic, as expressed in passenger/km.[136] Charter traffic is important because most European travellers are leisure travellers interested in low fares.[137] The nature of the traffic changes, however, according to the season.

Air transport in Europe faces considerable competition from rail[138] and road transport especially for short distances. There is an expanded and very well-run network of railways in Europe.[139] The speed limit on highways is higher than in the United States;[140] in some countries, such as Germany and Italy, there is no speed limit. The fact that a larger part of European flights are short-haul

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134. Air et Cosmos, No. 1189, 7 mai 1988, p. 36.

135. AWST, Oct. 20, 1980, p. 55.

136. Naveau, op. cit., Intro. fn. 2, p. 141.

137. Ibid., p. 142.

138. Air et Cosmos, No. 1132, 28 Feb. 1987, p. 8.

139. Both France and Germany consider that the needs of their respective railroad system have to be taken into consideration when liberalizing the air transport system, ITA Magazine, No. 36, June-July 1986, pp. 19-22 at 19.

140. Air et Cosmos, No. 1189, 7 mai 1988, p. 36.

flights makes speed, the most important advantage of air travel, not so important, particularly when the inevitable delays at airports are taken into account.[141]

Given the special characteristics of the European air transport system, the great majority of European decision makers did not believe that US-style deregulation could be applied directly in Europe. Even though they were unable to agree for a long time on the methods that should be used for liberalization or even on the definition of Europe,[142] there was general agreement that the US type of free-wheeling operating pattern was not a likely short term possibility for Europe, due to state controls and infra-structure constraints.[143]

A major reason for US domestic deregulation of air transport was the CAB approval of voluntary inter-carrier capacity reduction agreements in the early seventies, although, it was not authorized to do so, at least domestically.[144] In Europe a system of governmental predetermination of capacity was adopted. This system was coupled with pooling agreements for sharing revenues derived from the joint operation of an air route by two or more airlines.[145] The effect was the elimination of both capacity competition between airlines and service quality competition, especially since pooling agreements were

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141. Trains are very fast in Europe, ex. TGV. A new connection has been planed between London and Paris on TGV, as well as, Paris-Brussels-Cologne-Amsterdam; see "The Future of High Speed Rail Lines in Western Europe", ITA Magazine, No. 25, May 1985 at 12-14.

142. INTERAVIA 7/1986, p. 725.

143. Lipman, op. cit., Ch. I fn. 119, p. 4.

144. Haanappel, op. cit., Ch. I fn. 65, p. 57.

145. Only revenues are shared and not costs, ibid., p. 57.

combined in most cases with governmentally approved tariff agreements.[146]

The central purpose of future European air transport policy, therefore, had to be creation of a more competitive industry, since the level of competition within Europe was inadequate. The objective was not to deregulate air transport, but to modify the regulatory structure in ways which would allow greater airline competition.[147] This method of modification is the normal consequence of Europeans considering air transport as a public utility. The question that arises is how competition can be increased. This increase could be achieved by the application of anti-trust legislation in order to ensure that carriers do not restrict competition through inter-carrier agreements. In the absence of such legislation, governments could enforce a system of free or increased competition, as was the case in the US International Air Transportation Competition Act.[148]

The present fragmentation of air transport policy in Europe is a source of concern to many. Change is now taking place mainly within the EEC. The wider community, as represented by ECAC, has shown signs of increased flexibility in regulatory matters, but has further to go than the EEC. European authorities were thus faced with a colossal

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146. Ibid., p. 58.

147. Stephen Wheatcroft, European air transport in the nineties, Lecture given at Royal Aeronautical Society - Air Transport Group, Dec. 9, 1987; This is the reason why the term used is Liberalization and not Deregulation. For a definition of the term Liberalization see B. Wood, "Europe's Liberalization of Air Services: An Update", (1988) 16 Int'l. Bus. Lawy., No. 6, p. 269; H.A. Wassenbergh, "New Aspects of National Aviation Policies and the Future of International Air Transport Regulation", (1988) 13 Air L., No. 1, p. 18 at 20

148. Haanappel, op. cit., Ch. I fn. 65, p. 55.

task of unification and reorganization.

SECTION III - A MORE LIBERAL APPROACH

Negotiations among European Community Member States lasted several years before all political, social, historical, diplomatic and economic issues were resolved. Despite this lengthy process, there was no immediate common agreement among the Member States and the Community institutions on the scope of liberalization. The United Kingdom, the Netherlands and the Commission, on the one hand, favoured far-reaching liberalization. On the other hand, the Parliament, ECOSOC, and the majority of Member States favoured a more moderate approach.[149] ECAC's point of view was that regulatory change in Europe should occur on a common basis.[150] This approach is impractical, however, because ECAC cannot go as far as the EEC, since provisions of the Rome Treaty, combined with the objective of the European Community's Member States to set up an internal market by 1992, can enable the EEC to set up a more consistent free market policy in air transport.

1. Commission's Efforts Before 1986

The main achievements before 1986 were the adoption of two memoranda by the Commission and of a directive regulating regional air traffic by the Council, resulting from the Commission's proposals.

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149. ITA Magazine No. 35, May 1986, p. 29.

150. Id.

a. Memorandum No. 1

After determining its priority objectives, the Council assigned the Commission with the task of initiating negotiations with the Member States, with a view to proposing, for the Council's approval, a Community regulation on each of the priority objectives.[151] In the following years, a formal Community policy on air transport evolved. The first document published by the Commission was its first memorandum.[152]

On July 4, 1979, the Commission laid out in Memorandum No. 1 its recommended requirements for the development of air transport services by the European Communities suggesting some cautious ways of integrating the airlines of Member States into the legal system of the Community. The Commission's objective was to improve the market structure of air transport, thereby pursuing the goals of the EEC Treaty.[153] Memorandum No. 1 favoured a gradual evolutionary process toward a less regulated environment.[154]

The underlying theme of Memorandum No. 1 was that the highly regulated air transport sector in Europe had lagged behind developments elsewhere, notably in the United

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151. Tanguy, op. cit., Ch. I, fn. 58 at 16.

152. Memorandum by the Commission on the contributions of the European Communities to the development of air transport services. Doc. 8139/79.

153. P.D. Dagtoglou, "Civil Aviation in the EEC", (1981) 1 Oxford J. of Legal Studies, p. 413.

154. 9 IATA Regulatory Affairs Review, No. 2, October 1984, p. 149.

States and on the North Atlantic.[155] The Memorandum recommended wider application of cheap fares, development of new scheduled services, adoption of measures to increase the possibility of market entry and establishment of EEC air transport competition rules.[156] These suggested measures were coupled with proposals covering employment[157] policies and safety rules.

Memorandum No. 1 was not based on a good knowledge of air transport issues. As well, by that time no Member State wanted its dealings with its own airlines to become subject to Community rules. As a result the Commission's proposals were cut out completely.[158] However, on the basis of this memorandum, the Council requested that the Commission develop proposals for inter-regional air services and air fares, in accordance with its priority objec-

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155. Tegelberg Aberson, op. cit., Intro. fn. 1, at p. 284; Naveau, op. cit., Intro. fn. 5, p. 515.

156. See Gadea Oltra, "The Interconexion Between European Developments and the Regulatory System of International Air Transport", in Rushing into a New Area; The 1986 Developments in European Community Air Transport Policy, seminar on Aviation Law, Rotterdam 9, October 1986, Aerovision Consultancy Publishing, p. 36; Dagtoglou, op. cit., Ch. I fn. 153 at 413; Haanappel, op. cit., Ch. I, fn. 106, p. 59, 60; Naveau, op. cit., Intro. fn. 5, p. 515.

157. According to the ECOSOC the Commission had not taken sufficient account of the social interests of workers. An attempt should have been made to situate air transport in the context of general transport policy in order to balance the needs and contributions of the various sectors, ECOSOC Brussels 3 July 1980, Opinion on the contributions of the European Community into the development of air transport services, Dossier TRA/55 Air Transport Policy Doc. No. 4.

158. Stanbrook, op. cit., Ch. I fn. 30, p. 52.

tives.[159]

b. Regional European Air Traffic

In developing proposals for inter-regional air services and air fares[160] the Commission submitted on December 1, 1980 a proposal to the Council which would facilitate the introduction of scheduled inter-regional air traffic measures.[161] On July 25, 1983 the Council issued the Directive concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States.[162] Although the Directive was a diluted version of the Commission's proposals,[163] it was an important development. Governments were forced to take a liberal attitude in their bilateral relations when judging license applications from one

159. Air Transport: A Community Approach, Bull. Eur. Com. Sup. 5/79 at 7.

160. Clarke, op. cit. Ch. 1 fn. 92, at 460.

161. Comm. (80) 624 final; see also Dagtoglou, op. cit., Ch. I fn. 16, p. 354.

162. Council Directive 83/416/EEC (came into force in October 1, 1984) O.J. Eur. Com., No. L237 August 8, 1983, p. 19; For a complete analysis see A. Tanguay, "The EEC Directive on Inter-Regional Air Services", ITA Magazine, No. 11, December 1983, p. 2-7 at 2; F. Sorensen, "Inter-regional air services in the EEC: A Further Assessment", ITA Magazine, No. 13, Feb. 1984, pp. 3-7.

163. The final text has been modified considerably compared with the initial proposal submitted by the Commission and finally accepted by the Member States as the many amendments enabled them to retain most of their powers and gave the Commission only a secondary role, see Tanguay, ibid. at 2.

another's airlines, which fall within a specific market-level.[164] As well, even though liberalization was restricted to a part of the European air traffic system, it could not fail to have its impact on the development of the entire air transport system in Europe.[165]

The Directive's impact should not be overestimated, however. Governments are obliged to approve applications if they comply with the conditions described in the Directive. Moreover, the scope of the Directive is limited to air services within the Community between regional airports classified in category 2 or 3, over distances greater than 400 km, with aircraft not exceeding a capacity of 70 passengers and a maximum take-off weight of 30,000 kg. Nevertheless, the Directive allowed the opening of 20 new inter-regional routes within the Community,[166] with the major carriers performing regional services.[167]

The Commission realized that regional air transport could help achieve the delicate balance which is essential to integration between European regional diversity and the reaffirmation of a new solidarity between its various regions.[168] Consequently, it started to consider a

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164. Tegelberg Aberson, op. cit., Intro. fn. 1 at 284.

165. Simone Veil, President that moment at the European Parliament, saw in this Directive the prefiguration of a common European airspace, see Naveau, op. cit., Intro. fn. 5 at 515; Naveau, op. cit., Intro. fn. 2 at 235; Dagtoglou, op. cit., Ch. I fn. 16 at 354.

166. Guillaume, op. cit. Ch. I fn. 30 at 70.

167. AviMag 957 (1-3-88), p. 41; AviMag 959 (1-4-8) p. 54; AviMag 962 (15-5-88) p. 23; AWST April 4, 1986, p. 37.

168. R. Fernandez, "Regional Aviation Markets Within the EEC", ITA Magazine, No. 36, June-July 1986, p. 16.

modification of the Directive in order to further encourage the creation of new inter-regional services.[169] The Commission observed that there was a need to connect regional airports to principal urban centers of the Community. It proposed, therefore, on September 11, 1986 to enlarge the scope of the Directive to include services having category 1 airports as their destination or departure point.[170] The Commission also proposed to withdraw the stage-length limit[171] in order to encourage direct flights and, consequently, meet the consumers' needs.[172] As well, the Commission proposed to apply the Directive to fifth freedom rights.[173]

Within the Council, there was general agreement in 1986 to accept the withdrawal of the minimal stage-length limit, and a possibility of agreeing to the application of the Directive to fifth freedom rights, subject to further safeguards.[174] Disagreement arose, however, between the Member States as to the inclusion of category 1 airports.

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169. Proposition de Directive du Conseil portant modification de la Directive 83/416/CEE concernant l'autorisation de services aériens réguliers interrégionaux pour le transport des passagers, d'articles postaux et de fret entre Etats Membres, (1987) 162 RFDA, No. 2, pp. 184-190 at 184 (hereinafter Proposition de Directive concernant les services aériens interrégionaux).

170. Id.

171. Id.

172. M. Suter, "What Further for Regional Air Transport", ITA Magazine, No. 36 June-July 1986, p. 23.

173. Proposition de Directive concernant les services aériens interrégionaux, op. cit., Ch. I fn. 169.

174. G.L. Close, Recent European Community Developments in Air Transport, p. 60.

Possible compromise solutions were to include this category, but with a further limitation of 50 seats, or to include only certain category 1 airports.[175]

The Directive was amended in 1986, but only to include in its classification of airports the airports of Portugal, a new Member of the EEC.[176]

c. Memorandum No. 2

In response to a call by the Parliament to create a revised work programme for 1984-1985,[177] the Commission issued in 1984 Memorandum No. 2.[178] This document accepts the Parliament's point of view that the Community should take appropriate steps to improve the intra-European air transport system. The bargain offered by the Commission was exemption from the competition rules (based on Article 85(3) of the EEC Treaty) for Member States' airlines, if the Council implemented the entire package[179] of measures

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175. Id.

176. Dir. 86/216 EEC O.J. Eur. Com., No. L. 152/47, June 6, 1986; Assession of the Kingdom of Spain and the Portugese Republic to the EC, O.J. Eur. Com., L302, Nov. 15, 1985, p. 639.

177. Dempsey, op. cit., Ch. I fn. 121, p. 101.

178. "Progress Towards the Development of a Community Air Transport Policy", Doc. Com.(84) 72 final.

179. The Commission asserted that all of the proposals in the Memorandum were interdependent and had, therefore, to be adopted and implemented as a package, ibid. at III.

proposed by the Commission.[180]

Three main factors contributed to the formulation of the Commission's proposals: while US deregulation had reached its limits, it had, nevertheless, introduced a liberal approach; European partners had become closer after 17 years of co-operation and had become able to evaluate better the special characteristics of aviation; and Europeans feared financial losses if they did not respond to the US initiative. Moreover, European companies started to exercise pressure in order to be able to make their choices with greater freedom, without losing the ultimate recourse to government protection.[181]

Memorandum No. 2 discussed the impact of deregulation in the United States and concluded that a Community air transport system was "not necessarily suitable for application to third countries".[182] As well, an evolutionary approach was preferred to the revolutionary policy adopted by the United States.[183] Memorandum No. 2 also recognized the need to render the air transport system significantly flexible so as to contain within itself sufficient pressure to ensure that airlines increased their productivity and provided their service at the lowest possible

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180. Stanbrook, op. cit., Ch. I fn. 30, p. 55; Tegelberg Aberson, op. cit., Intro. fn 1, p. 285.

181. M.G. Folliot, "Les Voies et moyens de l'évolution réglementaire du transport aérien en Europe", (1986) 40 RFDA, p. 24 at 25.

182. Memo 2, op. cit., Ch. I fn. 178 at 1.

183. Ibid. at 26. P.S. Dempsey, "Aerial Dogflights over Europe: The Liberalization of EEC Air Transport", (1988) 53 JALC, No. 3, p. 615 at 661.

cost.[184] The Memorandum called for greater freedom in the following areas: capacity, market entry, pooling agreements, costs, state aid, pricing and competition.[185] Three measures were proposed by the Commission in order to achieve a more flexible air transport system:[186] (1) establishment of community rules on certain points affecting the content and method of application of the bilaterals which Member States conclude; (2) action to amend the machinery for the settlement of air tariffs; and (3) action to limit the effect of commercial and tariff agreements between airlines.

As far as capacity was concerned, the Commission proposed that Member States should not seek to regulate capacity in such a way that any one party was guaranteed a traffic share of more than 25 per cent but if that principle were to be applied on a country-pair basis, a safety net should be established to avoid abuse of a dominant position.[187] The market entry proposals were the most disappointing ones since, by limiting its proposals on free entry to small aircraft and consumer services, the Commission had not recognized that market entry was a principal factor in creating competition.

On pooling agreements, the Commission's view was that they should be permissible, not obligatory. Since

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184. Memo 44, op. cit., Ch. I fn. 178 at 27; Dempsey, op. cit., Ch. I fn. 121, p. 101; Clarke, op. cit., Ch. I fn. 92 at 461.

185. Clarke, id.,; Memo 46, ibid. at 29.

186. Naveau, op. cit., Intro. fn. 5 at 515; Dempsey, op. cit., Ch. I fn. 121 at 101; Dempsey, op. cit., Ch. I fn. 183 at 663-666; Thaine, op. cit., Ch. I fn. 109 at 30.

187. Thaine, ibid. at 93; Folliot, op. cit., fn. 181 at 32-34.

pooling agreements eliminate competition, they should only be allowed if they could demonstrate user benefits. Even then, they should have limits on the degree of revenue transfer allowed between airlines.[188] While it considered that some degree of public aid may be necessary for socially required routes in remote regions, the Commission concluded that air transport had to be considered a commercial business instead of a branch of public service, and proposed withdrawal of all aid schemes which offset airline operating losses.[189]

Under the tariff proposals, pricing was to be subject to double approval, provided that zones of flexibility were established with a minimum percentage range. These proposals offered a method for overcoming the veto power which could be exercised by a government over air fares proposed by the airline of another State.[190] By suggesting multilateral criteria and procedural rules in the field of capacity and fares and upholding the basic principles of bilateral agreements, the Commission showed that it was possible to maintain the existing system, while at the same time introduce multilaterally elements of flexibility.[191]

Reactions to Memorandum No. 2 were varied. IATA and AEA, while agreeing on the necessity of reform, published their own proposals which differed considerably from

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188. Thaine, ibid. at 93,94; Haanappel, op. cit., Ch. I fn. 65 at 60.

189. Thaine, ibid. at 95.

190. European Civil Aviation Memorandum 2. A policy declaration and response adopted by the Executive Board of the ICC, Dec. 3, 1984, (1985) 10 Air L., No. 3, at 102.

191. Schulte-Strathaus, op. cit., Ch. I fn. 129 at 22.

Memorandum No. 2.[192] By contrast, charter airlines and consumer groups voiced strong support for the Commission's proposals. Trade unions and airports opposed the Memorandum because they felt their economic well-being threatened.[193]

The above-mentioned proposals demonstrate the Commission's basic aim, which was to apply the competition rules to air transport in the Community. The "Nouvelles Frontières" decision emerged as the most definitive statement of these objectives in 1986.

2. The Contribution of the European Court of Justice

Since no common transport policy was created, it was up to the European Court of Justice (ECJ) to create the policy or, at least, to oblige other Community institutions to adopt a common transport policy.

a. Lord Bethell v. Commission of the European Communities

In September 1981, Lord Bethell, a member of the European Parliament, registered an action against the Commission,[194] complaining that the Commission had failed to act on his earlier complaint dealing with concertation in air tariffs. He maintained that

> even if air tariffs were ratified by the Governments concerned, the concertation among airlines at IATA tariff conferences and elsewhere to agree tariffs for submissions is manifestly intended to limit if not eliminate, competition within the

192. AWST, Nov. 4, 1985 at 29.

193. Dempsey, op. cit. Ch. I, fn. 183 at 667.

194. 9 IATA Regul. Affairs R., No. 2, Oct. 1981, p. 155.

> Community and fails to take account of the Commission's obligations under Article 89.[195]

This action was discussed by the Court on June 10, 1982[196] on procedural grounds only.[197] Although this action was directly relevant to the important question of the applicability of the competition rules of the Rome Treaty to air transport, the ECJ did not consider the matter to be very important and asked its second Chamber to deal with it.[198] The Court had considered that the action was inadmissible because the applicant was

> ...not in the precise legal position of the action addressee of a decision which may be declared void under the second paragraph of Article 173 or in that of the potential addressee of a legal measure which the Commission has a duty to adopt with regard to him, as is position under the third paragraph of Article 175."[199]

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195. Id.

196. Case 246/81 Lord Bethell v. Commission, 1982 2 ECR 2277-2291; see H. Rassmussen, "Why is Article 173 Interpreted Against Private Plaintiffs", (1980) 5 Europ. L.R., pp. 112-127; C. Harding, "The Private Interest in Challenging Community Action", (1980) 5 Europ. L.R., pp. 354-361; Lord Bethell v. Commission, (1982) 7 AASL, pp. 599-600.

197. 11 IATA Regul. Affairs R., No. 4, Nov. 1982, p. 346.

198. Cour de Justice, 10 juin 1982, Affaire 246/81, comments by René Joliet, Cahiers de Droit Européen, 1982 No. 1, pp. 552-565 at 552.

199. Ground 16; see Harding, op. cit., Ch. I fn. 196.

b. European Parliament v. Council of the European Communities

In March 1982 the Parliament stressed again in a Resolution the need to set a common transport policy.[200] It also made a demand on the Council of Ministers to resolve on the many Commission proposals.[201] Since no satisfactory answer was given by the Council and no common transport policy had been adopted, the Parliament lodged a complaint in January 1983 against the Council, on the basis of Article 175(1) of the Rome Treaty. The Parliament argued that establishment of a common transport policy was a requirement flowing directly from the Treaty.[202] It is remarkable that this was the first time in the history of the EEC where an action for failure to act had been declared admissible in the ECJ.[203]

In its judgment of May 22, 1985[204] the Court slightly diversified its decision from that in the case

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200. Storm van's Gravesande, op. cit., Intro. fn. 19 at 141.

201. Id.

202. Dempsey, op. cit. Ch. I fn. 183 at 651.

203. Id.

204. Case 13/83 European Parliament v. Council, op. cit., Ch. I fn. 7; for a complete analysis of the judgment see: Bombardella, "Analysis of the Judgment of the Court of Justice of 22 May 1985 - Common Transport Policy - Council's obligations June 14, 1985"; B. Maury, "La Politique commune des transports, un nouveau janus juridique?", (1986) Cahiers de Droit Européen, no. 1, pp. 62-91; P. Fennel, "The Transport Policy Case", (1985) 10 Europ. L.R., No. 1, pp. 264-276; J.P. Jacqué, "Parlement Européen c. Conseil des Communautés Européennes", (1985) R. Trimestrielle de Droit Européen, pp. 757-766; R.D. Kerridge, "European Court of Justice: Parliament v. Council 83/85", (1986) 27 Harvard Int'l L.J., no. 1, pp. 243-249.

of Commission v. France[205] and held: "The absence of a common policy which the Treaty requires to be brought into being does not in itself necessarily constitute a failure to act sufficiently specific in nature to form the subject of an action under Article 175."[206] But the Court also observed that objective difficulties which stand in the way of necessary progress toward a common transport policy were irrelevant for the purposes of the present action.[207]

According to the Court's declaratory judgment, the Council had failed to meet the obligations laid down in Article 175 of the Treaty that is to establish rules for the freedom to provide services in the sphere of international transport, and to fix conditions under which non-resident carriers could operate transport services within a Member State by not taking measures necessary to that purpose before the expiration of the transitional period.[208] The Court held that this failure was in fact a breach of the Treaty.[209] In the Advocate General's opinion, the Council had violated the Treaty by failing to reach a decision on the proposals that dealt with inland transport, but not with respect to the proposals concerning air and sea transport.[210] This does not mean, however, that the Advocate General considered that the Council had no obliga-

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205. Guillaume, op. cit., Ch. I fn. 30 at 65-78.

206. Case 13/83, op. cit., Ch. I, fn. 7, Ground 53.

207. Ibid., Ground 48.

208. Doc. 31, 1969.

209. Dempsey, op. cit., Ch. I fn. 183 at 652; van's Gravesande, op. cit., Intro. fn. 19 at 141.

210. 18 Bull. Circ. Comm. (No. 1) 2.4.6. (1985); Kerridge, op. cit., Ch. I, fn. 204 at 245; conclusion of A.G. Lenz in Case 13/83, op. cit., Ch. I fn. 7 at 1551 (4.1).

tion to act with respect to air and sea transport. These two modes of transport "have considerable economic significance and are closely connected with the other sectors of the Common Market."[211] Nevertheless, adoption of appropriate rules for a common air transport policy is subject to a longer time limit, since establishment of these rules is left entirely to the Council.[212]

c. The "Nouvelles Frontières" Judgment

In a criminal proceeding brought in the French "Tribunal de Police", several airlines and travel agencies were charged with violating certain provisions of the French Civil Aviation Code, which provided that all proposed air fares be submitted and approved by the French Minister for Civil Aviation.[213] (The defendants were offering unapproved fares that undercut the officially approved ones.) The French "Tribunal de Police", in accordance with Article 177 of the Rome Treaty, requested the ECJ to give a preliminary ruling on the conformity of the French Civil Aviation Code with Article 85(1) of the rules of competition of the Treaty of Rome. The French Court rejected the argument that Article 85, under Article 84(2), was not applicable to the sphere of transport. This rejection is noteworthy, considering that the only object of Article 84(2) was to enable the Council to organize a common transport

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211. Conclusion of the A.G. Lenz in Case 13/83, ibid. at 1535 (1.2.3).

212. Ibid. at 1538 (1.2.7.2).

213. French Civil Aviation Code, Articles: L330-3, R330-9, R330-15; These provisions recur in more or less the same form in the legislations of other Member States, see P.J. Kuyper, "Joined Cases 209 to 213/84 Min. Public v. Lucas Asjes et al.", (1986) 23 CMLR, 661-681.

policy.[214] The French Court determined that "those provisions which call for a concerted practice between airlines, undoubtedly have as their effect the prevention, restriction or distortion of competition within the Common Market."[215] Three questions were in fact distilled from the French Court's request by the ECJ:[216] Are competition rules applicable to air transport? What are the consequences of the non-existence of an implementing regulation of Articles 85-86? Are national air fare approval systems compatible with Community Law, if the air fares to be approved are the result of an agreement, of a decision by an association of companies, or of a concerted practice contrary to Article 85?

The ECJ answered these questions in its Nouvelles Frontières judgment of April 30, 1986.[217] All parties were satisfied with the judgment. Since the Court restricted itself to jurisdictional issues and left all the substantive issues untouched, the ruling contained aspects,

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214. F.A. van Bakelen, "ECJ Decision, 30 April 1986", (1986) 21 Europ. Transport L., pp. 498-507 at 500.

215. See Opinion of Advocate General, (1986) 3 CMRL 177-209.

216. Tegelberg Aberson, op. cit., Intro. fn. 1 at 288.

217. Joined cases 209 to 213/84, (1986) 3 CMLR 173. The case is also known as the Asjes case.

which could be regarded as positive by both sides.[218]

On the applicability of the competition rules to air transport,[219] the Court referred to its ruling of April 4, 1974, noting that Article 74 prescribes that the objectives of the Treaty, including the creation of a non-restricted and undistorted competitive environment, must be pursued by the Member States within the framework of the common transport policy.[220] Only provisions on the free movement of services are exempt due to Article 61.[221] According to the Court, no other provision of the Treaty is subject to the adoption of a common transport policy, as far as its applicability to the transport sector is concerned.[222] In any case where the Treaty intended to exclude certain activities from the application of the competition rules, it did so by specific provisions, such as Article

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218. J.F. Bellis, "Nouvelles Frontières and EEC Competition Law in the Air Transport Sector: A Restatement of Classical Jurisdictional Rules", (1986) Swiss Review of Int'l Comp. L., No. 27, pp. 51-56 at 51; E. Henrotte, "Le Transport aérien et le Traité CEE: Défi et Perspectives", Journée d'Études - 5 Dec. 1986 - Les Conséquences de l'Arrêt N. Frontières", (1986) 21 Europ. Transport L., 537.

219. See Kuyper, op. cit. fn. 213 at 667-669; D. de la Rochère, "Arrêt du 30 Avril 1986, Min. Pub. c/Asjes, Gray, Maillot et al.", (1986) 22 R. Trimestrielle du Droit Européen, p. 511 at 526-527; A. Burnside, "Cheaper Air Fares in Europe. The ECJ New Frontier", (1986) 83 The L. Society's Gazette, No. 26, p. 2166 at 2166-2167.

220. Joined Cases 209 to 213/84, op. cit., Ch. I fn. 217, Grounds 35-36.

221. Ibid., Ground 37.

222. Ibid., Ground 39.

42.[223]

After these general considerations the Court referred to air transport in particular and stated that Article 84(2) "serves merely to exclude, so long as the Council has not decided otherwise, sea and air transport from the rules of Title IV Part Two of the Treaty relating to the common transport policy."[224] The Court concluded that "air transport remains, on the same basis as the other modes of transport subject to the general rules of the Treaty including the competition rules."[225] This ruling overturned the argument used to avoid adoption of procedural rules on competition submitted by the Commission to the Council.[226]

Concerning implementation of articles 85 and 86, there was a disagreement between the parties,[227] due to the lack of implementing regulations in accordance with Article 87 of the Treaty. Article 87 enables the Council to lay down all the appropriate regulations or directives in order to ensure the application of articles 85 and 86. It is under article 87 that the Council adopted Regulation 17/62.[228] This regulation was declared inapplicable to

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223. Ibid., Ground 40; Art. 42 concerns the production and trade of agricultural products.

224. Ibid., Ground 44.

225. Ibid., Ground 45.

226. L. Defalque, "La Position des Parties, les Conclusions de l'Avocat Général et l'Analyse de l'Arrêt Nouvelles Frontières", (1986) 21 Europ. Transport L., p. 524.

227. Joined cases 209 to 213/84, op. cit., Ch. I fn. 217, Grounds 46 to 49.

228. Regul. No. 17, op. cit., Ch. I fn. 43.

the transport sector by Regulation 141.[229] Regulation 141 was replaced by Regulation 1017/68 of July 19, 1968,[230] which concerns the applicability of the competition rules to transport by rail, road and inland waterways.[231]

The Court ruled that until implementing regulations were adopted, articles 88 and 89 continued to apply.[232] Under Article 88, authorities in Member States are obliged to apply articles 85 and 86.[233] Where there is an infringement, the Commission may propose "appropriate measures" to bring it to an end, pursuant to Article 89. In case of non-compliance, the Commission can issue a "reasoned decision" and authorize Member States to take measures to remedy the situation.[234] The Commission had, therefore, neither genuine investigatory powers nor the power to impose penalties. Article 169 provided its only procedural power against a Member State if it failed to fulfill its obligations under the Treaty.

The meaning of "authorities in Member States" was differed by the Council in accordance with the BRT v. SABAM case.[235] The term means:

> "the administrative authorities entrusted, in most Member States, with the task of

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229. Regul. No. 141, op. cit., Ch. I fn. 42.

230. Regulation 1017/68 of July 19, 1968 O.J. Eur. Com., English Special Edition 1968(1), p. 302.

231. See Dagtoglou, op. cit., Ch. I fn. 16 at 353-354.

232. Joined Cases 209 to 213/84, op. cit., Ch. I fn. 217, Ground 52.

233. Ibid., Ground 54.

234. Ibid., Ground 58.

235. Case 127/73 1974 ECR 51.

> applying domestic legislation on competition subject to the review of legality carried out by the competent courts, or else the courts to which, in other Member States that task has been especially entrusted."[236]

This term "does not include the criminal courts whose task is to punish breach of the law".[237]

The most important point in the case is the provisional validity accorded by the Court to concerted tariff practices between airlines, where there is an absence of implementing regulations and where no decision is taken by either "national authorities" or the Commission under articles 88 and 89.[238] To support its argument, the Court referred to the principle of legal certainty[239] and to the theory inaugurated in Bosch v. Van Rijn.[240] In the Bosch case the Court had used the theory of provisional validity in order to ensure that there be no contradiction between the judgment of a national court and an eventual decision of exemption. Following this judgment, the Court

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236. Joined Cases 209 to 213/84, op. cit., Ch. I fn. 217, Ground 55.

237. Ibid., Ground 56; see J. Amphoux, "Les règles de la concurrence", (1987) Cahiers de Droit Européen, No. 1-2, p. 191 at 185; Bellis, op. cit., Ch. I fn. 218 at 53-55; Tegelberg Aberson, op. cit., Intro. fn. 1 pp. 289-290; Kuyper, op. cit., Ch. I fn. 213 at 670-672.

238. Joined Cases 209 to 213/84, op. cit., Ch. I fn. 217, Grounds 63, 65.

239. See K. Walsh, "Air Transport and the EEC Competition Rules", (1986) 14 Int'l Bus. Lawy., No. 2, p. 223 at 224.

240. Joined Cases 209 to 213/84, op. cit., Ch. I fn. 217, Grounds 61, 64; Case 13/61 (1962) ECR 45.

had tried to restrict the scope of this theory. In Haecht II judgment,[241] this theory was restricted to old agreements (for example, agreements that existed before the adoption of Regulation No. 17). In the Perfume case[242] the Court excluded from the scope of the theory old agreements for which a "comfort letter" had been issued. It is submitted, therefore, that the Court's decision in Nouvelles Frontières is outdated. The only argument that could support the ruling is that, in the absence of implementing regulations, the content of the competition rules was undefined, thereby risking the uniformity of application of the competition rules in the different Member States.[243]

Furthermore, the Court contradicted its previous decisions in deciding that articles 85 and 86 have no direct effect.[244] In any case, the direct effect of these articles results from their very wording, particularly in Article 85(2) which declares that "any agreements or decisions prohibited pursuant to this Article shall be automatically void".[245] Subsequent to Nouvelles Frontières the full direct effect of articles 85 and 86 and, in particular,

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241. Case 48/72 SA Brasserie de Haecht v. Wilkin Janssen (1973), 1 ECR, p. 77.

242. Joined cases 253/78 and 1 to 3/79. Procureur de la République and Others v. Bruno Giry and Guerlain SA and Others, (1980) 2 ECR, 2327.

243. Burnside, op. cit., Ch. I fn. 219 at 56.

244. Case 10/71, Public Prosecutor of Luxembourg v. Muller, [1971-73 Transfer Binder] Comm. Mkt. Rep. CCH/8140 (1971); Case 14/68, Walt Wilhelm v. Federal Cartel Office [1967-1970 Transfer Binder] Comm. Mkt. Rep. CCH/8055 (1969); also see: W.C. Schlieder, "European Competition Policy", (1981-82) 50 Antitrust L. J., p. 647 at 650.

245. See Dogtoglou, op. cit., Ch. I fn. 30.

of the nullity under Article 85(2) were conditioned on the enactment of a Regulation by the Council.

Concerning the obligation of the Member States under articles 5, 3(1) and 85 of the Treaty, the Court, without responding to the arguments of the parties, concluded that it is contrary to the obligations of the Member States to approve and reinforce tariffs when a decision has been taken by the competent national authorities under Article 88, or by the Commission under Article 89, ruling that those tariffs resulted from a concerted practice.[246] It is important to note that it is not governmental approval of tariffs which may be illegal, but approval of tariffs which have resulted from a tariff co-ordination procedure between airlines.[247]

The Nouvelles Frontières decision will result in a diversity of decisions by the "national authorities" during the period between the decision of the Court and the adoption of the implementing regulations, since there is no mechanism in European Community law capable of unifying those decisions, and since the judgment does not assign any positive duties to the Member States, but limits itself to the description of what is contrary to their obligations.

Another effect of Nouvelles Frontières concerns the definition of agreements which are subject to the procedure of articles 88 and 89. Agreements which have no direct relation to the provision of purely transport services, such as cargo services, are regulated by Regulation 17 not articles 88 and 89. This conclusion was reached by the Commission in 1985 when it wanted to force Olympic Airways

246. Joined Cases 209 to 213, op. cit., Ch. I fn. 217, Ground 76.

247. P.P.C. Haanappel, Colloquium Nouvelles Frontières, State University of Leyden, The Netherlands, 26 June 1986, (1986) 11 Air L., p. 181 at 181.

to provide information on its cargo services.[248]

There are many questions which remained unsolved by the ECJ in Nouvelles Frontières. The Court completely ignored both the considerations of the Advocate-General on the validity of the agreements concluded between Member States and third countries before entry into force of the Treaty of Rome, and the question of competition and public enterprises.[249]

While many uncertainties remain, by proclaiming that the competition rules of the Treaty are applicable to air transport, the decision opened the way for adoption of a common air transport policy.[250] In June 1986, the European Council assigned to the Council of Ministers the task of adopting, without any delay, the appropriate measures to regulate tariffs, capacity and market access. Adoption of the implementing regulations of articles 85 and 86 became absolutely necessary because their absence precluded the possibility of successful legal actions on price-fixing. Proof of this necessity can be found in the September 11, 1986 decision of the Queen's Bench Division of the British High Court concerning an action of Lord Bethell against British Airways, aimed at striking down cartel practices among airlines.[251] The British High Court relied on the Nouvelles Frontières decision and the interpretation that "its effect was suspended until applied in accordance with procedure set out by Articles 88 and

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248. Dec. - Jan. 23, 1985, O.J. Eur. Com., L46/51 of Feb. 15, 1985.

249. See infra Ch. II, p. 183-187, Ch. III, p. 218-223.

250. Tanguy, "Viewpoint to Liberalization and Politics in the EEC", ITA Magazine, No. 37 Sept. 1986, p. 5.

251. 51 Antitrust and Trade Reg. Rep. 475, Oct. 2, 1986.

89".[252]

3. Factors Favouring Liberalization

As well as the elements discussed previously, two additional factors considerably advanced the liberalization process. These factors are certain liberal bilateral air transport agreements concluded by some European nations, and adoption of the Single European Act.

a. Liberal Bilaterals

It was argued in the introduction that bilaterals have been the preferred instrument of nations seeking to protect their own interests and the interests of their airlines from the effects of unrestrained competition. Recently, however, bilaterals between some of Europe's more liberal governments have tried to encourage competition in certain markets.

State sovereignty, being the biggest obstacle to free competition, it was very difficult for the Commission to accelerate the pace of liberalization and create a competitive environment in the European market, which consists of several independent nations. For this reason liberal bilaterals were concluded by some European nations.

The main features of liberal bilateral agreements are:[253] (1) Capacity provisions are flexible. They provide for unlimited multiple designation of air carriers, while the designated carriers of both contracting States determine capacity, frequency of flights and types of air-

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252. Id.; Clarke, op. cit., Ch. I fn. 92 at 474.

253. See Haanappel, op. cit. Ch. I fn. 106 at 139-157; Haanappel, op. cit., Ch. I fn. 65 at 43-45; Majid, op. cit., Ch. I fn. 82.

craft to be used; (2) They forbid the fixing of tariffs in a cartel-like manner, and encourage low tariffs; (3) They contain provisions on fair commercial opportunities by providing that commercial restrictions can only be justified on technical, safety, operational and environmental grounds; (4) They contain no limitations on the carriage of scheduled sixth freedom traffic; and (5) They try to preserve and enhance the freedom to run charter services.

The first liberal bilateral was concluded in March 1978 between the United States and the Netherlands.[254] Reasons for this agreement included the US interest in exporting deregulation and the speculation of profit by the Netherlands, which was confident in its flag carrier's position in the transatlantic market.[255] This agreement was followed by the US-Belgium Agreement[256] and the US-FRG Agreement,[257] Given the proximity of Belgium and the FRG to the Netherlands, these two countries believed that their market shares in the North Atlantic would be diminished without liberal bilaterals with the United States.[258]

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254. Protocol relating to the US-Netherlands Air Transport Agreement of 1957, 29 UST 3089, TIAS 8999 (entered into force March 31, 1978).

255. Haanappel, op. cit., Intro. fn. 21 at 85.

256. Protocol between the Government of the USA and the Government of Belgium Relating to Air Transport, 30 UST 617, TIAS 9207 (entered into force in December 1978).

257. Protocol Relating to the USA-FRG Air Transport Agreement of 1955, 30 UST 7323, TIAS 9591 (entered into force Nov. 1, 1978).

258. This is characterized by Prof. Haanappel as the "snowball effect", see Haanappel, op. cit., Intro. fn. 21 at 86.

These first liberal agreements provided the basis for the conclusion of others to which the United States was not a partner. In 1984 the United Kingdom and the Netherlands led the movement toward the institution of greater freedoms, after having anticipated that the conclusion of liberal air transport agreements would provide the necessary foundation for unrestricted entry/access, capacity and fare determinations.[259]

Their Agreement of July 20, 1984,[260] went far beyond any EEC proposals,[261] permitting any Dutch or British airline to operate scheduled services on any route between the two countries, including routes already served by other airlines, and to serve more than one point in either country. Free capacity-mounting and a double disapproval regime for fares are also part of the Agreement.[262] In concluding this Agreement both countries endeavoured to convince other governments of the usefulness of a more liberal regime.[263]

Due to the "snowball effect" the UK-Netherlands Agreement was followed by the conclusion of other liberal bilaterals between the United Kingdom, on the one hand, and Belgium, Luxembourg, France, the Federal Republic of Germany and Switzerland, on the other.

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259. Dempsey, op. cit., Ch. I fn. 121 at 103.

260. UK-Netherlands Agreed Record of Discussions, Dept. of Transport, London.

261. AWST, Nov. 12, 1984 at 71.

262. Tegelberg Aberson, op. cit., Intro. fn. 1 at 286. For an analysis of the Agreement see H.A. Wassenbergh, "Regulatory Reform - A Challenge to Intergovernmental Civil Aviation Conferences", (1986) 11 Air L., p. 31.

263. Tegelberg Aberson, ibid. at 286.

In the UK-Luxembourg Agreement of March 1985[264] fares may be rejected only by the agreement of both governments, although the country of origin may unilaterally reject a fare which it considers predatory or excessive in relation to costs.[265] The Agreement further liberalizes route access and capacity control.[266] This agreement went even further, giving carriers between the two countries an almost unlimited opportunity to offer additional capacity and discount fares.[267] Any certified airline may fly to any point in either country and thereafter either to a second point within the country or onto a third country.[268] Schedules and capacity are not controlled; fares are controlled by the country of origin.[269]

The UK-France Agreement, concluded in September 1985,[270] is the most restrictive agreement concluded by the United Kingdom[271] because the French government is strongly opposed to liberalization. This agreement contains a capacity-sharing formula of 45-55 per cent applying to

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264. UK-Luxembourg Agreed Record of Discussions, Dept. of Transport, London.

265. S. Wheatcroft and G. Lipman, Air Transport in a Competitive European Market, London, The Economist Intelligence Unit, 1986, p. 66; Dempsey, op. cit., Ch. I fn. 183 at 213.

266. This is the type of agreement the UK would like to see instituted throughout the EEC, AWST, Dec. 2, 1985, p. 36.

267. AWST, Nov. 12, 1984 at 65, 66.

268. AWST, op. cit., Ch. I fn. 266.

269. Id.

270. UK-France Confidential Memorandum of Understanding, Dept. of Transport, London.

271. Dempsey, op. cit., Ch. I fn. 183 at 632.

services between London and Paris.[272] The UK-Belgium Agreement of October 1985[273] incorporated the most liberal provisions of the United Kingdom agreements with Luxembourg and the Netherlands.[274]

While the results of the UK initiatives are not very impressive, due to the resistance of other governments, they did create a more liberalized climate. It also should be noted that the UK efforts were supplemented by efforts of individual airlines. For example, British Caledonian decided to withdraw from participation in the political committee of AEA, after the organization refused to agree to liberalization measures.[275]

b. The Single European Act

The Single European Act (SEA)[276] is a Treaty that grew out of efforts initiated by the European Council after its members realized that they had to make the EEC work efficiently. The first draft of the Treaty was presented in February 1984[277] in response to the European Council's Solemn Declaration at Stuttgart on June 19, 1983.[278] The Act was signed by representatives of the 12 Member States on February 4, 1986, and took effect on July 1, 1987 following ratification by all the Member

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272. Wassenbergh, op. cit., Ch. I fn. 262.

273. UK-Belgium Agreed Record of Discussions, Dept. of Transport, London.

274. Dempsey, op. cit., Ch. I fn. 183 at 632.

275. AWST, June 24, 1985 at 36; Dempsey, ibid., at 636.

276. S.E.A., op. cit., Intro., fn. 29.

277. Dempsey, op. cit., Ch. I fn. 183 at 675.

278. S.E.A., op. cit., Intro., fn. 29, see Preamble.

States.[279]

The objectives of the Single Act[280] are simultaneously to establish the internal market by 1992,[281] achieve greater economic and social cohesion,[282] set up a European research and technology policy,[283] strengthen the European monetary system and policy co-operation,[284] lay the foundations for a European social area[285] and ensure significant action in the environmental field.[286] To achieve these objectives, the SEA improves the decision-making process in the Community by setting up a consultation procedure that associates the Parliament with the legislative process,[287] by strengthening the Commission's executive powers[288] and by extending the use of the qualified majority vote.[289]

The attainment of an internal market, the most important objective of the Act, requires not only institutional modifications but also removal of trade barriers and merging of the Members into a single economic area extended

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279. Ibid., Article 33(2).

280. See Bull. of the European Com. Sup. 1/87. The Single Act; A New Frontier Program of the Commission for 1987, Strasbourg, 18 Feb. 1987 at 7.

281. S.E.A., op. cit., Intro. fn. 29, Arts. 13 to 19.

282. Ibid., Art. 23.

283. Ibid., Art. 24.

284. Ibid., Art. 20.

285. Ibid., Arts. 21-22.

286. Ibid., Art. 25.

287. Ibid., Art. 7.

288. Ibid., Art. 10.

289. Ibid., Art. 16.

to include freedom of movement of workers, the right of establishment, the free movement of services and capital and a common transport policy.[290] Inclusion of a common transport policy is absolutely necessary. Complete freedom of movement of goods and persons cannot make complete economic sense unless a transport policy makes substantial progress toward a genuinely competitive system which would enable unit costs to be reduced significantly, so that travel within Europe becomes easier. Consequently, adoption of an effective transport policy for Europe became indispensable for the completion of the internal market.[291]

In June 1985 the Commission released its "White Paper"[292] as a major proposal for progress toward an internal market and reaffirmed both the importance of a common transport policy and the need to liberalize European air transport. In that way the SEA forced the Council to reach an agreement, while at the same time it removed the requirement of unanimity, a major barrier to the adoption of the liberalization measures. This requirement was replaced by another providing for action by a qualified majority, unless the proposed change would "have a serious effect on the standard of living and on employment areas and on the operation of transport facilities".[293] Therefore, adop-

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290. Creation of internal market, 1 Com. Mkt. Rep (CCH)/202.07 (1978).

291. P. Sutherland, "Liberalized Airspace in 1992 - One Small Step for Europe", Sydney, 12 October 1988 at 2; P. Sutherland, "European Air Transport Liberalization", Seminar sponsored by AEROPA and Air Europe Brussels", 20 April 1988 at 2.

292. Completion of the Internal Market sought by 1992, 4 Comm. Mkt. Rep. (CCH)/10,693 (1985) at 29.

293. Wood, op. cit., Ch. I fn. 147 at 269.

tion of a decision was made much easier.[294]

The importance of the SEA should not be overestimated, however. The SEA has a limited legal impact because it only manifests the political willingness of the Member States to adopt, before January 1, 1983, all the decisions necessary to achieve an internal market.[295]

4. Action Taken After 1986

After 1986, the Commission decided to exercise its powers and force the Council to adopt the measures which would be an important step toward the integration process.

a. Action Against the European Carriers

After the 1986 preliminary ruling in Nouvelles Frontières the EEC Transport Ministers convened on June 30, 1986. Since they could not agree even on modest changes to established practices, the Commission was forced to resort to its powers under the EEC Treaty as interpreted by the Court.[296] The Commission notified the Council that, in absence of satisfactory progress toward adoption of a procedural regulation for application of the competition rules to air transport, it would exercise its powers under Article

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294. See G. Guillaume, "Les Incidences de la Réalisation du Marché Unique des Transports Aériens sur les Compétences Extérieures des Communautés Européennes", (1987) 164 RFDA, No. 4, p. 488 at 492.

295. Guillaume, op. cit., Ch. I fn. 30 at 74.

296. See S. Clinton Davis', EEC Commissioner's for transport and consumer protection views in AWST, Sept. 23, 1985; G. Reiner, "Vision or Friction? An Intra-European Air Transport Market", (1986) 35 ZLW. pp. 183-192 at 187.

89.[297] What the Commission was actually trying to do was pressure the Council into reaching an agreement.[298]

The Commission initiated its action in July 1986, when it sent Article 89 letters to ten airlines,[299] stating restrictive practices undertaken by them, which constituted, in the Commission's view, an infringement of the Treaty's competition rules.[300] Seven airlines agreed to modify their agreements.[301] While three airlines (Lufthansa, Alitalia and Olympic Airways) did not. Consequently, the Commission recorded the infringements of the three carriers and declared these agreements and practices to be in contravention of the competition rules.[302] The Commission also required these airlines to end their infringements, but did not notify these airlines of its decision, in order to give them a last opportunity.[303] In July 1987 the Commission reinforced its action by notifying the three carriers that, until the Council finally

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297. Wood, op. cit., Ch. I fn. 147 at 270.

298. 52 Antitrust and Trade Regulation Report, 1-15-87, p. 94.

299. Sabena-KLM-Lufthansa-O.A.-A.F.-Aerlingus-Alitalia-SAS-B.A.-B.CAL.

300. Air et Cosmos, No. 1105 at 36; Dempsey, op. cit., Ch. I fn. 183 at 668-669; Close, op. cit., Ch. I, fn. 174 at 65-67; Commission of the EC Press Release IP. (87) 115 Brussels, 18 March 1987.

301. 52 Antitrust and Trade Regulation Report, 4-2-87 at 655.

302. Com. of the EC Press Release, op. cit., Ch. I fn. 300, IP(27) 343, 31 July 1987; Tegelberg Aberson, op. cit., Intro. fn. 1 at 291.

303. Id.

adopted the package of measures proposed by the Commission, it felt obliged to pursue its Article 89 proceedings. The airlines had until September 1987, to conform to the Commission's requirements,[304] which they did.[305]

In a separate case, London European Airways (LEA), a British carrier offering low rates on the UK-Belgium route, was denied access to the CRS of SABENA.[306] On April 22, 1987, LEA filed a complaint with the Commission for abuse by SABENA of a dominant position.[307] The Commission found such an abuse to be in violation of Article 86 and forced SABENA to grant the British carrier access to its reservations system.[308]

b. Adoption of the "Package" of Measures in December 1987

From January 1 until July 1, 1986, the Dutch and British governments chaired the Council. Even though these two governments were among the strong supporters of liberalization, no changes to transport policy were made.[309] The Commission's proposals of 1984, were discussed repeated-

304. Wood, op. cit., Ch. I fn. 147 at 270. The Commission also extended its action by initiating proceedings against three more airlines, Iberia-Luxair and TAP, IP(87) 343, op. cit. fn. 302.

305. 52 Antitrust and Trade Regulation Report, 5-14-87, p. 913.

306. W. Rycken, "European Antitrust Aspects of Maritime and Air Transport Law", (1987) 22 Europ. Transport L., No. 5, pp. 484-499, Vol. 23, No. 1, 1988, pp. 3-25 at 9.

307. Id.

308. Id.

309. Tegelberg Aberson, op. cit., Intro fn. 1 at 287.

ly in the Air Transport Working Party of the Council, and were modified slightly in June 1986 in order to introduce more flexibility. A gradual liberalization was provisioned after a first stage of four years.[310] Six months of Council debate resulted in a vague commitment on June 30, 1986.[311] Contrary to prior practice, those nations opposed to the conclusion of an agreement were liberal nations such as the United Kingdom, the Netherlands and Ireland.[312] These nations blocked the liberalization proposal because it did not go far enough.[313] The Council meeting of December 1986 also failed to reach an agreement.[314]

After a long internal debate in the Council, the draft regulation on air transport was tabled in June 1987. The entire package was accepted in principle by all Member States, since they realized the importance of the adoption of the regulations. They also wanted to put an end to the Commission's action against European airlines. However, adoption of the package was vetoed by Spain, merely a few hours before the Single European Act entered into force and replaced the principle of unanimity by a qualified majority vote. The veto was in response to an issue with virtually no relation to air transport. This issue was related to the disagreement between Great Britain and Spain concerning

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310. G. Guillaume, "L'arrêt de la CJCE du 30 avril 1986 sur le transport aérien et ses suites", (1987) 161 RFDA, No. 1, pp. 13-21 at 18.

311. Tegelberg Aberson, op. cit., Intro. fn. 1 at 287; Dagtoglou, op. cit., Ch. I fn. 30 at 131.

312. AWST, Feb. 12, 1986, p. 38; AWST, July 7, 1986, p. 33.

313. Id.

314. Dagtoglou, op. cit., Ch. I fn. 30 at 132.

sovereignty over Gibraltar.[315] Spain continued to contest British sovereignty over Gibraltar and used its Council veto power to re-assert its position.[316] Finally Great Britain and Spain concluded an agreement on December 2, 1987, which resolved the situation.[317] However, even if the two countries could not have reached an agreement, the ability of the Council to reach a majority decision was facilitated by the weighted voting of Member States permitted by the Single Act. Consequently, no single nation could again unilaterally threaten the Council's legislative ability.

In December 1987 a spirit of compromise[318] produced a package of measures based largely on proposals made earlier by the Commission. The Council adopted a regulation on the application of the Rome Treaty's competition rules to scheduled air transport[319] and group exemp-

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315. Dempsey, op. cit., Ch. I fn. 183 at 672; Rycken, op. cit., Ch. I fn. 306.

316. Id.

317. Europe, Dec. 4, 1987, No. 4673 (new series) at 10; Europe, Dec. 9, 1987, NO. 4677 (new series); The agreement does not affect the respective legal position of the two countries concerning the sovereignty issue but it only refers to the dispute concernign use by both countries of the Gibraltar airport.

318. The Air Transport Commission of the ICC send a letter to the Council of Ministers asking for the adoption of the package even if more advanced liberalization was needed, (1988) 165 RFDA, No. 1, pp. 102-103.

319. Council Regulation on the Application of the Competition Rules No. 3975/87 of Dec. 14, 1987, O.J. Eur. Com. L374/1 of Dec. 31, 1987.

tions thereto;[320] a directive on air fares;[321] and a decision on capacity sharing and market access.[322]

Adoption of the package, which will be treated in the second chapter, was facilitated by several factors: (1) the political problem between Spain and Great Britain was resolved; (2) the Single Act facilitated the adoption of measures without the need of a unanimous decision; (3) Member States wanted to put an end to the Commission's threats; (4) new bilaterals, concluded between the Member States, had created a more liberal environment; (5) the aviation industry had to reorganize itself due to strong competition from charters and railways; and (6) the European States started to realize that a US-style deregulation also had its disadvantages.

5. The European Civil Aviation Conference

Europe comprises more than the 12 EEC Member States. Even before creation of the EEC, the idea of European integration in the field of European aviation had already developed in another direction. In 1955, ECAC was

320. Council Regulation on the Application of Article 85(3) of the Rome Treaty No. 3976/87 of Dec. 14, 1987, O.J. Eur. Com., L374/9 of Dec. 31, 1987.

321. Council Directive on Scheduled Air Fares of Dec. 14, 1987, 87/601 EC, O.J. Eur. Com., L374/1 of Dec. 31, 1987.

322. Council Decision on Capacity Sharing and Market Access of Dec. 14, 1987, O.J. Eur. Com., L374/19 of Dec. 31, 1987.

created.[323] ECAC addresses the same issues as the EEC, but for the rules on competition. Measures adopted by ECAC relate to intra-European air transport and to external relations of Europe, particularly in the relations of its Member States with the United States.

a. Intra-European Developments

ECAC is an intergovernmental organization with 22 Member States.[324] It harmonizes the air transport policies of its Member States in order to promote the co-ordination, better utilization and orderly development of European air transport, through recommendations and resolutions, in the economic, technical and security fields.

ECAC's Constitution[325] provides in its Article 1(3) that ECAC can engage in consultations and that its resolutions and recommendations depend on the Member States' governments' approval.[326] Consequently, all measures adopted by ECAC are not legally binding on its Member States. Therefore, unlike the EEC, ECAC cannot be consider-

323. On the creation of ECAC see Matte, op. cit., Intro. fn. 5 at 267-269; see also Stage, op. cit., Ch. I, fn. 115; Naveau, op. cit., Intro. fn. 2 at 101-163; Weber, op. cit., Intro. fn 26, at 54-67.

324. Austria, Belgium, Cyprus, Denmark, Finland, France, Great Britain, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, Yugoslavia.

325. The Constitution of ECAC was modified in 1968; see the ECAC Constitution of 1968, ECAC Information Paper No. 13, October 1969.

326. See L. Weber, "Les éléments de la coopération dans le cadre de la CEAC", (1977) RFDA at 396.

ed a supranational organization. Nevertheless, all measures adopted by ECAC are considered by its Member States and are often implemented as regulations.[327]

Due to ECAC initiatives, the two first multilateral agreements on European co-operation and harmonization of aeronautical policies were concluded. The first agreement was the Multilateral Agreement on Non-Scheduled Services of April 30, 1956,[328] which liberalized the non-scheduled part of the aviation industry. Today, chartered carriers account for more than 50 per cent of Europe's passenger air transport with minimal regulation due mainly to the liberal interpretation and application given to the Agreement by ECAC Member States.[329]

The second agreement was the Paris Agreement of July 10, 1967,[330] which is a noteworthy example of regional regulation overruling bilateralism. The Agreement was not innovative in the sense of creating new methods for the establishment of tariffs for scheduled international air transport, nor did it provide for the mutual exchange of commercial rights. Rather, its importance lies in the fact that by 1967 this Agreement was the only multilateral agree-

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327. Dempsey, op. cit., Ch. I fn. 183 at 625.

328. Multilateral Agreement on the Commercial Rights of Non-Scheduled Air Services in Europe, ICAO Doc. 7695; see Matte, op. cit. Intro. fn. 5 at 270-271.

329. Haanappel, op. cit., Ch. I fn. 106 at 19-21, 126, 127.

330. International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services, (entered into force in May 30, 1968) ICAO Doc. 8681 (hereinafter the Paris Agreement).

ment ever reached on the subject of price-fixing.[331]

An interesting provision of the Agreement is that it was open for signature and ratification not only by ECAC Member States,[332] but also, after entry into force, by non-ECAC States who are members of the U.N. or one of its specialized agencies.[333] The Agreement adopted a simple procedure based on a double approval clause,[334] and was firmly committed to IATA ratemaking for scheduled international air transport.[335] The Paris Agreement replaced all the tariff clauses on scheduled services in bilaterals concluded between the Member States.[336]

Another multilateral agreement achieved by the ECAC, prior to the Paris Agreement, was the Multilateral Agreement Relating to Certificates of Airworthiness for Imported Aircraft, signed at Paris in 1960.[337] The Agreement provides for mutual recognition of airworthiness certificates, but does not cover imported aircraft, which are to be registered in the importing State. ECAC also had recommended actions on the question of searching passengers and their luggage and on the organization of security in

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331. See Haanappel, op. cit., Ch. I fn. 106 at 21-22; see also Naveau, op. cit., Intro. fn. 2 at 169-71; M.G. Folliot, "Une étape vers un modèle européen de réglementation de la concurrence dans l'aviation commerciale", (1987) 162 RFDA, No. 2 at 92.

332. Paris Agreement, op. cit., Ch. I fn. 330, Articles 5-6.

333. Ibid., Art. 8.

334. Ibid., Art. 2(4).

335. Ibid., Art. 2(3).

336. Ibid., Art. 1(b).

337. ICAO Doc. 8056, April 22, 1960 (entered into force August 24, 1961).

airports in order to avoid acts of terrorism involving aircraft or passengers.[338]

In 1980, under ECAC auspices, a Task Force on Competition in Intra-European Services prepared a report entitled "Competition in Intra-European Air Services" (COMPAS Report), in which a list of policy objectives for promoting competition was set out.[339] The COMPAS Report was adopted by ECAC in June 1982.[340] It was decided to publish the Report as an ECAC document, subject to inclusion of a notice pointing out that the Report had been prepared by a task force of experts and did not necessarily represent ECAC policy.[341] The Report particularly explored the possibility of zones of flexibility for route entry, tariffs and capacity,[342] and gave rise to a recommendation which suggested that regional or bilateral considerations be given to implementation of a zone system in Europe.[343]

In June 1985,[344] ECAC adopted a joint policy statement on intra-European air transport, which defined the ECAC goal as achieving "coordinated orderly development of

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338. ECAC Doc. No. 15, July 1978.

339. For the contents of the Report see Thaine, op.cit., Ch. I, fn. 109 at 92; Folliot, op. cit. Ch. I, fn. 331 at 92-95.

340. Id.

341. 11 IATA Regulatory Affairs Review, No. 2, Aug. 1982, pp. 113-114.

342. B. Peguillan, "Competition in Intra-European Air Services", ITA Magazine Jan. 1983, at 7.

343. 11 IATA Regul. Affairs R., No. 2 at 113.

344. Tanguy, "Les atouts d'un projet CEAC", ITA Magazine, No. 30, Dec. 1985 at 3.

European air transport, while maintaining high standards of safety".[345] The 20 Member States adopting the statement agreed to keep a certain a priori control over international air transport. They also agreed to the establishment of orderly competition, since they wished to maintain bilateralism in order to ensure their influence and control over international airline activities.[346]

Adoption of this statement was facilitated by several opinions expressed in previous years on European air transport as contained in the Commission's Memoranda 1 and 2, on the ICC's Policy Statement on international aviation in June 1983, and in its response to the Commission's Memorandum No. 2 in December 3, 1984.[347]

In June 16, 1987, ECAC concluded a new Agreement on the Procedure for the Establishment of Tariffs for Intra-European Scheduled Air Services,[348] which modified the 1967 Paris Agreement. This agreement was supplemented by a second agreement dealing with capacity sharing,[349] since ECAC Member States realized that tariff flexibility could not be achieved without true capacity flexibility. These two agreements will be treated in the second chapter, together with the EEC Council's Package of 1987, due to their inter-relationship and similarities.

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345. Twenty European States agree policy on intra-European air transport, (1986) 11 Air L., at 47-53.

346. Wassenbergh, op. cit., Ch. I fn. 262 at 31-39; E. Hudson, "Themes for a 30th Anniversary", ITA Magazine, No. 25, May 1985.

347. ICC, op .cit., Ch. I fn. 190.

348. EC 9/1.8/1-396 ECAC.

349. ECAC/No. 18110.

b. ECAC-USA Memorandum of Understanding on North Atlantic Pricing

Externally, ECAC has served successfully in recent years as the instrument of European countries for discussing the mechanism of tariffs over the North Atlantic with the United States and Canada.

After deregulation of air transport in the United States, that nation tried to extend into the international arena some deregulatory elements with the objective of increasing the market share of US carriers. To this end, the CAB show Cause of Order of June 1978[350] threatened to take anti-trust immunity away from the IATA Traffic Conferences. This order was put aside in March 1982[351] to enable conclusion of the US-ECAC Memorandum of Understanding, which envisages use of the IATA ratemaking machinery on the North Atlantic.[352]

On the other side of the Atlantic, Europeans were alarmed by the chaotic situation in the North Atlantic market, where overcapacity combined with cutthroat competition[353] was forcing below-cost pricing and resulting in significant financial losses.

In late 1981 the United States and ECAC started

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350. Order 78-6-78, June 9, 1978; see Haanappel, op. cit. Ch. I fn. 156 at 158.

351. Order 82-3-17, March 12, 1982.

352. See Haanappel, op. cit., Ch. I fn 106 at 157-164; McMahon, "Air Transport Regulatory Developments", ITA Magazine, No. 23, March 1985 at 8.

353. On the results of competition on the N. Atlantic market see: 10 IATA Regul. Affaires R., No. 2 March-April 1982 at 260-270; Majid, op. cit., Ch. I fn. 82 at 311; Dempsey, op. cit., Ch. I fn 183 at 259.

negotiations to conclude an agreement which could accommodate their respective concerns. These negotiations led to the conclusion of the first MOU on North Atlantic pricing, signed on May 2, 1982 in Washington,[354] which was in force between August 1982 and February 1983.[355] A second MOU, in force between February and November 1983, was replaced by a third MOU, which was in force until November 1984.[356] On October 11, 1984[357] the United States and ECAC, despite their disagreement,[358] signed a new MOU, which in turn was replaced in February 1987,[359] when a new two-year MOU was concluded, containing even more liberal provisions than the previous ones.

According to 1(c) of the 1987 agreement, the MOU applies to scheduled transatlantic passenger services, a term that means the "public transport of passengers and their baggage on scheduled air services between the territory of the United States on the one hand and, on the other, the territory of any other Party."

The MOU demonstrates, once again, ECAC's readiness to apply new multilateral concepts while leaving the existing bilateral framework intact.[360]

The main feature of the MOU is the establishment of zones of pricing freedom, within which airlines are free to

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354. Naveau, op.cit., Intro. fn. 2, at 260.

355. Haanappel, op. cit., Ch. I fn. 65 at 46.

356. Id.

357. 13 IATA Regul. Affairs R., No. 4, Oct.-Dec. 1984 at 428.

358. 13 IATA Regul. Affairs R., No. 2, March-May 1984 at 177.

359. MOU USA-ECAC, op. cit., Intro. fn. 31.

360. Ibid., see Article 2(2), 2(3).

set tariffs for the various defined fare types.[361] These zones are established on the basis of a reference fare agreed for each city-pair. Airlines are guaranteed automatic approval for all filings lying within the established zones.[362] In case fares are filed above or below the zones, they must be considered in accordance with the applicable bilateral air services agreements.[363] Adoption of this system is the compromise found for the opposing policies[364] of the United States and ECAC Members, revealed during negotiations. Free pricing zones enable airlines to pursue innovative ideas and respond in a commercial way to market conditions. However, the regulatory authorities surrender the right to disapprove fares only within a specified range, the extent of which is settled by agreement between the same authorities.

The 1987 MOU provides for the periodic review of certain elements of the zone system, such as the reference fare level, depth of zones and conditions attached to fares. This provision ensures that the North Atlantic partners will not be bound for lengthy periods by an agreement related to an economic sector susceptible to rapid evolution.[365]

Under the new agreement, deep discount fare zones have been dropped by an average of 10 per cent; also fares can be offered with fewer restrictions than before.[366] Parties to the agreement also agreed to permit airline consultation through traffic conferences, open to all North

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361. Ibid., Article 3.

362. Ibid., Article 3(1).

363. Ibid., Article 3(2).

364. See van's Gravesande, op. cit., Intro. fn. 19 at 184.

365. Folliot, op. cit., Ch. I fn. 331 at 95.

366. AWST, Feb. 23, 1987 at 32.

Atlantic carriers whether or not they are members of IATA. While IATA Tariff Conferences are not expressly mentioned, they are included. Inclusion of this provision is the price the United States had to pay in exchange for European agreement on a flexible tariff system. It must be noted, however, that the flexibility applies mainly to the tourist market and only partially to the business one.

Conclusion of this MOU with the United States, and its subsequent renewals, inspired ECAC to adopt measures for intra-European air transport.

CHAPTER II
LIBERALIZATION: THE FIRST PHASE

The measures adopted in 1987 by ECAC and the EEC aim for a gradual liberalization of air transport in Europe. Both organizations proceeded in a similar way and decided that, given the special characteristics of Europe and the special needs of the European air transport industry, a common denominator should be established and an effort to develop it should follow.

Even if the newly established regime is only the first step in the liberalization process, it is certain that competition will increase. As a result, airlines will seek partnerships, in order to meet the challenge of a competitive environment. As well, governments will be tempted to subsidize their carriers in an effort to support them. In this respect, the competition rules of the EEC Treaty will prevent creation of an oligopoly and will ensure fair competition, even though no specific implementing measures have been adopted by the Council of Ministers of the EEC, a lacuna that might hinder the Commission in the correct application of the Treaty.

The increase in competition, and in the number of schedules and fares brings light to another important aspect, automation in the airline industry, with all its advantages and anti-trust implications. Both the EEC and ECAC are trying to ensure that the use of CRSs does not result in unfair advantages of certain airlines over others.

All of the above have a common point of departure, application of the competition rules of the EEC Treaty to air transport enterprises. There is, however, an exception to the application of these rules: the provisions of the EEC Treaty concerning public enterprises as defined by the

European Court of Justice.

SECTION 1 - THE ECAC PACKAGE

Although the Agreements of December 19, 1986 were signed by a minority of ECAC Member States,[1] they were approved by all the Member States in June 1987. The agreements on the sharing of capacity and on the procedure for establishing tariffs have certain similarities.

1. Similarities Between the ECAC Agreements

The two agreements contain identical provisions concerning their application and administrative provisions.

a. Application of the ECAC Agreements

The two texts, which achieve a good balance among the various liberalization proposals, apply to scheduled air services between the territories of ECAC Member States (Article 2 of both agreements). ECAC combined, once again, multilateralism with bilateralism since the two agreements were agreed to multilaterally, but are applied bilaterally. Member States also agreed not to conclude any arrangements more restrictively than these two agreements, but to maintain or develop more liberal relations on a bilateral basis (Article 1(2) of both agreements).

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1. The ECAC Agreement on Capacity was signed by the FRG, Denmark, Spain, France and Italy. The Agreement on fares was signed by the same States in addition to Greece and Portugal; Europe June 18, 1987, no. 4571 at 8. It is remarkable that these Agreements were not accepted by the same countries who had blocked liberalization in the EEC in June 30, 1986, supra, Ch. I, p. 80 and fn. 312; see AWST, Jan. 12, 1987 at 36.

b. Administrative Provisions

The administrative provisions of the two texts are related to the procedure adopted for the settlement of disputes which might arise over the interpretation of the agreements, to the amendments procedure, to the denouncia-tion and to reservations to the agreements.

Pursuant to Article 8 of both agreements, if a dispute over the interpretation or application of the agree-ments arises and cannot be settled through negotiations, it must be submitted to arbitration.[2] If the parties to the dispute cannot agree on the organization of the arbitration proceedings, anyone of those parties may refer the matter to the International Court of Justice.[3] This provision applies, however, without prejudice to the provision of the Tariff Agreement concerning disagreements on the approval of fares, which are to be settled according to the procedure provided for by Article 6 of the Tariff Agreement.[4]

Amendments[5] can be made after a proposal made by any party to the agreements is approved by a majority of parties attending an ECAC meeting convened for this purpose, following a decision by at least 25 per cent of ECAC Member States, the party proposing the amendment included. The

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2. ECAC Agreement on Capacity, op. cit., Ch. I, fn. 322 Art. 8 and Agreement on Tariffs, op. cit., Ch. I, fn. 321 Art. 8.

3. Ibid., in both Agreements Art. 8(2).

4. Infra Ch. II, p. 104-105; ECAC Tariff Agreement, ibid., Art. 8(1).

5. ECAC Agreement on Capcity, op. cit., fn. 322 Art. 13 and Agreement on Tariffs, ibid., Art. 13.

proposed amendment must be approved by two-thirds of the parties to the agreements and then be submitted to all parties for ratification. Such an amendment enters into force for the parties who ratified it 30 days after those parties have deposited their ratification instruments with ICAO. In the case of a proposed amendment to the zonal scheme for both fares and capacity determination, the proposal must be approved by two-thirds of the parties to the agreements and then submitted to all the parties for acceptance. Such amendments enter into force for the parties who have ratified them 30 days after those parties have notified their acceptance to ICAO.[6]

In case a party wants to denounce the agreements it must notify ICAO. A denounciation takes effect one year from the receipt of notification.[7]

Reservations cannot be made to the agreements, with the exception of a reservation to paragraph 2 of Article 8. Such a reservation may be withdrawn after notification to the ICAO.[8] Both agreements were open for signature for any ECAC Member State and were subject to ratification. The Agreement on Tariffs entered into force on June 5, 1988, and the Agreement on Capacity on July 17, 1988, the 30th day after five signatory states deposited their instruments of ratification with ICAO.

2. Agreement on the Sharing of Capacity

It is important to note that the Agreement on Capacity was concluded after ECAC Member States realized

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6. ECAC Tariff Agreement, ibid., Art. 14.

7. ECAC Agreement on Capacity, op. cit., Ch. I & fn. 322 Art. 15 and Agreement on Tariffs, ibid., Art. 15.

8. Ibid., in both Agreements Art. 16; see supra Ch. II, p. 94.

that the European companies could not be innovative in the field of air fare fixing and hence lower their fares, without increasing their capacity. In this way, air carriers could offset any profit loss.

The Capacity Agreement is based on the following principles:

1) Governmental action takes precedence over air carriers' action. While governments continue to play an important role in both the capacity and the tariff agreements, this role is reinforced in the Capacity Agreement.

The ECAC Package contains no provisions for market access, since this aspect is closely related to national sovereignty. It was therefore decided to resolve this aspect nationally. Consequently, governments designate their flag carriers on each route. These carriers must submit their capacity proposals for the following season to the aeronautical authorities of concerned States, 60 days in advance of the commencement of each season.[9] Forty-five days before the commencement of each season, governments calculate capacity by adding up the capacity proposed by their designated carriers, and try to reach agreement with the other party's government, which has proceeded in the same way, on total capacity for the route.[10] The calculated total capacity is used as a reference for the calculation of the "zone of flexibility".

2) The Capacity Agreement creates a liberalized regime for capacity proposals falling within the "zone of flexibility" and maintains regulations for proposals falling outside this zone.

Each party can set its capacity at between 45 and 55 per cent of total capacity on the route, in contrast to

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9. ECAC Agreement on Capacity, ibid., Art. 4(1).

10. Ibid., Art. 4(2).

the previous scheme of sharing it on a 50-50 basis.[11] The margin of 10 per cent might seem low; but, considering the volume of traffic in question, it is quite a significant beginning, in terms of traffic and revenue;[12] it allows the airlines to compete; and it avoids the possibility of over-capacity if each party should propose maximum capacity, since total route capacity would be only 10 per cent above the reference level.

If the proposed capacity falls outside the zone of flexibility, the traditional system of establishing capacity between the parties will apply.[13] It should be noted, however, that the text contains no provisions on how governments will determine the reference capacity if they are unable to reach an agreement. This problem becomes more acute, given that the reference capacity has to be established "without prejudice to bilateral or multilateral provisions governing the determination of capacity".[14] In other words, governments will not reach an agreement in every bilateral situation unless they really want to.[15]

3) The new system for capacity determination opts for progressive liberalization according to a reviewing system. The zonal scheme is established for a period of

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11. Id., Annex para. 3.

12. See M.G. Folliot, op. cit., Ch. I, fn. 331 at 101.

13. ECAC Agreement on Capacity, op. cit., Ch. I, fn. 322, Art. 4(4), 4(5).

14. Ibid., Art. 4(2).

15. See Folliot, op. cit., Ch. I, fn. 331 at 101; Tanguay, "A European Aviation Project", ITA Magazine, No. 46 - Nov.-Dec. 1987, p. 15 at 17.

three years[16] and contains two tiers, the first one lasting two years,[17] and the second, one year. Eighteen months after entry into force of the Capacity Agreement, a review will be carried out with the object of achieving more flexibility than that obtained during the first tier period.[18] The review will be subject to Article 14 of the Agreement, which provides that amendments can be made on a multilateral basis only and with a two-thirds majority of Member States. If no agreement on more liberal provisions can be reached, and one party has reached the maximum capacity share of 55 per cent by the end of the first tier, that party will be entitled to an automatic increase of 5 per cent on the 55 per cent capacity share.[19] The aim of these provisions is to allow a gradual flexibility in order to enable air carriers to compete and to find more resources.

It is important to note that EEC Member States have attached to the Capacity Agreement a statement to the effect that they cannot be deemed to override community rules concerning relations between them. Consequently, the more liberal regime adopted in December 1987 by the EEC supersedes the obligations that the EEC Member States undertook when signing the ECAC Agreement. It would seem unlikely, however, that this statement was made in relation to the provisions concerning the establishment of greater flexibility, since the Agreement provides that conclusion of more liberal agreements is permitted. Therefore, it would

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16. ECAC Agreement on Capacity, op. cit., Ch. I, fn. 322, Annex para. 1.

17. Ibid., para. 2.

18. Ibid., para. 4.

19. Ibid., para. 5.

be more logical to conclude that this statement refers mainly to the administrative provisions and to the special powers of the EEC Commission.

3. Agreement on the Procedure for Establishment of Tariffs

The Tariff Agreement applies to tariffs charged on scheduled services between ECAC Member States, for the transport of passengers, baggage or cargo. It replaces all previous tariff[20] and settlement of dispute provisions in all existing bilaterals between two parties to the Agreement, if those provisions are inconsistent with the Tariff Agreement.[21]

The Tariff Agreement is based on several principles:

1) The Agreement gives carriers some autonomy, with governments having less control than in the case of capacity determination; 2) the Agreement opts for a liberalized regime within the "zone of flexibility" and for the maintenance of regulations outside them; 3) the Agreement adopts the principle of obligatory filing of tariffs with governments, whether or not approval is required and irrespective of the form of approval; and 4) the Agreement creates a system of progressive liberalization as in the case of capacity determination.

A dual-pricing regime is established, based on two "zones of flexibility", the discount and the deep discount

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20. As the 1967 Paris Agreement, op. cit., Ch. I, fn. 330; see AWST, Feb. 17, 1986 at 38, June 17, 1985 at 28.

21. ECAC Agreement on Tariffs, op. cit., Ch. I, fn. 321, Art. 1(b)(c).

zone;[22] both of which are defined by precise criteria. The reference price for the definition of the two zones is the economy class round-trip fare in force on each route when the Tariff Agreement entered into force. If more than one such fare exists for a city pair, the average level is to be used, unless otherwise agreed to by the concerned parties. If there is no normal economy fare, the lowest fully flexible fare is used.[23] While reference prices are adjusted by the authorities to reflect percentage changes in the economy fare, they also can be adjusted by mutual agreement between the two parties.[24] The discount zone extends from 90 per cent to 65 per cent of the reference price; the deep discount zone extends from 65 to 45 per cent of the reference price.[25]

Certain conditions attach to fares in order for them to qualify for the two zones. A fare qualifies for the discount zone if all of the following conditions are met.[26]

a) round or circle trip travel;
b) minimum stay of not less than the "Sunday Rule" or six days; and
c) maximum stay of not more than six months.

To qualify for the deep discount zone all of the above conditions must be met, as well as at least one of the following:[27]

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22. Ibid., Annex para. 2.

23. Ibid., para. 7.

24. Ibid., para. 8.

25. Ibid., para. 9.

26. Ibid., para. 3.

27. Ibid., para. 4.

a) reservation for the entire trip, ticketing and payment to be made at the same time; cancellation or change of reservation only permissible prior to departure of outbound travel and at a fee of at least 20 per cent of the price of the ticket;

b) mandatory advance purchase period of not less than 14 days; reservation, ticketing, payment and cancellation or change of reservation being subject to the same conditions as in (a);

c) purchase of the ticket permitted only on the day prior to departure of outbound travel; reservations to be made separately for both the outbound and inbound journeys and only in the country of departure on the day prior to travel on the respective journey;

d) limitation of eligibility to youths up to and including 25 years, senior citizens aged 60 years and over, or both; and

e) availability to be confined to off-peak periods of the day or week and, in addition, limited as to capacity to be offered. These timing and capacity restrictions are subject to agreement between the parties concerned and, where agreed, shall subsequently be clearly indicated in the tariff and in all offers to the public.

Carriers can, however, attach additional conditions to the fare as sold for carriage on their own services.[28] These conditions, which must be attached to fares in order for them to qualify as falling within the two zones, limit the fares to those related to holiday traffic and only a small part of business travel, since passengers have to know in advance their exact date of departure and return, and the minimum stay is quite long.

The Tariff Agreement also provides for additional flexibility if a fare, which is approved under the bilateral

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28. Ibid., para. 5.

tariff approval regime and which qualifies for the deep discount zone as far as the above conditions are concerned, is below the floor of that zone. The additional flexibility extends from 10 per cent below the bilaterally approved level of that fare to the ceiling of the deep discount zone.[29]

Both fares falling within the two zones and fares falling outside them must be filed for approval of the aeronautical authorities of the parties concerned and in such a form as those authorities require.[30] The filing period is shorter for fares falling within the zones. Fares falling outside the zones must be filed at least 60 days prior to the proposed date of their entry into force.[31] The filing period for fares falling within the zones and fares for which additional flexibility is granted, under Article 10 of the Annex, is 21 days.[32] In both cases, the aeronautical authorities concerned may agree on a shorter filing period; however, under no circumstances can they require a longer one.[33] Inter-airline consultations for the filing and establishment of tariffs are neither prohibited nor mandatory.[34]

Fares falling outside the zones must be approved by the aeronautical authorities of either party. This approval need not be given expressly since such a fare is considered as approved unless the aeronautical authorities of that party have served written notice of disapproval not more

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29. Ibid., para. 10.

30. Ibid., Art. 4(1)(2).

31. Ibid., Art. 4(1).

32. Ibid., Art. 4(2).

33. Ibid., Art. 4(1)(2).

34. Ibid., Art. 3(2).

than 30 days after the date of filing on both the authority of the other party and the airlines concerned.[35]

Fares falling within the two zones and fares which qualify for additional flexibility are automatically approved.[36] If the aeronautical authorities decide that the filed fare does not fulfill the necessary requirements for falling within the zones, they must notify the applicant airline to that effect within 14 days of the filing date.[37]

Approved fares cannot be withdrawn before their expiry date, as fixed by the aeronautical authorities, unless these authorities approve the withdrawal. The expiry date may be extended by mutual agreement between the authorities of the States concerned. In this way, governments can unilaterally prevent action, but must agree before they take action.[38]

While the zonal scheme adopted by ECAC is a new feature of European air transport, it is not the only one. Another novelty concerns the concept of price leadership, according to which an airline may file new fares that are more attractive to the users. This possibility is accorded only to third and fourth freedom carriers. However, once such fares are filed, they may be matched by all the other carriers operating on the same route.[39]

A third novelty in the procedure for the establish-

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35. Ibid., Art. 5(1).

36. Ibid., Art. 5(2).

37. Id.

38. See Tanguay, op. cit., Ch. II, fn. 5 at 18; Folliot, op. cit., Ch. I, fn. 331 at 103.

39. ECAC Agreement on Tariffs, op. cit., Ch. I, fn. 321, Art. 5(3).

ment of fares is the incorporation of a relatively quick arbitration process to resolve tariff disputes. This process cannot last more than 81 days. If a party disapproves a tariff falling outside the zones or does not automatically approve a tariff thought to fall within the zones, and if the other party approves such a tariff, a consultation procedure must be followed. This process must be instituted at the request of the approving party, in no more than 30 days from the date of request.[40]

If no agreement is reached through consultation, the matter must be put to arbitration at the request of either party.[41] The arbitration panel is composed of three arbitrators, who are appointed according to Article 6(3). Its decisions are based on a majority of votes. The Agreement also provides for the Parties to the dispute to chose a single arbitrator; if the parties fail to appoint the arbitrators within 14 days from the date of receipt of the request of arbitration, the President of ECAC completes the panel within seven days of receiving of such a request from either party, unless the President is a national of a Member State Party to the dispute. In this case, this function will be assumed by the most senior vice-president of the Conference, provided he is a national of a Member State not party to the dispute.[42] The decision of the arbitration panel, which must be made within 30 days from the completion of the panel, is final and binding on both parties.[43] It must be noted that, according to Article 6(8), arbitration of tariffs falling with the zones must be confined to application of the zonal scheme as specified in

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40. Ibid., Art. 6(1).

41. Ibid., Art. 6(2).

42. Ibid., Art. 6(4).

43. Ibid., Art. 6(5).

the Annex to the Agreement.

As with the Capacity Agreement, the Tariff Agreement opts for a progressive liberalization. According to Article 11 of the Annex of the Tariff Agreement, the zonal scheme is established for a trial period of three years, from the date of entry into force of the Agreement. Two years after this date, the Member States may make proposals for amendments according to the same amendment procedure found in the Capacity Agreement. Before the end of the third year, the Parties to the Agreement must decide whether the scheme will be continued. This provision is not clear, however. Does it enable adoption by Member States of a more restrictive zonal scheme so as to limit the number of tariffs for which approval is automatic under the present regime? In light of Article 1(2), the answer would seem to be negative. It is possible, however, for ECAC Member States to amend Article 1(2), according to the amending provisions of the Agreement.

Furthermore, it is important to note that, according to Article 1 of the Annex, the Parties can agree bilaterally to exclude certain routes from the scope of the zonal scheme. The Annex does not specify, however, the type of routes and under what conditions Member States can invoke this provision.

These two texts slightly relaxed the tight regulation of air transport. The governments' role still remains important, while air carriers enjoy a quite limited freedom, especially insofar as capacity is concerned, where enforcement of the system depends on governments (Article 7). ECAC managed, nevertheless, to provide Europe with a regulatory framework which allows for the coexistence and simultaneous application of regional and national rules without threatening national sovereignty, the identity of carriers or their financial stability. The objective of gradual liberalization demonstrates the awareness by ECAC that, in such a

sensitive area as the international aviation system, it was preferable to establish a minimal common denominator and try to develop it in the years to come.

SECTION II - THE EEC PACKAGE OF DECEMBER 1987

The EEC went further than ECAC in adopting similar regulations. The EEC tried to include rules in order to facilitate access to the market and proved to be more flexible with respect to tariffs and capacity. The Council also adopted regulations implementing the competition rules of the EEC Treaty because those rules apply to relations between the EEC Member States, but not to relations between those ECAC Member States which are not members of the EEC. Finally, the geographical scope of the EEC provision applies to a more restricted area than the ECAC agreement.

1. Application of the Competition Rules of the EEC Treaty to Intra-European International Air Transport Services

The EEC Council of Ministers adopted two regulations concerning the implementation of Articles 85 and 86 of the EEC Treaty.

a. Main Features of Articles 85 and 86

The authors of the EEC Treaty intended to "guarantee a steady expansion, a balanced trade and fair competition",[44] and entrusted to the Community "establishment of a system ensuring that competition shall not be distorted in

44. Preamble of the Rome Treaty, op. cit., Intro., fn. 25.

the Common Market".[45]

The European competition policy is not restricted merely to assuring free operation of market forces. It must also ensure economic justice among operators in the Community Market: (1) the EEC Treaty provides for interventions in certain sectors of the economy;[46] and (2) the Commission of the European Communities has the power to grant exemptions from the ban on restrictive practices.

The EEC competition policy, which is integral part of the overall economic and political structure of the Community,[47] has the purpose of controlling, in the public interest, the actual or potential market power of business firms. This power may arise either from the dominant market position of a single firm or from agreements between several firms, which have the effect of reducing or eliminating competition.

The EEC competition rules prohibit in principle any measures which prevent, restrict or distort supply or demand.[48] Agreements and concerted practices by firms which restrict competition are therefore incompatible with the Common Market, as are State aid,[49] conduct by mono-

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45. Ibid., Art. 3(f).

46. Ibid., Art. 53 to 64 and 67 ff. (right of establishment, free movement of services and capital), 38 ff (agriculture), 74 ff (transport).

47. See R. Merkin and K. Williams, Competition Law, Antitrust Policy in the U.K. and the EEC, London, Sweet and Maxwell, 1984, p. 12.

48. On the meaning of the prevention, distortion or restriction of competition, see ibid. at 57-59.

49. Rome Treaty, op. cit., Intro., fn. 25, Art. 92(1).

polies of a commercial character[50] and public enterprises inconsistent with fair competition.[51] The Treaty allows derogations only under certain precisely defined conditions.

Furthermore, according to ECJ judgments and the very wording of Article 85 itself, the competition rules take precedence over national law[52] and have the force of directly applicable constitutional law.[53]

Article 85(1) covers both agreements between competitors and agreements between companies operating at different levels in the economic process. The rules safeguard not only competition which could take place between the firms parties to an agreement, but also competition between the firms and third parties, and among third parties themselves.[54] Agreements between firms belonging to the same group are not caught by this prohibition, since such agreements are considered as matters of internal allocation of tasks.[55] Nevertheless according to the ECJ Article 86

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50. Ibid., Art. 37.

51. Ibid., Art. 90.

52. ECJ Case 26/62, op. cit., Ch. I, fn. 24, p. 1; Case 6/64, op. cit., Ch. I, fn. 23 at 585.

53. Supra, Ch. I, fn. 244; see J.M.H. Faull and J.H.H. Weiler, "Conflicts of Resolution in European Competition Law", (1978) 3 Europ. L.R., p. 116 at 120-126.

54. W.C. Schlieder, "European Competition Policy", (1981-82) 50 Antitrust L.J., p. 647 at 656.

55. ECJ Case 15/74, Centrafarm v. Sterling Drug Inc. (1974), 2 ECR, p. 1147, Ground 41; see D. Vaughan, (ed.) Law of the European Communities, London, Butterworths, 1986, Vol. 2, at 878.

may apply in such a situation.[56]

The prohibition of Article 85(1) applies only to agreements which "are likely to affect trade between the Member States". This provision does not preclude its application in cases where the head offices of all firms taking part in an agreement are located in one Member States.[57]

Article 85(2) provides that any agreement or decision contrary to Article 85(1) is automatically null and void. The third paragraph of this article provides for exemptions to the general principle of the first two paragraphs.

Article 86 is breached if the dominance of a firm results in effects which contravene the objective of an undistorted system of competition. The Article 86 prohibition is quite strict, since unlike Article 85, it contains no exemptions.

The ECJ has ruled that "the dominant position ... relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[58] The test for dominance includes structure of the relevant market, and market share of the firm concerned, its financial resources, degree of vertical integration, advance over competitors in relation to technology or distribution, and barriers to market access for new competi-

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56. See infra Ch. III, p. 206-211.

57. Ibid., Ground 39.

58. ECJ Case 27/76, United Brands Co. v. Commission, (1978) 1 ECR, p. 207, Ground 65.

tors.[59] Existence of a dominant position can be established only for a relevant market covering those goods or services which are considered by consumers to be similar by reason of their characteristics, price or use.[60] The fact however that a dominant position exists is not sufficient for Article 86 to be applied. An abuse of the dominant position is a necessary ingredient of the Article 86 prohibition.

As far as the behaviour of such a firm is concerned, the Court ruled that Article 86 relates

> to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of normal operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[61]

It must be noted that, although articles 85 and 86 are directed to undertakings, Member States may not enact measures enabling private undertakings to escape from the constraints imposed by those articles,[62] and, consequently, should not impose or favour the conclusion of agree-

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59. Ibid., Ground 66.

60. ECJ Case 6/72, Europemballage Corp. v. Commission, (1973) 1 ECR, p. 215.

61. ECJ Case 85/76, Hoffman-Laroche and Co. A.G. v. Commission, (1978) 1 ECR, p. 1139, Ground 91.

62. ECJ Case 13/77, Tobacco Products, (1977) 2 ECR, p. 2115, Ground 31.

ments contrary to the competition rules of the Treaty.[63] Therefore, Article 86 applies to an undertaking holding a dominant position in a particular market, even where that position is due, not to activities of the undertaking itself, but to the fact that there can be no competition in that market by reason of legal provisions.[64]

The Article 86 prohibition does not apply unless the prohibited action affects the Common Market or a substantial part of it. Application of Article 86 is triggered only if that quantitative threshold is met.[65] It would seem that the term "substantial part" of the Common Market refers to large or medium-sized Member States or even areas of a Member State.[66]

Finally it is important to note that, to deal effectively with infringements of the ban on restrictive practices or on abuse of a dominant position, the Commission has extensive powers to investigate[67] to open proceedings, to make decisions and to impose penalties with respect to enterprises and associations of enterprises.

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63. Amphoux, op. cit., Ch. I, fn. 237 at 182.

64. ECJ Case 311/84, Télémarketing (CBEM) S.A., (1985) 3 ECR, p. 3270, Ground 18.

65. L. Gyselen and N. Kyriazis, "Article 86 EEC: The Monopoly Power Measurement Issue Revisited", (1986) 11 Europ. L.R., p. 134 at 144-146.

66. Schlieder, op. cit., Ch. II, fn. 54 at 676.

67. On the investigation powers of the Commission and the legal regime covering the information given to the Commission see J.M. Joshua, "Information in EEC Competition Law Procedures", (1986) 11 Europ. L.R., p. 409-429.

b. Application of Articles 85 and 86 to Air Transport

The Council adopted in 1987 two Regulations. The first lays down the procedure for application of the rules on competition to the air transport sector (Regulation 3975/87); the second provides for certain exemptions from the application of Article 85(1) (Regulation 3976/87).

(1) Council Regulation 3975/87

i) Territorial Scope

Regulation 3975/87 lays down detailed rules for the application of Articles 85 and 86 of the Rome Treaty to international air transport services between Community airports.[68] The Regulation does not apply to services between Community and non-Community airports, nor does it apply to domestic services provided within the territory of an EEC Member State. An uncertainty is thus created with respect to flights not between Community airports. The fact that the Regulation is not applicable does not mean that the competition rules are not applicable. Since the Regulation does not exclude application of the competition rules to services between a Community and a non-Community airport or between two airports both situated in the same country, the competition rules do apply in these situations. In addition, such an exclusion would be inconsistent with the EEC Treaty for two reasons. First, according to Article 145, the Council's obligation is to "ensure coordination of the general economic policies of the Member States" and not to

68. Council Regulation 3975/87, op. cit., Ch. I, fn. 319, Art. 1(2).

amend the Treaty. Second, the ECJ decided in the Nouvelles Frontières case that the competition rules apply to air transport.[69] Nothing in the Court's decision demonstrates an intention to exclude domestic air transport or international air transport between Community and non-Community airports from application of the competition rules. This consideration is reinforced by the fact that articles 85 and 86 apply even to conduct occurring outside the EEC, if this conduct produces its effects within the Community.[70] Two conclusions can therefore be drawn. First, the Council, by not considering those situations, is in breach of its Treaty obligations as interpreted by the ECJ. Second, the applicable regime in those two situations should follow the ECJ's judgment in Nouvelles Frontières.

As a result of the Council's inactivity on these matters, agreements, decisions and concerted practices among airlines on the topic of intra-Community flights are automatically prohibited, pursuant to Article 85(1) and (2), if they have as their effect or object the prevention, restriction or distortion of competition among Member States. Furthermore, actions by airlines which take improper advantage of a dominant position within the Common Market are also prohibited. While a prior declaration to this effect by the Commission, the ECJ or "national authorities" is not required, these prohibitions are not automatic for flights between Community and non-Community airports or for domestic flights.[71]

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69. Op. cit., Ch. I, fn. 217, Ground 45.

70. ECJ case 48/69, Imperial Chemical Industries Ltd. v. Commission, (1972) 2 ECR, p. 619.

71. On the extra-territorial effect of the competition rules of the Rome Treaty, see infra Ch. III, p. 202-218.

ii) Procedure for Application of the Competition Rules

Regulation 3975 resembles Council regulations on application of the competition rules to the other modes of transport, particularly for Commission powers to investigate, issue cease orders, and impose fines and penalties for violations.

Fortunately this Regulation does not give its own definition of "prohibited activities", but relies on the prohibitions of articles 85 and 86. The Commission must initiate procedures to terminate infringements of articles 85 and 86. According to Article 3 of the Regulation, the Commission may act on in its own initiative or on receipt of a complaint submitted either by a Member State or by a natural or legal person who claims a legitimate interest. If the Commission concludes that there is no infringement of the competition provisions of the Treaty, it will reject the complaint as unfounded.[72] If the Commission finds that there has been an infringement, it may require by a decision the concerned party to bring such an infringement to an end.[73]

It might happen, however, that an agreement, decision or concerted practice satisfies both articles 85(1) and 85(3). In such a case the Commission must decide whether to apply Article 85(3) and thereby exempt the practice from the scope of Article 85(1).[74] An exemption also may be granted under Article 2 of the Regulation for

72. Council Regulation 3975/87, op. cit., Ch. I, fn. 319, Art. 4(2).

73. Ibid., Art. 4(1).

74. Ibid., Art. 4(3).

certain technical agreements. Such agreements are exempted from Article 85(1) prohibition if their sole object and effect is to achieve technical improvements or co-operation. A non-exhaustive list of such agreements is contained in the Annex to the Regulation.

As well, exemptions may be granted pursuant to an objections procedure provided by Article 5 of the Regulation. Following this procedure, if an agreement, decision or concerted practice of an undertaking falls within the prohibition of Article 85(1), and if that undertaking seeks application of Article 85(3), it must submit an application to this effect to the Commission. If the Commission has in its possession all the available evidence, it will judge the application admissible. If the Commission has taken no action against this agreement, pursuant to the Article 3 procedure described above, it will publish the application in the Official Journal of the European Communities and invite all interested third parties to submit their comments. The Commission will then decide on the applicability of Article 85(3). If the agreement, decision or concerted practice conforms with the description given in the application, and if the conditions of Article 85(3) are satisfied, the Commission must exempt it from the Article 85(1) prohibition. This exemption will be valid for a period of six years from the date of publication in the Official Journal. If the Commission finds that the conditions of Article 85(3) are not satisfied, it must so notify the applicants within 90 days from the date of publication in the Official Journal. The Commission must issue a decision, even after the 90-day period, declaring that the prohibition of Article 85(1) applies. This decision may be retroactive, if the applicant has provided inaccurate information, has abused an exemption from the prohibition of Article 85(1) or has contravened Article 86.

If the Commission decides to apply Article 85(3),

whether the decision was made after examination of a submitted application, on the Commission's own initiative or after the Commission received a complaint, that decision is subject to any conditions imposed by the Commission and must indicate the period of its validity, which cannot be less than six years.[75] This decision can be renewed if the conditions for applying Article 85(3) continue to be satisfied,[76] but can be revoked or amended under certain circumstances.[77]

For this purpose, the competent authorities of Member States must assist the Commission, if so requested.[78] The Commission can request all necessary information from the governments and competent authorities of EEC Member States, as well as from any undertaking.[79] The Regulation specifies that these undertakings are obliged to provide the Commission with all the information[80] required; it also provides the procedure to be followed if such an undertaking does not comply with the Commission's requirements.[81] However, the Regulation does not mention anything concerning the obligation of governments or competent authorities. If governments or competent authorities do not reply to a Commission's request for information, the Commission may refer the matter to the ECJ, in accordance with Article 169 of the EEC Treaty. The Regulation also invests

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75. Ibid., Art. 6(1).

76. Ibid., Art. 6(2).

77. Ibid., Art. 6(3).

78. Ibid., Art. 10(1).

79. Ibid., Art. 9(1).

80. Ibid., Art. 9(4).

81. Ibid., Art. 9(5).

the Commission with investigation powers;[82] and imposes an obligation of compliance on the concerned undertakings.[83]

The Regulation provides for penalties to be imposed by the Commission, if undertakings either supply incorrect information or do not comply, intentionally or negligently, with the investigation procedure. More severe penalties are imposed if an undertaking infringes Article 85(1) or Article 86.[84] The Commission may also impose periodic penalty payments for the purpose of ending an infringement of articles 85 or 86, or to obtain any requested information. Subsequent to compliance by a concerned undertaking, the Commission can fix the total amount of the penalty at a lower figure than that which would have resulted from the original decision.[85]

All decisions of the Commission on the implementation of competition rules on air transport are subject to review by the ECJ. The Court has unlimited jurisdiction to review these decisions and to cancel, reduce or increase the fines or periodic penalty payments imposed by the Commission.[86] In addition, the Regulation gives parties and third persons the right to be heard prior to any Commission decision,[87] and provides guarantees for professional secrecy.[88]

Finally, the Regulation provides that in accordance

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82. Ibid., Art. 11(1).

83. Ibid., Art. 11(3).

84. Ibid., Art. 12.

85. Ibid., Art. 13.

86. Ibid., Art. 14.

87. Ibid., Art. 16.

88. Ibid., Art. 17.

with the Nouvelles Frontières judgment the national authorities of Member States may decide whether any case falls under articles 85(1) and 86. This power is limited in time, since Member States can only act until the Commission decides to initiate a procedure either for formulating a decision on the case in question or for notification, within 90 days of publication in the Official Journal of an application based on Article 85(3), that there are serious doubts as to the application of Article 85(3).[89] The Commission has the sole decision-making authority for matters concerning the application of Article 85(3), subject to review of its decision by the ECJ. Nevertheless, the Commission must act in close and constant liaison with the competent authorities of Member States[90] and in certain cases, must consult with the Advisory Committee on Agreements and Dominant Positions in Air Transport, (Advisory Committee) created for this purpose.[91]

(2) Block Exemptions from Article 85(1)

Apart from individual exemptions, which can be granted by the Commission either by individual decision or according to the procedure of Article 5 of Regulation 3975/87, the Council adopted Regulation 3976/87, enabling the Commission to grant by regulation block exemptions from Article 85(1) prohibition to certain categories of agreements and concerted practices.[92] This Regulation

89. Ibid., Art. 7.

90. Ibid., Art. 8(1).

91. Ibid., Art. 8(3),(4), (5), (6).

92. Council Regulation 3976/87, op. cit., Ch. I, fn. 320, Art. 2(2).

applies, just as Regulation 3975/87 does, to international air transport between Community airports only.[93] These block exemptions may be granted for a limited time in order to allow airlines to adapt to an increasingly competitive market.

Article 2(2) of the Regulation contains a non-exhaustive list of matters that the Council considers the Commission may exempt under Article 85(3). Before adopting a regulation to this effect, the Commission must consult the Advisory Committee[94] and invite all persons and organizations concerned to submit their comments.[95] Such a regulation is retroactive to decisions and concerted practices which existed at the date of entry into force of the regulation.[96] However, the regulation must expire by January 31, 1991.[97]

It might happen that the persons concerned are in breach of a condition or an obligation attached to the exemption granted by a Commission's regulation. In such a case, the Commission must first address recommendations to the concerned persons[98] and then, depending on the gravity of the breach, must adopt a decision that will (1) prohibit them from carrying out or require them to perform a specific act, or (2) withdraw the benefit of the block exemption, but accord the party in breach an individual exemption pursuant to Article 4(2) of Regulation 3975/87, or

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93. Ibid., Art. 1.

94. Ibid., Art. 6.

95. Ibid., Art. 5.

96. Ibid., Art. 4.

97. Ibid., Art. 3.

98. Ibid., Art. 7(1).

(3) withdraw the benefit of the block exemption.[99] Similarily, if an agreement covered by a block exemption has effects which are either incompatible with Article 85(3) or prohibited by Article 86, the Commission may withdraw the benefit of the exemption and take all appropriate measures necessary to end the infringement.[100]

Regulations 3975/87 and 3976/87 on competition authorized the Commission as the Community's institution for implementing them. On January 1, 1988 the Commission was invested with similar powers for air transport, as is the case in the other economic sectors,[101] and now does not have to act on the basis of Article 89. Thereafter, the Commission informed the 13 airlines that it would undertake new appropriate action, according to its new powers, on all airline agreements which were still formally in force after January 1, 1988 and which contained measures contrary to the new package.[102] The Commission also announced in April 1988 that it had drafted three regulations, pursuant to its authority under Regulation 3976/87.[103] These regulations were adopted by the Commission on July 26, 1988 and cover (1) agreements between air transport undertakings concerning joint planning and co-ordination of capacity, revenue sharing, tariff consultation, and slot allocation at air-

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99. Id.

100. Ibid., Art. 7(2).

101. See Press Release IP(87) 217 Brussels, June 4, 1987; IP(87) 614, Brussels, Dec. 23, 1987.

102. Press Release IP(87) 614.

103. Press Release IP(88) 234, Brussels, 22 April 1988.

ports;[104] (2) provision of ground handling services;[105] and (3) computerized time-tabling and ticket reservation systems.[106]

2. Fares and Capacity Determination in the EEC

The objective of the Council Directive on Fares and the Decision on Capacity is to produce more competition, since the combination of governmental limitations on entry and capacity together with airline agreements on pricing and pooling had created an inadequate level of competition within Europe.

Both measures are the first three-year step toward creation of a European internal market by 1992. Before November 1, 1989 the Commission must publish a report on the application of these measures.[107] On the basis of this report, the Council will revise by June 30, 1990[108] its measures on fares and capacity.

Both the Decision and the Directive were addressed to the EEC Member States for their implementation by

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104. Regulation (EEC) No. 2671/88 O.J. Eur. Com. No. L239/9 (30.8.88) infra, Ch. II, p. 153-155.

105. Com. Regulation (EEC) No. 2673/88, O.J. Eur. Com. No. L239/17 (20.8.88); infra, Ch. II, p. 153-155.

106. Com. Regulation (EEC) No. 2672/88 O.J. Eur. Com. No. L239/13 (30.8.88); infra Ch. II, p. 169-170.

107. Directive on Fares, op. cit., Ch. I, fn. 321, Art. 9; Decision on Capacity, op. cit., Ch. I, fn. 322, Art. 13.

108. Directive on Fares, ibid., Art. 12; Decision on Capacity, ibid., Art. 14.

December 31, 1987, on consultation with the Commission.[109]

a. Liberalization of Air Fares

The Directive provides for a Community system for approval of fares on scheduled air services between Community airports. As is the case under the ECAC Agreement on Fares, Member States cannot conclude any agreements containing more restrictive provisions than those adopted by the Council, while more flexible arrangements are allowed.[110]

Several criteria have been fixed to determine acceptable fares.[111] Fares should take into account the fully allocated costs of air carriers, the needs of consumers, the need for a satisfactory return on capital, the competitive market situation and the avoidance of dumping.

Filing of fares is subject to the same rules as the ECAC Agreement.[112] Approval is once again either express or tacit.[113] The validity of an approved fare is unlimited, unless an expiration date has been agreed or replaced. Fares can be prolonged after their original expiration date, but not for more than twelve months.[114] If a fare is approved for a service on a certain city pair,

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109. Directive on Fares, ibid., Art. 11; Decision on Capacity, ibid., Art. 12.

110. Directive on Fares, ibid., Art. 6.

111. Ibid., Art. 3.

112. Ibid., Art. 4(1).

113. Ibid., Art. 4(2).

114. Ibid., Art. 4(3).

a carrier operating the same route can match the approved fare except for indirect flights which exceed the length of the shortest direct service by more than 20 per cent.[115] As under the ECAC Agreement, only third- and fourth-freedom air carriers can act as price leaders.[116] However, the Directive recognizes a fifth freedom right to air carriers even if they have to apply fares already approved for third- and fourth-freedom carriers.

The EEC Directive also incorporates the distinction between maintenance of a regulation regime and adoption of a flexible regime, according to whether a proposed fare falls within or outside the created "zones of flexibility". The Directive reiterated the same zones created by ECAC.[117] Fares falling within the zones are automatically approved, while provisions concerning additional flexibility are contained in Article 5(3).

The conditions which a fare must satisfy in order to qualify for automatic approval are less stringent under the EEC Directive than under the ECAC Agreement. To qualify for the discount zone,[118] the fare must apply to a round or circle trip with a maximum stay of six months. In addition, either the minimum stay must be not less than Saturday night or six nights, or, for "off-peak" flights, tickets must be purchased at least 14 days in advance with reservation, ticketing and payment made at the same time, with cancellation or change of reservation possible only prior to departure and at a fee of at least 20 per cent of the ticket price.

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115. Ibid., Art. 4(4).

116. Ibid., Art. 4(5).

117. Ibid., Art. 5.

118. Ibid., Annex II, Art. 1.

To qualify for the deep discount zone,[119] a fare must meet all of the above conditions in addition to one of the conditions attached to deep discount zone fares under paragraph 4 of the Annex to the ECAC Agreement.[120] In the case of an "off peak" flight, a fare will qualify as falling within the deep discount zone if it refers to a round or circle trip of a maximum stay of six months. Such a fare also must satisfy one of the following two schemes. According to the first scheme, this fare must refer to a service for which the ticket is purchased at least fourteen days in advance, with reservation, ticketing and payment made at the same time, with cancellation or change of reservation only possible prior to departure, and at a fee of at least 20 per cent of the ticket price.

This condition must be coupled with one of the following conditions: (1) the passenger must be aged not more than 25 years or not less than 60 years; (2) father, mother, or both and their children aged not more than 25 years must be travelling together (minimum 3 persons); or (3) six or more persons together with cross-referenced tickets, must be travelling together. According to the second scheme, purchase of the ticket must be made at least 28 days in advance; reservation, ticketing and payment must be made at the same time; and cancellation or change of reservation must only be available at a fee of at least 20 per cent of the ticket price, if cancellation or change in reservation is requested more than 28 days before the date of departure, or at a fee of at least 50 per cent of the ticket price if cancellation or change in reservations is made in a period less than 28 days before the departure date.

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119. Ibid., Annex II, Art. 2.

120. Supra, Ch. II, p. 100.

Consequently, discount and deep discount fares can be offered to travellers outside peak hours, allowing respectively at least a 10 to 35 per cent and 35 to 55 per cent discount rate, subject to the above-mentioned conditions, an offer which was not included in the ECAC package.[121]

Article 7 of the Directive provides for the settlement of disputes which might arise if one party approves a fare while another does not. Although the procedure, is generally the same as that in the ECAC Agreement, there are differences, particularly due to the special powers of the Commission in this respect. As well, the Commission's role in the procedure extends its duration. In case of a disagreement and subsequent to appropriate notification, a consultation procedure takes place if the dispute has not been resolved. Any disagreement is subject to an arbitration procedure, which is carried out by three arbitrators, unless the parties agree to the appointment of a single arbitrator. If the parties cannot agree on the appointment of the arbitrators, the panel is completed by the President of the Council, as in the arbitration procedure established by the ECAC Agreement. The Commission has the right to attend any arbitration procedure as an observer. The arbitration panel must submit the arbitration award to the Commission, which has ten days to confirm its compliance with the Community law. The Commission's decision, which can be express or tacit, is binding on the parties concerned.

Finally, pursuant to Article 10 of the Directive, Member States are obliged to eliminate any incompatibility which could arise from an agreement concluded with one or more non-Member countries giving fifth freedom rights for a

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121. See Europe, June 22/23, 1987, No. 4574; June 18, 1987, No. 4571.

route between Member States to a non-Member State carrier.

b. The Council Decision on Capacity

The Decision on Capacity concerns the sharing of capacity, between air carriers of one Member State and air carriers of another Member State, on scheduled air transport services between these States. The Decision also applies to access for Community carriers to certain routes between Member States which they did not operate prior to the adoption of the Decision.[122]

(1) Capacity Provision

Automatic approval is given for capacity increases in all bilateral relationships, if the resulting shares of capacity do not exceed the 55-45 per cent limit in the period between January 1, 1988 and September 30, 1989[123] and the 60-40 per cent limit after October 1, 1989.[124] If a carrier suffers "serious financial damage" from implementation of these arrangements, he may request a re-examination of these capacity provisions for the period after October 1, 1989.[125] The Council will then make a decision, after it receives the Commission's proposals, as to whether these provisions should be applied to their integrity.[126]

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122. Decision on Capacity, op. cit., Ch. I, fn. 322, Art. 1(1).

123. Ibid., Art. 3(1).

124. Ibid., Art. 3(2).

125. Ibid., Art. 4(1).

126. Id.

Capacity adjustments within the above limits, and for any given season, will also be approved automatically under four conditions:[127] (1) after the first automatic approval, the air carrier offering less capacity will be able to increase its capacity up to the limit of the capacity approved for the carrier of the Member State offering the larger capacity; (2) if the carrier with less capacity chooses to react as per (1), it will receive automatic approval for one further increase up the level of its first capacity filing for that season; (3) the carrier offering less capacity will then receive automatic approval for one increase up to the matching level; and (4) any further increases during that season will be subject to the applicable bilateral provisions between the two Member States concerned. It is important to note that these conditions do not apply to regional air transport services which are subject to the 1983 Directive[128] as amended in 1986.[129]

(2) Market Access Provisions

The market access provisions are the most important element in the package. Significant new opportunities are given to existing airlines for starting new services and to potential newcomers for entering the market.

Article 5 of the Decision provides that Member States can designate two or more of their air carriers to operate scheduled air services to each of the other Member States. Member States may not designate more than one carrier on a given route, except on routes on which: (1) in the first year after notification of the decision, more than

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127. Ibid., Art. 3(4).

128. Ibid., Art. 1(4).

129. Directive 86/216, op. cit., Ch. I, fn. 176.

250,000 passengers were carried in the preceding year; (2) in the second year, more than 200,000 passengers were carried in the proceeding year or there were more than 1200 return flights per annum; and (3) in the third year, more than 180,000 passengers were carried or there were more than 1000 flights per annum.

The Decision also accounts for the interests of air carriers in peripheral Member States and protects relations between hub airports of one Member State and regional airports of another Member State.

Article 6 of the Decision authorizes Community air carriers to establish third- or fourth-freedom scheduled air services between category 1 airports in the territory of one Member State and regional airports in the territory of another Member State.[130] Article 6(2) exempts certain airports from application of the above-mentioned principle, for the duration of the Decision, in order to prevent any major disturbances of existing air traffic systems and to allow time for adaptation. Article 7 provides that third- and fourth-freedom air carriers may combine scheduled air services, if no traffic rights are exercised between the combined points.

Services provided in accordance with the above-mentioned provisions are subject to the controls on capacity adopted by the Decision,[131] unless these services are offered on routes between hub airports and regional airports, using aircraft with no more than 70 seats.[132]

The Decision also gives Community air carriers fifth-freedom rights for scheduled services between Member

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130. Annex II of the Decision on Capacity, op. cit., Ch. I, fn. 322, lists the airport categories.

131. Decision on Capacity, ibid., Art. 5(3), 6(1).

132. Ibid., Art. 6(3).

States, if third- or fourth-freedom rights exist and if such a service meets the following conditions:[133] (1) it is authorized by the State of registration of the Community air carrier concerned; (2) it is operated as the extension of a service from, or as the preliminary of a service to, the carrier's State of registration; (3) it is operated between two airports, at least one of which is not a category 1 airport; and (4) not more than 30 per cent of the carrier's annual capacity on the route concerned may be used for carriage of fifth-freedom passengers.

Notwithstanding the provisions on market access, Article 9 of the Decision provides that a Member State is not obliged to authorize a scheduled air service, if its airport has "insufficient" facilities to accommodate it, or when its navigational aids are "insufficient". However, the Decision neither specifies who will make the final decision on the insufficiency of that Member State's facilities, nor specifies what procedure will be followed if the two concerned Member States disagree. Therefore, although the Council has established a coherent arbitration procedure for disagreements concerning the approval of fares, for disagreements on the application of Article 9 of the Capacity Decision, any dispute will most probably be resolved by the ECJ. In such a case, the procedure will be extremely lengthy, given the fact that the Decision is only valid until 1990. Member States could, therefore, use this provision to avoid the establishment of more liberal relations between them.

3. Contribution of the New Measures

As with the ECAC Member States, the Council of Ministers had to adopt measures on air transport, according

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133. Ibid., Art. 8.

to the most common wishes of all EEC Member States. This approach was inevitable, since these States have quite different objectives, have markets of different sizes and have airlines with different capabilities for surviving competition.

The provisions of the Package, which is characterized as "a watered down version of earlier pro-deregulation proposals"[134] do not bring any great changes to the European aviation environment. The liberal bilaterals concluded between some liberal European States, offer more scope, while the Package does not put any real pressure for change on the conservatives. Moreover, governments are far from being deprived of power. They have retained their prerogative of approval in both tariff and capacity determination, and in the case of market access. The competition rules are implemented only for services between Community airports, while the capacity freedoms were already in effect. Flexibility on pricing does not cover the very high business fares. Also, while entry rights open some possibilities for further development, the numerous derogations and the compelling conditions attached to the exercise of fifth freedom rights lead to traditional bilateral negotiations, with the governments masterminding the conclusion of agreements. For example, in 1988 multiple designation applied to only 24 routes, of which 15 were to and from London, yet on

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134. P.P.C. Haanappel, A Decade of Deregulation, Address before the Aviation and Space Law Section of the Ass'n of American Law Schools, Miami Fla., Jan. 9, 1988, p. 10 in Dempsey, op. cit., Ch. I, fn. 183 at 679.

those routes 10 already had multiple designation.[135] Similarily, it should be noted that most "deep discount zone" fares, which were already in place, were below the base of the tariff flexibility zones.[136] Governments have, consequently, largely retained power of control and will be able to accelerate or slow down the liberalization process, according to whether or not they have a liberal attitude.

However, the Package is only the first step in the creation of an internal market by the end of 1992. Progressivisme was determined to be the best way to liberalize air transport due to the special characteristics of European airlines. These airlines are national carriers; as such, whether or not they are government or private owned, they have assumed responsibilities different than those assumed by US carriers. Furthermore, there are large differences in strength between the European companies ("Europe à deux vitesses").

The competition rules are now in force and can be invoked by nationals of Member States in front of their national authorities. Governments cannot block changes within the tariff and capacity zones. The criteria which apply to the approval of fares have been harmonized in all Member States. Therefore, once the conditions are satisfied, an innovative airline can expect approval of fares, regardless of differences in governmental policies among the Member States of the EEC. In this respect, the Council did achieve the introduction of the first legal basis for a

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135. European Airline Mergers, Implications for Passengers and Policy Options, study commissioned in Sept. 1987 by the Netherlands Min. of Transport and Public Works from the IFAPA, June 1988 at 19 (hereinafter European Airline Mergers).

136. Ibid.

Community policy on air transport and did succeed in convincing Member States to abandon a small part of their sovereignty and apply supranational rules instead of national ones.

Moreover, the Commission has been given extensive powers, not only for regulating application of the competition rules, but also for participating in the tariff coordination procedures. Consequently, the Commission can ensure that Member States will apply the Council measures and can pursue its efforts for the progressive liberalization of air transport.

It should be noted, however, that the steps now taken in Europe, for gradual liberalization of the air transport market are to be applied bilaterally. As such, the present procedure cannot lead to the drastic changes which are necessary for a consensus on an agreement by the end of 1992 for a multilateral, integrated air transport market. At least the air transport measures adopted by the Council in December 1987 have opened the way for further progress. Air transport companies can use the new entry provisions as well as those for fifth freedom services to generate new expansion; they can use the new capacity provisions and offer supplementary capacity; they can create new promotional tariffs and attack certain markets they could not in the past; and they can co-operate with other carriers.

The Commission started in 1988 to contemplate the drafting of proposals for the approximation of operating conditions, the improvements of safety and the harmonization of certain social provisions.[137] It also considered the possibility of defining rules for a common approach to non-

137. Program of the Commission for 1988, Bull. of the E.C. Sup. 1/88, Strasbourg, Jan. 20, 1988, p. 50.

member countries, notably on traffic rights.[138] Finally the Commission adopted the three regulations concerning certain types of co-operation between airlines.[139]

SECTION III - CONSOLIDATION OF THE EUROPEAN AIRLINE INDUSTRY

It is certain that the European airline industry will, in its own way, follow the example of the U.S. industry as far as the consolidation process is concerned. Creation of an oligopolistic environment is, however, not only undesirable but also contrary to the EEC Treaty's competition rules.

1. European Airline Consolidation: The Future

a. Factors Conducive to Airline Consolidation

In the United States, airline mergers and other co-operative arrangements have increased considerably since Deregulation, for the following reasons:[140] bankruptcies and business failures; a shield from competition; safeguarding market share and position; desire for rapid expansion; feeding of traffic to hubs;[141] the snowball effect;

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138. Ibid.

139. Supra Ch. II, p. 120-121.

140. See "European Airline Mergers. op. cit., Ch. II, fn. 135 at 71.

141. AWST, Jan. 4, 1988 at 20.

obtaining scarce airport slots,[142] gates and aircraft, or a CRS; and obtaining complementary route structures, since larger networks enhance route density and therefore increase profitability.[143] Some of these reasons will certainly accelerate consolidation of the European airline industry; but such a consolidation will also find its roots in aspects specific to the European legal, economic and aeronautical environment.

The EEC was created in part with the objective of bringing about economic conditions that would favour the development of industry on a scale comparable to that of the United States, for the benefit of the Member States and the people of the Community as a whole. The structural changes in the industry envisaged by the founders of the Community implied an increased concerted effort in the Community and in forms of co-operation for mutual undertakings.

European airlines already perceive the need to built stronger groupings among themselves in order to meet the challenge of both the mega-carriers which have emerged from US deregulation and the strong Asian and Pacific area airlines. These achievements outside Europe suggest that very few European carriers are earning enough on their

142. Id.; A merger with Sabena would give SAS entrance to the African market and would give Sabena entrance to S. America and a more powerful position in the Asian market, "European Airline Mergers", op. cit., Ch. II, fn. 135 at 29.

143. Airports have become one of the battlegrounds of US airline deregulation, AWST, Nov. 3, 1980 at 55.

investments to compete with the "megas".[144] However, European carriers have to face the dismantling of internal frontiers by 1992, which can be expected to result in major corporate reorganization within the Community. Indeed, such structural changes are already under way in many Community markets, the air transport market being among them.[145] The upcoming industrial restructuring will be supported by the fact that there is in Europe an increasing reliance on the market economy, as well as a favourable political and business climate.

Furthermore, European airlines are looking for capital for equipment and automation in order to be able to respond to the increasing consumer demand for better service and lower fares.[146] Many European countries are particularly interested in foreign investment as a means of lowering the foreign debt.[147]

The fact that there are many reasons for European airlines concentration does not mean, however, that the

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144. "European Airline Mergers", op. cit., Ch. II, fn. 135 at 17; Air France and Lufthansa agreed on the formation of a joint airline, "Euroberlin France", to serve Berlin and W. Germany due to the US "megas'" threat, AviMag 969 (1-10-88) at 52, 53, AWST, Aug. 1, 1988 at 89, AWST, Nov. 4, 1988 at 125.

145. Doc. Com. (88) 97 final, Amended Proposal for a Council Regulation on the Control of Concentrations Betwen Undertakings, Brussels, April 25, 1988, O.J. Eur. Com. 1988 C130 at 2; Sabena is convinced its dimension will not allow it to be competitive in the 1992 marked unless it joins forces with other carriers, AviMag 959 (1-4-88) at 53.

146. H. Nuutinen, "The Attractions of Cross-Border Link-Ups", The Avmark Aviation Economist, May 1987, p. 6 at 7, 8.

147. Ibid., at 9, 10.

future of the European aviation industry will parallel to US experience. In Europe, to implement the use of mega-carriers in the first stages of the liberalization efforts which proceed full integration, European airlines will have to look to transborder co-operation. This co-operation will be extremely difficult due to differences in legal, social, financial and cultural backgrounds. Existing legislation in most European countries does not easily allow for cross-border take-overs and mergers of air transport companies. Special barriers are raised to the establishment and operation of air transport services for licensing, designation and establishment.

Most of the European countries' national laws have two licensing requirements, ownership and effective control.[148] For ownership, the basic State requirement is that the majority ownership must be vested in its nationals; for control, the most common condition is that majority of management must consist of nationals.[149] Such requirements not only block industrial restructuring, but are also contrary to the EEC Treaty since they contravene the principle of non-discrimination based on nationality.[150]

As far as designation is concerned, most provisions found in bilateral agreements require that substantial ownership and control of the designated airline be vested in the contracting party designating the airline, or in its

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148. "European Airline Mergers", op. cit., Ch. II, fn. 135 at 36.

149. See Appendix I.

150. Rome Treaty, op. cit., Intro., fn. 25, Art. 7; see also J. Naveau, "Le Droit de la CEE va-t-il influencer le droit aérien international", (1988) 13 AASL, p. 161 at 171.

nationals.[151] Consequently, the bilateral partner reserves the right to disapprove of the designation if it is not satisfied that substantial ownership and effective control are vested in the contracting partner or in its nationals.[152] It is noteworthy that, although the EEC Council dealt with the issue of multiple designation, no provision dealing with this problem was included in the 1987 Package. Even if no such problem arises in intra-EEC relations, given the principle of non-discrimination based on nationality, this problem will be a vital one in the external relations of the EEC.[153]

An alternative for trans-national co-operation is to set up a subsidiary in another country. This possibility is quite limited because establishment is precluded or restricted by most countries.[154] This situation may change in the future for EEC Member States, with application of the EEC Treaty's rules on freedom of establishment.[155]

It is not only national legislation that creates problems for trans-national mergers, but international instruments as well. Article 7 of the Chicago Convention prevents States from granting cabotage rights. This prohibition may apply to a multinational company which performs domestic flights within the territory of one of the owners

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151. "European Airline Mergers", op. cit., Ch. II, fn. 135 at 36.

152. Id.

153. See infra, Ch. III, p. 196-197.

154. "European Airline Mergers", op. cit., Ch. II, fn. 135 at 37; see Appendix I.

155. Rome Treaty, op. cit., Intro., fn. 25, Arts. 52-58; see infra, Ch. III, p. 193-198.

and with aircraft registered in another owner country.[156] Will the State of the territory in which the services are performed, be considered to have granted cabotage rights?[157] Another problem concerns the negotiations of bilateral agreements with third countries. Which State owner of a combined airline will negotiate bilaterals? Will the EEC Commission be vested with negotiating authority? What will happen in negotiations if a joint airline has EEC States Members as well as non-EEC States Members that are members of ECAC?[158] What will happen to the traffic rights of the merged airlines? Will they be automatically transferred or will the bilateral partners demand renegotiation and concessions?[159]

All of these legal obstacles demonstrate that European airlines, in their mandatory quest for scale economies and market strength through size, will not be able to follow the direct path of consolidation of companies of different nationalities into single units, big enough to take on the US giants. Instead, the European way will be cautious, progressive, beginning with marketing and operational relationships and dual designation.[160] Joint fleet planning may come next, to be followed eventually by exchanges of equity, by joint management of financial resources and by domestic mergers and take-overs.[161] At that stage, and provided that political and legal con-

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156. Haanappel, op. cit., Intro., fn. 21 at 103, 104.

157. See infra, Ch. III, p. 226-230.

158. Id.

159. Id.

160. Nordio, op. cit., Ch. I, fn. 113 at 22.

161. Id.; Haanappel, op. cit., Intro., fn. 21 at 107.

straints have been removed, trans-national mergers will evolve. However, European progressivism should not be considered a negative parameter in the development of European air transport; abrupt moves toward full consolidation that are not preceded by careful analysis and planning may fail to deliver the promised benefits.

b. Effects

The effects of mergers in the United States can be transposed to the European context, when the air transport industry becomes consolidated. An IATA group called Deregulation Watch has monitored the implications of US developments for the benefit of the airline industry.[162] In its third Report, Deregulation Watch concluded that large size has given overwhelming marketing strength to airlines, for several reasons.[163]

Large airlines benefit from a large and widespread route network which enhances their route density and increases, therefore, their profitability.[164] They can control distribution, particularly through CRSs; they dominate operations and marketing at large hubs; and they have the ability to exercise price leadership. Large airlines enjoy a variety of market opportunity possibilities for cross-subsidization in competitive pricing; they also can afford large-scale advertising campaigns.

As far as passengers are concerned, they benefit from the fact that more routes are served by the same carrier. As a result passengers enjoy better on-line connections and easier transfers; they face fewer incidents

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162. Wheatcroft, op. cit., Ch. I, fn. 147 at 7.

163. Ibid., at 7,8.

164. Supra, Ch. II, p. 134.

of lost baggage and better integrated schedules.[165] Furthermore, passenger fares are lower, given the normally increased profitability of a large airline.

For these reasons, this development should in principle be welcomed. It reflects the pressure on industry to adjust to changes in market conditions and is thus in line with the requirements for dynamic competition. Such development can increase the competitiveness of the European airline industry and help to improve the conditions for growth and the standard of living in Europe.[166]

It is necessary to ensure, however, that mergers do not damage competition, especially in the air transport sector, where a small number of firms could dominate the market. Merger activity in the Unites States in the aftermath of deregulation suggests that similar action will occur in Europe even if liberalization does not progress, since the resulting snowball effect does not depend on an increase in liberalization.

Therefore, special measures are necessary to ensure that the objectives of public policy are achieved and that an oligopolistic industry does not suppress competition to such an extent that the interests of the consumers become secondary to profit maximization.[167] Furthermore, the increase in market power, which results from increased concentration, is more likely than elsewhere to lead to the exacting of monopoly profits by dominant undertakings, due to high regulatory and economic entry barriers in the air transport sector. It should be remembered that, even where

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165. "European Airline Mergers", op. cit., Ch. II, fn. 135 at 8.

166. Com (88) 97 final, op. cit., Ch. II, fn. 145.

167. S. Wheatcroft, op. cit., Ch. I, fn. 147 at 9.

new entry is possible, there will be a considerable timelag between the abuse of a dominant position (for example, the charging of a monopoly rent) and the entry of a new carrier.[168]

Existing national provisions on merger control are tailored to mergers with predominantly local features within a single country. However, the effects of trans-national mergers lie largely outside the control of individual national authorities. Additionally, national instruments would pose a risk of damage to the internal market, since they would tend to favour "national champions" rather than the interest of the Community as a whole.[169]

Application of the competition rules has proven ineffective, since the Commission was forced to rely on articles 85 and 86, which are difficult to apply.[170] In particular, there is no requirement that the Commission decide an issue within a specified time limit. Such a limit is indispensable in merger cases.[171]

In contrast, the EEC Commission has shown that it can act, when necessary, to control the abusive or restrictive creation of a monopoly power in the air transport industry. The Commission participated in an effort to ensure that the reduction in competition resulting from the British Airways (BA) and British Caledonian (BCal) merger, the most spectacular merger outside North America in 1987, will be mitigated by the creation of new opportunities for the entry of other airlines on routes previously served in parallel by BA and BCal. Immediately following completion of the BCal sale, the EEC Commission requested talks with BA

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168. Sutherland, op. cit., Ch. I, fn. 291 at 9.

169. Com. (88) 97 final, op. cit., Ch. II, fn. 145.

170. Infra, Ch. II, p. 155-157.

171. Meyers, p. 3.

management regarding the competitive aspects of the merger.[172]

The Commission decided not to take official proceedings against the merger because it had obtained adequate assurances that the proper conditions for free competition would be maintained.[173] In exchange for not intervening, the Commission wanted a guarantee that the merged operation's arrangements would not significantly restrict competition between airlines on the Community market.[174] The Commission wanted to be sure that:[175] (1) there would be sufficient competition with other airlines on the routes which were operated by both the BA and BCal, before the merger; (2) other carriers would have access to the market; and (3) slots allocated to BA and BCal at the Heathrow and Gatwick airports would leave enough room for rival companies.

The several commitments given to the Commission should create stronger opportunities for new competitors to emerge by improving substantially the prospects for other carriers to be licensed on several former BCal routes; by limiting the merged airlines' share of slots at Gatwick airport; and by ensuring that the merger does not lead to constraints on slots at Heathrow airport.[176] These commitments will apply for four years, a period of time considered to be of sufficient duration to allow competitors to emerge and become established and, thus, to enable other

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172. AWST, Jan. 4, 1980 at 70.

173. Europe, April 11-12, 1988, No. 4761 at 9.

174. Id.

175. Id.

176. Ibid., at 9, 10.

carriers to compete effectively in the market place.[177]

2. Airline Consolidation: European Economic Community Law

The competition provisions of the EEC Treaty apply in different ways, depending on the form of co-operation. Application of these provisions is limited, however, by the absence of an implementing regulation.

a. Definitions

It is necessary to distinguish between mergers, joint ventures and other forms of co-operation, since application of the EEC Treaty provisions on competition is dependent on the form of agreement in question. A merger occurs where undertakings fuse all their assets under one control, so that two separate companies no longer remain.[178] When undertakings transfer all their assets to a joint venture with full business functions and become a mere management holding company, there is a de facto merger.[179] If a joint venture forms a completely and irreversibly separate business from that of any parent companies, it is deemed a merger or "partial integration" rather than a joint venture.[180] Joint ventures exist when companies bring only part of their activities permanently and irreversibly

177. IP (88) 131 Brussels, March 9, 1988.

178. Vaughan, op. cit., Ch. II, fn. 55, Vol. 2 at 1104.

179. Ibid. at 1105; see also EC Com. 4gh Rep. on Comp. Policy, Point 40; C. Ballamy and G.D. Child, Common Market Law of Competition, London Sweet and Maxwell 1987 at 420.

180. Id., EC Com 6th Rep. on Comp. Policy, Point 55.

under one management.[181] According to the EEC Commission, a joint venture means an enterprise subject to joint control by two or more undertakings which are economically independent of one other.[182] Airlines may conclude more limited co-operation agreements such as revenue pools, consultation on tariffs and technical agreements.

b. Application of Article 86 of the EEC Treaty to Airline Mergers

While Article 86 of the EEC Treaty is the most important provision for controlling mergers, it does not prohibit concentration per se. However, it does prohibit abuses of a dominant position in a relevant market within the Common Market by one or more undertakings, if trade between Member States may be affected.[183] Consequently, this provision provides the Commission with a posteriori merger control.

Application of Article 86 to mergers was upheld by the ECJ in the Continental Can case,[184] when it held that an abuse may occur:

> if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one .... [T]he strengthening of the position may be an abuse and prohibit-

181. European Airline Mergers, op. cit., Ch. II, fn. 135 at 41.

182. Vaughan, op. cit., Ch. II, fn. 55, Vol. 2 at 1104; EC Com. Doc. 84/381 1985 1 Com. Mkt. L.R. at 735.

183. Supra, Ch. II, p. 109-111.

184. Case 6/72, op. cit., Ch. II, fn. 60.

> ed under Article 86 of the Treaty, regardless of the means and procedure by which it is achieved, if it has the effects mentioned above.[185]

The significance of Continental Can lies in the rejection by the ECJ of the view that Article 86 is limited to the conduct of undertakings in the market and does not apply to structural distortions of competition.[186] The finding that a dominant position can be abused in this way is, however, open to criticism: it is not really possible to say that taking over a rival is an abuse of a dominant position.[187] Furthermore, the decision does not clarify whether Article 86 applies if the merger results in the creation of a dominant position. Dominant positions per se are not prohibited. It is the conduct after the creation of a dominant position which may be prohibited. Consequently, mergers between non-dominant undertakings do not contravene Article 86 even if they result in the creation of a dominant position.[188]

It would be contrary, therefore, to Article 86 if an airline strengthened its dominant position in any city pair, in any sector, or in more than one sector of the total market through a merger, in such a way that the only airlines to remain in the relevant market were those whose behaviour depended on the dominant one. This reason explains why the BA-BCal merger was cleared subject to the condition that BA should return licenses for domestic and

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185. Ibid., Grounds 26, 27.

186. J. Lever and P. Lasok, "Mergers and Joint Ventures in the EEC", (1986) 6 Yrbk. of Europ. L., p. 121 at 131.

187. A Parry and J. Dinnage, EEC Law, 2nd ed. London, Sweet and Maxwell, 1981 at 331.

188. Lever and Lasok, op. cit., Ch. II, fn. 186 at 132.

intra-European routes.[189]

In the case of a merger between two or more airlines, the problem which arises is the definition of the relevant market. It has been suggested[190] that, in this situation, special consideration must be given to the routes operated by the merging airlines. A merger between airlines with complementary route networks is not likely to contravene Article 86. National mergers may strengthen the dominant position of the merged airlines on domestic routes and on routes to and from the country where the airlines are based.[191] A cross-border merger is more likely to lead to the strengthening of a dominant position on the routes between the respective hubs of the airlines.[192] As was shown by the Commission's intervention in the BA-BCal merger, control over airport slots and dominance of CRSs resulting from a merger also may constitute abuse of a dominant position.[193]

Article 86 is a limited tool for merger control because it can only be applied a posteriori; there is no provision for prior authorization or exemption from the prohibition.[194] This limitation is another reason why the Commission submitted a proposal to the Council in 1973 for a regulation elaborating a system of merger control.

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189. European Airline Mergers, op. cit., Ch. II, fn. 135 at 40.

190. Id.

191. Id.

192. Id.

193. Supra, Ch. II, p. 141-142.

194. Compare with Art. 66 of the ECSC Treaty, op. cit., Ch. I, fn. 1.

c. Application of Article 85 of the EEC Treaty to Airline Mergers

The EEC Commission took the view in its Memorandum on Concentrations[195] that Article 85 did not apply to concentrations, mainly for two reasons. The Commission considered that, because Article 85 applies in principle to all arrangements without exception, and because exemptions from the Article 85 prohibition are temporary, Article 85 was inappropriate as an instrument for controlling mergers, since mergers require exemption on a permanent basis.[196] Additionally, the Commission believed that Article 85 applied to arrangements between independent undertakings, while concentrations were alterations to the internal structure of undertakings.[197]

It is now well established, however, that the aim of Article 85 is to preserve workable competition,[198] with the result that not all arrangements between undertakings are prohibited by Article 85(1). The term "workable competition" has been defined by the ECJ as "the degree of competition necessary to ensure that observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market."[199] In the Philip Morris decision of November

195. Doc. SEC (65) 3500 of Doc. 1, 1965, Study No. 3/1966.

196. Lever and Lasok, op. cit., Ch. II, fn. 186 at 129.

197. Id.

198. ECJ Case 27/76, op. cit., Ch. II, fn. 58 Ground 20.

199. Id.

17, 1987,[200] the Court decided that agreements which have as their subject matter the acquisition of shares in competing companies may fall within Article 85(1), if those agreements result in a restriction of competition within the Common Market and influence trade between Member States. The Court held that

> [a]lthough the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business.[201]

Application of the prohibition of Article 85(1) to mergers is, therefore, limited to certain agreements, such as acquisition of a shareholding which gives legal or de facto control to the investing company;[202] an agreement providing for commercial co-operation between companies;[203] or an agreement which is intended to result in a company take-over even at a later stage.[204] In all these circumstances, the agreements will have the objective or effect of influencing the competitive behaviour of the companies in the relevant market.[205]

The Philip Morris decision set out some general

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200. Joined Cases 142 and 156/84, British-American Tobacco Ltd. v. EC Com., Nov. 17, 1987, 4 CMLR 24.

201. Ibid., Ground 37.

202. Ibid., Ground 38.

203. Id.

204. Ibid., Ground 39.

205. Ibid., Ground 40; see also M Friend, "Controlling Mergers", 12 Europ. L.R., No. 32, p. 189-196.

principles on the compatibility of merger agreements with Article 85. As a result, the Commission found itself vested with new opportunities to control mergers. In a press release issued the day after the judgment, the Commission announced that "the key issue was whether the agreement gives rise to actual or potential influence by one company over the business activities of the other Market conditions and the particular circumstances of the companies involved must always be carefully examined by the Commission."[206] Several problems arise in interpreting this decision; they concern the forms of mergers to which the decision can be applied, whether it is the agreement itself or the transfer of shares that is rendered void, and the elements which will determine whether a merger agreement restricts competition.

Article 85(1) applies to agreements between undertakings. A friendly take-over which results in an agreement is also subject to Article 85(1). A contested take-over does not fall under Article 85(1) because in that case there is no agreement between undertakings.[207] A public bid and the acquisition of shares through a stock exchange should not be considered to fall under Article 85(1).[208] Concerted practices of undertakings are also prohibited. Consequently, if a company either reacts positively to or co-operates with a public offer for its shares, it should be considered as contravening the prohibition related to con-

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206. W. Elland, "Mergers: The EEC'S Expanding Role", (1988) 16 Int'l Bus. Lawy., No. 8, p. 28.

207. Friend, op. cit., Ch. II, fn. 205 at 196.

208. W.J.L. Calkoen and J.J. Feenstra, "Acquisition of Shares in Other Companies and EEC Competition Policy: The Philip Morris Decision", (1988) 16 Int'l Bus. Lawy., No. 4, p. 167 at 168.

certed practices.[209] On the question of which transaction is declared void, the logic of Article 85 favours the agreement itself, voiding the transfer of shares, something that could have substantial consequences, for example, in the case where a merger is set aside several years after it had taken place.[210] To determine whether a merge agreement restricts competition, the ECJ used the elements of control and co-operation. This solution leaves ample room for interpretation. In a merger between Carnaud, a French can maker with 5 per cent of the Community market, and Sofreb, owned by the steel group Sacilor, a subsidiary of the Continental Can, the Commission had the opportunity to show that "its control of changes in the structure of the share capital of companies takes into account the needs of industry in the Community in that it permits desirable economic restructuring while opposing particular structures which would be actually or potentially damaging to the maintenance of effective competition in the market in question."[211]

d. Application of the EEC Treaty Competition Rules to Joint Ventures

According to Brodley, a joint venture is

> an integration of operations between two or more separate firms, in which the following conditions are present: (i) the enterprise is under the joint control of the parent firms, which are not under related control; (ii) each parent makes a substantial contribution to the enter-

209. Id.

210. Elland, op. cit., Ch. II, fn. 206 at 29.

211. P. Sutherland's comments on the case, IP Jan. 12, 1988 in Elland, id.

> prise; (iii) the enterprise exists as a business entity separate from its parents; and (iv) the joint venture creates significant new enterprise capabilities in terms of new productive capacity, new technology, a new product or entry into a new market.[212]

Joint ventures provide the opportunity for independent undertakings to increase their competitiveness on the market. However, the potential anti-competitive effects of such arrangements are greater than those in the case of a simple co-operation agreement, given the numerous relationships affected: the relationship between the parents themselves, between each parent and the joint venture, between each parent and third parties, and between the joint venture and third parties.[213] The main forms of anti-competitive behaviour flowing from a creation of a joint venture are collusion, loss of potential competition and exclusion of third parties from the market.[214]

A basic question which arises as to the assessment of a joint venture under the EEC competition rules is whether the joint venture is to be judged under Article 85 or Article 86. This issue is a significant one because it is more difficult to establish an infringement under Article 86, which requires an abuse of a dominant position, than under Article 85(1), which prohibits all agreements that substantially restrict competition within the EEC. Article 86 will apply in those cases where the parent companies have ceased to be competitors in the market of the joint ven-

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212. J.B. Brodley, "Joint Ventures and Antitrust Policy", (1982) 95 Harvard L.R., p. 1523 at 1526; see also J. Faull, "Joint Ventures Under the EEC Competition Rules", 1984, Europ. L.R. at 358.

213. Lever and Lasok, op. cit., Ch. II, fn. 186 at 144.

214. Brodley, op. cit., Ch. II, fn. 212 at 1530.

ture,[215] while Article 85 will apply if the parent companies continue to compete in the joint venture market.[216]

The next question which arises is how to determine whether competition has been restricted. A joint venture will restrict competition if the parents are actual or potential competitors or, where they are neither actual or potential competitors, if the joint venture arrangements affect the market position of third parties.[217] In a case of a joint venture between actual competitors, a restriction of competition is "likely if not unavoidable".[218] To assist in assessing the risk to potential competition of a joint venture, the Commission has produced a check list covering the following factors: input of a joint venture, production of the joint venture, sales by the joint venture and the risk factor.[219] If an evaluation of these criteria indicates that the partners could reasonably be expected to enter the market individually in the foreseeable future, then it is likely that the joint venture will be considered to restrict potential competition.[220] It should be noted, however, that the Commission may grant exemptions to certain joint ventures under Article 85(3), if

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215. I. Van Bael, J.F. Bellis, Competition Law of the EEC, CCH 1987 at 183; Parry, Dinnage, op. cit., Ch. II, fn. 187 at 332.

216. Id.

217. Van Bael and Bellis, id.

218. 13th Rep. on Comp. Policy No. 53, Principles Governing the Assessment of Joint Ventures under the Competition Rules, Doc. IV/471/85-EN.

219. Ibid., at No. 55.

220. Id.

they improve the production or distribution of goods or if they promote technical or economic progress.[221]

e. Application of Article 85 to Other Forms of Co-operation

Airlines are tempted to conclude agreements on, inter alia, revenue pooling, consultation on tariffs, fares and conditions, technical aspects of the industry and CRSs. In these agreements, the degree of co-operation is more limited than in the case of mergers or joint ventures.

Certain categories of such agreements have strong anti-competitive effects and are prohibited by Article 85. However, most of these agreements fall within the scope of the Council's 1987 Package. Also the Commission has granted block-exemptions to the Article 85(1) prohibition for certain categories of co-operative agreements concluded between airlines.[222] The aim of the regulations for block exemptions is to determine the conditions under which certain co-operative agreements are authorized, notwithstanding the prohibition of Article 85(1). These regulations attempt to reconcile the competition rules of the EEC Treaty with some well-established international practices which contributed to the development of civil aviation.[223] Adoption of these regulations was necessary for the integration of the European aviation model into the world aviation system. After all, these regulations have a temporary character which does not interfere with the realization of the second stage of liberalization after

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221. See Vaughan, op. cit., Ch. II, fn. 55, Vol. 2, at 1106-1109.

222. Supra, Ch. II, fn. 104, 105, 106.

223. AviMag 969 (1-10-88) at 51.

January 1, 1992.

Pursuant to Regulation 2673/88,[224] Article 85(1) of the EEC Treaty does not apply to agreements, decisions or concerted practices concluded between two parties only and concerning the provision of ground handling services by one of the two parties.[225] The services to which the Regulation applies are broadly defined in Article 2 of the Regulation, and include any service generally provided on the ground at airports. The Commission tried to ensure that competition would not be restricted or distorted by such agreements. According to Article 3 of the Regulation, the exemption applies under several conditions related to relations between the supplier and the customer and to the terms of the agreement. Regulation 2671/88[226] exempts from the Article 85(1) prohibition agreements on joint planning and co-ordination of capacity, sharing of revenue and consultations on tariffs on scheduled air services, and slot allocation at airports. As with Regulation 2673/88, the Commission attached several conditions to ach one of these agreements in order for them to benefit from the exemption. These conditions, once again, aim to avoid the distortion or restriction of competition within the Community.[227] The third Regulation adopted by the Commission concerns agreements on computerized reservation systems.[228]

All three Regulations provide that the granted exemption may be withdrawn if the Commission finds that the

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224. Supra, Ch. II, fn. 105.

225. Ibid., Art. 1.

226. Supra, Ch. II, fn. 104.

227. Ibid., Art. 2-5.

228. Infra, Ch. III, p. 169-170.

exempted agreements have certain effects which are incompatible with the conditions laid down by Article 85(3) or which are prohibited by Article 86 of the EEC Treaty.

f. Need for the Adoption of a Regulation

The present powers of the Commission to control mergers and other co-operative arrangements are insufficient to ensure the proper application of the EEC Treaty's competition rules. Under Article 86, there is no control over an increase in pre-existing dominance, no power to authorize mergers caught by Article 86 but desirable for other reasons, and no authority to prevent mergers. Therefore, as an instrument of merger control, Article 86 is clearly incapable of application in a systematic and coherent way. As far as Article 85 is concerned, the Philip Morris decision left enough room for a broad interpretation by the Commission.

The inconvenience arising from an absence of Council regulations to ensure uniform application of the competition rules cannot be denied. This gap is the reason for the Commission's first proposal to the Council in 1973.[229] Notwithstanding three amendments, it is unfortunate that the Council did not act on this proposal.[230] Two weeks after the Philip Morris decision, the Council gave the Commission a political "green light" to propose once again a draft merger regulation.[231]

The Commission's proposal presented in April

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229. O.J. Eur. Com. No. C92 (31-10-73) at 2.

230. O.J. Eur. Com. No. C36 (12-2-83) at 3; O.J. Eur. Com. No. C51 (23-2-84) at 2; O.J. Eur. Com. No. C324 (17-12-86) at 5.

231. Elland, op. cit., Ch. II, fn. 206 at 29.

1988,[232] is based on four principles. First, control should apply to large-scale mergers of Community-wide importance.[233] It should be noted that, although the term "merger" is used, the regulation refers to "concentrations", a broader term encompassing 100 per cent mergers as well as partial mergers and take-overs. These concentrations should have a "Community dimension". "Geography" and "turnover" are the two criteria used to determine whether a concentration has a Community dimension.[234] Second, prior notification of planned mergers[235] is mandatory. Third, anti-competitive mergers are prohibited, while authorization of mergers, on the basis of principles analogous to those contained in Article 85(3) is required.[236] This appraisal process represents a combination of articles 85 and 86 of the EEC Treaty. The regulation uses the idea of the dominant position of Article 86 coupled with the possibility of authorization and the authorization criteria of Article 85. Fourth, close and constant co-operation between the Commission and Member States is provided, so as to ensure that procedures are handled rapidly,[237] The basic aim of the draft Regulation is merger control in the sense of a public interest evaluation of a merger's long-

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232. Com. (88) 97 final, op. cit., Ch. II, fn. 145 at 4; see also S. Hornsby, "National and Community Control of Concentrations on a Single Market: Should Member States be Allowed to Impose Stricter Standards?", (1988) 13 Europ. L.R., no. 5, pp. 295-317.

233. Ibid., Art. 1(1).

234. Ibid., Art. 1(2).

235. Ibid., Art. 4.

236. Ibid., Art. 2.

237. Ibid., Art. 11, 12, 18.

term implications.[238] This regulation is complemented by three further measures: (1) the "anti-raider" Directive, first proposed in 1985 and approved by the Council in July 1988, which aims to introduce in all Member States minimum standards for the disclosure of shareholdings above specified thresholds;[239] (2) a draft Directive on insider trading; and (3) a future proposal for measures on all aspects of hostile take-over bids.[240]

SECTION IV - AUTOMATION AND THE EUROPEAN AIRLINE INDUSTRY

The post-deregulation era is characterized by an increased reliance on automation by the air transportation distribution system. This development, combined with the possible anti-competitive use of CRSs, has forced both ECAC and the EEC to adopt measures regulating CRSs.

1. The Essence of Computerized Reservation Systems

While CRSs have many advantages and can facilitate air transport distribution, their anti-trust implications must be considered seriously.

a. Advantages of CRSs

One major result of air transport deregulation in the United States was a large increase in the airline

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238. A. Burnside, "Merger Control with a European Dimension", (1988) 86 Int'l Bus. Lawy., No. 8, p. 348 at 350.

239. Press Release in Europe, Brussels, July 12, 1988.

240. The Independent, July 12, 1988 at 23.

activity coupled with the emergence of a wide variety of fares and schedules. As a result, the air transportation distribution system started to rely on the use of CRSs.

Large airlines, able to meet the heavy investment costs, first introduced CRSs mainly to facilitate the work of their sales and reservation departments.[241] As their systems grew and technology developed, these airlines were able to link travel agents directly to the airline CRS.[242] These airlines then began to offer other airlines the opportunity to participate in their systems.[243] In this way CRSs penetrated the airline distribution system and became a fundamental part of it. The US market, which devised the systems, is now divided into four major CRS: Sabre (American Airlines), with a 37 per cent share of the market; Apollo (United Airlines), with 27 per cent, System I (Texas Air), with 23 per cent; and PARS (TWA/Northwest), with 14 per cent.[244] CRSs perform such a vital function in the air transportation industry that currently 97 per cent of US agents are linked to one of these systems.[245]

A CRS consists of a central database, periodically updated, which feeds to and is accessed by the numerous terminals of the subscribing agents.[246] These systems

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241. W.D. Zubkov, "The Development of CRSs: The ICAO Viewpoint", ITA Magazine, No. 412, March-April 1987, p. 3 at 4.

242. Id.

243. Id.

244. Europe, July 27, 1988, No. 4832 at 9.

245. Id.

246. D. Saunders, "The Antitrust Implications of CRS's", (1985-86) 51 JALC, p. 157 at 160; see also 14 CFR para. 255.3.

provide carriers and travel agents with expedious determination of schedules, loads, fares; booking of reservations; and issuance of tickets for thousands of city-pair combinations.[247]

The importance of CRSs is magnified by two factors, the essential nature of CRSs for travel agents and the crucial role of these agents in airline ticket sales. Modern travel agencies demand the use of CRSs because airline ticketing without them is slow and inefficient.[248] As well travel agents are uniquely able to arrange consumer travel, given the increase in the number of fares, schedules and restrictions; the ability of travel agents to offer supplementary services such as car rentals and hotel reservations; and the fact that agents are almost the exclusive source of interline tickets for consumers.[249]

The attraction of the CRS depends on the amount of information which can be retrieved from it. For this reason, CRS owners are interested in the inclusion of different airlines' fares and schedules. Airlines themselves seek this inclusion, since it increases their access to the market. They are prepared, therefore, to pay for being listed as well as for the reservation capability.[250]

CRSs offer many advantages to airlines, travel

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247. See ICAO Circular 214-AT/84, Guidance Material on the Regulation of CRSs 1988 at 1.

248. Travel agents can make a reservation using a CRS in 1/3 of the time it took before, D. Saunders, op. cit., Ch. II, fn. 246 at 163.

249. Ibid. at 164.

250. W.D. Zubkov, op. cit., Ch. II, fn. 241.

agents and consumers:[251] (1) They contain vast amounts of constantly changing travel data such as schedules, tariffs, hotels, surface transport, attractions and restaurants;[252] (2) Interrelation and reorganization of that data is possible due to sophisticated software programmes; (3) They offer a wider choice of travel information to passengers in order to meet their travel needs in an optimal manner; (4) They make it easier to obtain travel documents and to settle accounts, since the computers print out everything from the air travel ticket to the itinerary and car rental confirmation; (5) They work at high speed and save time for travel agents and passengers; and (6) They make "code sharing" possible among airlines thereby allowing them to enhance their commercial presence, to enlarge their network without opening new connections and negotiating for traffic rights.[253]

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251. For the passenger's benefits see N. Ehlers, CRSs in the Air Transport Industry, How to Optimize the Pasenger's Benefits, Deventer, Netherlands, Kluwer Law and Taxation Publishers, 1988 at 47-49.

252. Sabre which has the largest databand of any of the American CRS's now stores more than 32 million different fares in its actual databank and hanldes fare changes worldwide at the rate of 200,000 - 1 million per day, CRSs the battle for Europe, Flight International Feb. 27, 1988, p. 32 at 33.

253. See for example, the agreement between B.A. and United for the route Seattle/London, via Chicago of Dec. 1987 and the agreement of A.F./Air Inter for the routes Paris/Marseille, Paris/Ibiza in April 1988, AviMag 964 (15-6-88) at 49; AviMag 963 (1-6-88) at 21.

b. Anti-Trust Implications of CRSs

The negative effects of automation in the airline industry threaten to shadow the benefits of this indispensable instrument, for several reasons:[254]
(1) The airline owning a CRS is usually tempted to give preferential screen display to its own services; (2) Override commissions given to travel agents could strain their objectivity[255] and might tempt them not to reveal all available travel options. Consequently, passengers will have to shop around to get the best deal; (3) Different options are listed in an order of priority, which is usually dependent on the time of travel. Fares are available on a different screen, due to their complexity. Estimates in the United States show that between 70 to 90 per cent of bookings are chosen from the very first screen and some 50 per cent from the first line of the first screen.[256] Abusive use of CRSs is therefore possible. For example, a CRS owned by an airline may be programmed deliberately to list a competing airline's flight in the order of priority so that it seems to leave an hour later than its actual departure time; (4) Participation of high volume carriers in a CRS is crucial to its marketability. American Airlines and United Airlines, the two largest CRS owners, charged relatively lower fees to higher-volume carriers, although they gener-

254. F.A. van Bakelen, "Aviation Wizards - Terminal Hazards", (1988) 13 Air L., No. 2, p. 77.

255. Ehlers, op. cit., Ch. II, fn. 251 at 50.

256. Zubkov, op. cit., Ch. II, fn. 241 at 6; see also Saunders, op. cit., Ch. II, fn. 246 at 161.

ally increased booking fees.[257] CRS vendors could, therefore, treat some carriers preferentially and discriminate against others; (5) Competitors may be excluded from CRSs by system vendors. As a result, consumers may suffer. This was the case when Sabena refused to grant London European Airways access to its Saphir CRS.[258] The EEC Commission rendered its decision on November 4, 1988.[259] Having established, for the second time, that Regulation 17[260] remains applicable to all areas which do not provide for transport services as such,[261] the Commission concluded that

> Sabena had infringed Article 86 of the Rome Treaty in that holding a dominant position on the market for the supply of computerized reservation services in Belgium, it abused that dominant position on that market by refusing to grant London European access to the Saphir system on the grounds that the latter's fares were too low and that London European had entrusted the handling of its aircraft to a company other than Sabena."[262]

(6) Easy access to the marketing data of competitors could allow for very precise competition, such as price competition for instance;[263] (7) Travellers can get twice

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257. Saunders, ibid., at 162; Ehlers, op. cit., Ch. II, fn. 251 at 48.

258. Supra, Ch. I, p. 79.

259. Com. Doc. 88/589/EEC, OJ, No. L317/47, Nov. 24, 1988.

260. Supra, Ch. I, fn. 43.

261. Com. Doc. 88/589/EEC, op. cit., Ch. II, fn. 259 at 51.

262. Ibid. at 53.

263. Ehlers, op. cit., Ch. II, fn. 251 at 49.

deceived from the combination of CRSs with the "code sharing" technique: They travel with several airlines, although they thought they had chosen a direct flight. As well, they must change planes, and expose themselves to all the possible pitfalls of missing a connecting flight or losing their luggage. Furthermore, "code sharing" could enable the "megas" to dominate the market;[264] and (8) European CRSs are, by and large, owned by the national flag carriers. Bias in these systems has been tempered by reciprocal arrangements between these carriers. However, several air carriers do not benefit from this reciprocity and are therefore disadvantaged.[265]

The potential for abusing the powers conferred by CRS ownership is the subject of continuing studies by ICAO. During the third Air Transport Conference in 1985, the smaller countries of Western Europe[266] urged adoption of a recommendation that the ICAO Council review all aspects of CRSs and formulate recommendations to protect the public against abuse and to maintain fair competition among air carriers.[267] These countries pointed out that, outside the United States, there is usually only one airline CRS, a situation which would lead to monopoly abuses such as display bias, unfair limitation on carrier access, incorrect

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264. Com. Proposal for a Council Regulation on a Code of Conduct for CRS's Com (88) 447 final, Brussels, Oct. 14, 1988 at 1 (hereinafter Proposal for a Code of Conduct for CRSs).

265. AviMag, 964 (15-6-88) at 50.

266. Austria, Belgium Luxembourg, Netherlands, Switzerland.

267. ICAO Doc. AT-Conf/3-WP/91, para. 15, July 2, 1985.

information and abuse of information.[268] As a result the Conference adopted Recommendation 5/4 which urged that "the Council study all relevant aspect of CRS and formulate recommendations whose purpose would be to avoid abusive use of these systems at the international level in order to enhance fair competition between airlines and protect the travelling public."[269] The Secretariat prepared a comprehensive set of conclusions on regulatory guidance, which were issued as guidance material to assist States in the development of policy and regulations to curb possible abusive use of CRSs at the international level.[270]

ICAO's contribution to resolving CRS-related issues would be extremely important, due to the participation of more than 160 nations in the organization. Emergence of a multilateral instrument on the issue is not likely, since its adoption would take too long and agreement on its terms would be difficult to reach. As well, ICAO's efforts are limited to the development of non-obligatory recommendations.[271] For the time being then, regional regulations are the only solution. ECAC and the EEC recently have made some efforts to regulate CRSs.

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268. Ibid., at para. 11.

269. ICAO Doc. AT-Conf/3-WP/59, para. 5:20, Nov. 4, 1985.

270. ICAO Circular 214-AT/84 Guidance Material on the Regulation of CRSs.

271. A/27/EC (Agenda Item 3) Inventory of the major problems associated with continued development in the air transport field, p. 3.

2. The Regulatory Environment

Efforts of ECAC and the EEC Commission do not arise only from anti-trust implications of the use of CRSs, but also from the proliferation in Europe of the CRSs of US carriers.

a. The US Invasion in Europe

When the US CRS market has become saturated, US vendors turned their attention to computerizing European travel agents.[272] European agencies became a desirable target for these vendors,[273] since the degree of travel agent automation in Europe is generally lower than in the United States.[274] As well, there is often little competition, as the flag carriers are frequently the only vendor in any given country.[275]

Europeans had an interest in keeping US CRSs outside Europe. US domination would reduce the control by

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272. R.J. Fahy, "Regulation of CRS in the US and Europe", Airlines Computerized Reservation Systems, Seminar on Aviation Law, Rotterdam, Oct. 10, 1986, Aerovision Consultancy Publishing.

273. Sabre was first placed by American Airways in Scandinavian travel agencies by 1985 and began its major marketing push in April 1986. By 1986 it had nearly 12% of the Scandinavian market and expected to triple its European market by 1987; M. Feazel, "European Airlines Express Concern over Competition from Sabre Apollo", AWST, Nov. 3, 1986, p. 101.

274. 80% of all European airline bookings are made through travel agencies and some 80% of all bookings made by travel agents are made through airline-owned CRSs, Proposal for a Code of Conduct for CRSs, op. cit., Ch. II, fn. 264 at 1.

275. Zubkov, op. cit., Ch. II, fn. 241 at 6.

European countries over distribution of their services, would reduce the profit of European vendors and would increase the airlines' distribution costs, as they would have to pay booking fees for these services sold through US CRSs. Furthermore, loss of control over marketing apparatus would cause a loss of revenue.[276] Another fear was that small airlines would decide to cooperate with Apollo or Sabre, rather than establish or expand their own travel agency booking system.

As a result, many European airlines, realizing that the only way to oppose Sabre and Apollo was through competition, sought out partners for joint-venture CRSs that would be large enough to compete with the arriving US systems. At the same time, a regulatory framework was necessary in order to avoid the anti-trust implications of CRSs.

In early 1987 the AEA commissioned an independent study on the possibility of setting up a European CRS to which all its members could subscribe. Although the study concluded that such a system was feasible, the existence of two major hardware suppliers to European airlines - IBM and Unisys - blocked the project.[277] Following a meeting of AEA airline presidents in May 1987, two CRS user groups were formed. One group, all Unisys users, is called Amadeus and comprised Luftansa, Air France, Iberia and SAS.[278] Amadeus has since been joined by Air Inter, Linjeflyg, JAT and Air Adria.[279] The other group, all IBM users is called Galileo and consisted of British Airways, Austrian,

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276. Feazel, op. cit., Ch. II, fn. 273 at 104.

277. B. Rek, "Computer Reservations Controversy Spreads", Interavia 8/1987 at 819; AWST August 3, 1987 at 37.

278. Id.

279. Flight International, Feb. 27, 1988 at 35.

Swissair and KLM.[280] Galileo was later joined by Aer Lingus, Alitalia, Austrian Airlines, BCAL and TAP Air Portugal.[281]

Ironically, the European response to the fear of US domination of CRSs in Europe does not exclude US participation. Although the European CRSs are being developed to compete with US systems, Galileo has joined forces with United and has purchased software and technical assistance from Apollo,[282] while Amadeus has purchased software and technical assistance from System 1.[283]

b. ECAC and EEC Measures

(1) ECAC

On the initiative of ECAC, CRS issues were included on the agenda of the 1986 ECAC-US meeting on North Atlantic pri ing.[284] The ECAC delegation contended that the effect of US CRSs in Europe was that ECAC carriers were denied fair and equal opportunity to compete.[285] ECAC also started to collect factual information on CRSs in intra-European air transport, as it wanted to produce guidelines for ensuring free access to CRSs and for achieving

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280. B. Rek, op. cit., Ch. II, fn. 277; AWST, Aug. 3, 1987 at 38.

281. CRS The Battle for Europe, Flight International, Feb. 27, 1988, p. 32 at 35.

282. AWST, July 20, at 33.

283. Ibid. at 34.

284. Ehlers, op. cit., Ch. II, fn. 251 at 39.

285. Id.

display of flights in a non-discriminatory way.[286] At the Paris Meeting of March 1987 it was unanimously agreed that there was a need to activate this item on the ECAC work programme and to begin work urgently on CRSs.[287] It was considered to be useful and necessary to collect information on:[288] (1) the number of types of CRSs in Europe; (2) the possible problems experienced by individual Member States with CRSs; (3) what were the existing national and EEC Treaty controls on CRSs; and (4) the possibility of ECAC developing a Code of Conduct. ECAC approved a Code of Conduct to govern European CRSs,[289] which entered into force on April 1, 1989.[290] The essence of this Code is fair access of systems to markets, fair access to carriers to system, specified display criteria giving priority to direct services and banning code sharing, reasonable terms for agents, and tentative steps to cover agents' presentation to the public.[291] The ECAC Code deals only with scheduled air services. ECAC Members plan to explore ways to include non-scheduled service, since charters account for about 50 per cent of the business in Europe.[292]

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286. Ibid. at 59.

287. Report 24th Meeting of the Working Group on Intra-European Air Transport Policy, EUPROL 24 Paris, 3-6 March 1987: EC 9-2. 2-1.24.204.

288. Id.

289. Id.; Doc. ECAC/13 Strasbourg, June 7-10, 1988, Appendix 6, Principles for ECAC Code of Conduct for CRS, p. 73.

290. Y. Cochennec, "SIR: La CEAC Adopte un Code de Conduite", Air et Cosmos, No. 1230, Mars 25, 1989 at 28.

291. Id.

292. TW March 9, 1989.

(2) The EEC

The Council of Ministers, as part of the December 1987 Aviation Package, delegated to the Commission powers to make regulations for block exemptions from application of the competition rules to inter alia, airlines CRSs. This action was designed to meet the specific cases of Amadeus and Galileo, which were seen by the Council as an appropriate response to the challenge of the major US system vendors.[293] This Regulation was adopted by the Commission in July 1988.[294]

The Commission block exemption regulation on CRSs is limited in scope and application, since it only applies to jointly-owned systems,[295] that is, the existing Amadeus and Galileo systems. The Commission tried to assure fair access of any carrier to CRSs and to protect participating carriers from being abused by the system vendor with respect to either termination of the contract[296] or the fees charged.[297] The Regulation also provides rules on display; displays must not be discriminatory and in no way related to the carrier's identity.[298] While no specified display criteria are given, interested parties may request the techniques used for the ranking and presentation of

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293. com (88) 447 final, op. cit., Ch. II, fn. 264 at 2.

294. Supra, Ch. II, fn. 106.

295. Com. Regulation No. 2672/88, op. cit., Ch. II, fn. 106 Art. 1.

296. Ibid., Art. 3.

297. Ibid., Art. 6.

298. Ibid., Art. 4(1).

information.[299] These rules are subject to reciprocity in so far as they concern the relations between a system vendor owning and controlling a CRS subject to the Regulation and a carrier owning and controlling another CRS.[300] Travel agents who use A CRS subject to the Regulation, are also protected with respect to contract termination and to their freedom to chose to use another CRS.[301] Consumers are protected as well, since the Regulation prohibits commissions given by parent carriers to travel agents for the sale of tickets on their air transport services, since such commissions could put the agents' objectivity under strain.[302] Finally the Regulation prohibits concerted practices among two or more system vendors for the purpose of partitioning the market.[303]

The provisions of the Commission's Regulation are general, avoiding the complex details of CRSs. This generality is understandable, given the inter-party nature of the Regulation and the rapid development of CRS technology. Since technology progresses faster than law, stricter regulation could hinder the ability of the Commission to take action against infringements of the Regulations. After all, the objective of this Regulation is limited to the exemption of agreements concerning CRSs from the prohibition of Article 85(1) of the EEC Treaty.

Galileo and Amadeus are not the only CRSs in the European market. Other systems of a different nature exist, such as those owned by single companies. The Commission believed that it was important, that a code of conduct

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299. Ibid., Art. 4(3).

300. Ibid., Art. 7.

301. Ibid., Art. 8.

302. Ibid., Art. 9.

303. Ibid., Art. 10.

applicable to those systems should also be established. With such a code, air carriers, travel agents, freight forwarders and users would have certainty of fare access and neutrality of display.[304] The Commission proposed in October 1988 the adoption of a Council Regulation on a Code of Conduct for CRSs.[305]

The proposed Regulation contains detailed rules which if adopted will apply to CRSs used in the territory of the EEC, even if the system vendor might not be a Community citizen, the information might come from outside the Community, or the air transport service concerned might be outside the Community.[306]

The Code of Conduct would cover scheduled, charter and freight flights. It would prohibit such practices as exclusive terms which prevent a participant in one system from using another; bias through screen presentation, speed of access or quality of information given; and denial of would-be subscribers of access to systems or the charging of prohibitive fees. Within the system's available capacity, the system vendor would have to offer the facilities at non-discriminatory fees,[307] to any air carrier who wished to participate.[308] Exclusive terms, precluding a new participant from also joining another system, would not be allowed.[309] To ensure that all participants in a CRS have equal standing, the Code would specify how information should be displayed.[310] Loading of data would be subject

304. Com (88) 447 Final, op. cit., Ch.II, fn. 264 at 2.

305. Ibid.

306. Ibid., Art. 1.

307. Ibid., Art. 3(2).

308. Ibid., Art. 3(1).

309. Ibid., Art 3(3)(c).

310. Ibid., Art. 4, 5.

to similar rules. The Commission would have full rights of investigation, in order to establish that the Code was being respected, and the power to fine system operators for any breach up to 10 per cent of annual turnover, subject to appeal to the ECJ.[311] An enigma of the Code is that it does not forbid the code-sharing practice, even though this issue is a rather crucial one from the traveller's point of view. The Annex to the proposed Regulation, however, does provide a set of general ranking criteria. Article 2 of the Annex provides that, unless code-sharing flights guarantee that the connecting flight will be held, those flights shall be treated as connecting flights for ranking purposes.

SECTION V - STATE AIDS AND THE AIR TRANSPORT COMPANIES

Although the Commission proposed in its Memorandum No. 2 that special rules should be adopted for aids granted to air transport companies, no such measures have yet been adopted by the Council of Ministers of the EEC. Nevertheless, the provisions of the EEC Treaty on State aids are applicable to the aviation sector, in so far as EEC Member States are concerned.

1. State Aids: The EEC Treaty

While State aids are incompatible with establishment of a Common Market, this principle has its derogations.

a. The Principle of Incompatibility

Establishment of a true single market and a system of undistorted competition requires that Member States are prohibited from granting to undertakings aids that distort,

311. Ibid., Art. 10 to 20.

or threaten to distort, competition and trade between Member States.[312] The ECJ has held that:

> The aim of Article 92 is to prevent trade between Member States from being affected by benefits granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Accordingly, Article 92 does not distinguish between the measure of State intervention concerned by reference to their causes or aims but defines them in relation to their effects.[313]

Five elements constitute State aid: (i) an advantage, (ii) granted by a Member State or through State resources,[314] (iii) favouring certain undertakings or the production of certain goods, (iv) distorting competition; and (v) affecting trade between Member States.

An advantage given to an undertaking without the undertaking having the obligation to do anything in return is clearly an aid.[315] However, the crucial test is whether an undertaking obtains a benefit which it would not have received in the normal course.[316] Consequently, a measure is still capable of being an aid even if the recipient undertaking is required to do something in return.

Article 92(1) provides that the prohibition applies to aids granted by a Member State or through State resources. In this respect, the ECJ has stated that:

> The prohibition contained in Article 92(1) covers all aid granted by a Member State

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312. Rome Treaty, op. cit., Intro. fn. 25, Art. 92(1).

313. Case 173/73, Commission v. Italy, 1974 ECR 709, 718.

314. This element is given by Art. 92(1) of the Rome Treaty, op. cit., Intro. fn. 25.

315. Bellamy and Child, op. cit., Ch. II, fn. 179 at 614.

316. Ibid. at 615.

> or through State resources without its being necessary to make a distinction whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid. In applying Article 92 regard must primarily be had to the effects of the aid on the undertakings or producers favoured and not the status of the institutions entrusted with the distribution and administration of the aid.[317]

For an aid to be prohibited under Article 92(1), it must be granted to certain undertakings only and not to undertakings in general.[318] This condition is met not only when the measures in question give an advantage to certain sectors of production or certain regions of the country, but also when the undertakings of a Member State do not all benefit from such measures.[319]

The ECJ has held that competition must be regarded as distorted where financial aid granted by a State strengthens the position of an undertaking in comparison with other undertakings competing in intra-Community trade.[320] In this instance, the Court upheld the Commission's decision even though the Commission had not made any reference to the relevant market. In two later cases, the Court moved away somewhat from its previous position and required more than a bald assertion that the assistance distorted or threatened

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317. Case 78/76 Steinike und Weinlig v. Germany 1977 ECR 595, 611.

318. See Bellamy and Child, op. cit., Ch. II, fn. 179 at 618-619.

319. Joined Cases 6, 11/69, EC Com. v. France 1969 ECR 523 at 552; see also Vaughan, op. cit., Ch. II, fn. 55 Vol. 2 at 708.

320. Case 730/79 Philip Morris v. Commission, 1980 ECR 2671.

to distort competition in the Community.[321] In particular, the Commission must explain how competition is affected, that is, it must examine the relevant market, the position of the aid recipient in that market and the volume of inter-State trade in the product concerned.[322]

A State aid is incompatible with the Common Market as long as it affects trade between Member States. Article 92 does not use the term "may affect trade", which is used in Article 85. Nevertheless, this omission is immaterial, since it is sufficient for an aid to be prohibited if it can affect trade between Member States if implemented. This conclusion may be drawn from Article 93(3). This provision gives the Commission the right to prohibit a planned aid if it considers that having, regard to Article 92, any such plan is not compatible with the Common Market. The immediate beneficiary of the aid need not necessarily be the undertaking itself.[323] The aid can be an advantage granted to consumers for a particular good or service, if that advantage could act as a stimulus to sales and indirectly to production.

Finally, the principle of Article 92(1) is not expressed in absolute terms. According to this article, it applies only "save as otherwise provided in this Treaty". Other Treaty provisions on aids are found in articles

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321. Joined Cases 296, 318/82, Netherlands and Leeuwarder Papiezwarenfabriek B.V. v. EC Commission, 1985 ECR 809, Case 323/82 Intermills S.A. v. EC Commission 1984 ECR 3809.

322. Ibid., Ground 24.

323. See Com. Doc. 65/556 OJ 1966, 3141; see also Parry and Dinnage, op. cit., Ch. II, fn. 187 at 345.

42,[324] 77, 82 and 223.[325] Articles 77 and 82 provide for certain aids to the transport sector. In Case 156/77,[326] the ECJ ruled, however, that Article 77 cannot exempt aid to transport from the general system of the Treaty for aid granted by Member States.

The Commission has had the opportunity to deal twice with aids related to the air transport industry. The first formal complaint was filed in 1982 against SABENA. The alleged subsidies to SABENA, cited in the complaint, include government loan guarantees and government subsidization of depreciation charges and some interest payments.[327] The second complaint was filed by the AEA against Olympic Airways (OA). The AEA alleged that OA received subsidies from the Greek government in the form of an exemption from paying landing fees at Greek airports.[328] According to the claim, allowing one airline to avoid paying fees distorts or threatens to distort competition and violates, therefore, Article 92(1) as well as Article 7 of the EEC Treaty, the latter article prohibiting discrimination on the basis of nationality.[329] The Commission filed suit against OA thereafter, stating that its operations were illegally subsidized by the Greek

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324. Art. 42 allows the Council to authorize special agricultural aids.

325. Art. 223 permits Member States t subsidize connected with the production of arms munitions and war material.

326. Case 156/77, op. cit., Ch. I, fn. 34.

327. AWST, Jan. 10, 1983 at 40.

328. AWST, Jan. 17, 1983 at 34.

329. Id.

government.[330]

b. Exceptions to the Principle

(1) Aids which are compatible with the Common Market

An aid is exempted from the prohibition of Article 92(2) if it falls within one of the three categories of aids set out in Article 92(2). Such an exemption is automatic, since the Commission is obliged to permit an aid falling within one of these categories.[331] Moreover, these aids are always compatible with the Common Market even if they distort competition or affect trade between Member States.[332]

The first category comprises aid having a social character, granted to individual consumers, if that aid is granted without discrimination as to the origin of the products concerned.[333] This provision refers to aids granted to firms in order to meet a governmental social objective.[334] The second category covers aids which compensate for natural disasters or "exceptional occurrences".[335] The third category consists of aid granted to the economy of certain areas of the Federal Republic of Germany, affected by the division of Germany, in so far as such aid in required to compensate for the economic dis-

330. AWST, Sept. 23, 1985 at 39.

331. Vaughan, op. cit., Ch. II, fn. 55 Vol. 2 at 709.

332. W.C. Schlieder, op. cit., Ch. II, fn. 54 at 684.

333. Rome Treaty, op. cit., Intro. fn. 25 Art. 92(2)(a).

334. Parry and Dinnage, op. cit., Ch. II, fn. 187 at 346.

335. Rome Treaty, op. cit., Intro. fn. 25 Art. 92(2)(b).

advantages caused by that division.[336] These aids, although definitively compatible with the Common Market, must nevertheless be notified to the Commission in accordance with the provisions of Article 93(1) and (3).

(2) Aids which may be considered to be compatible with the Common Market

There are five ways in which aid may be considered compatible with the Common Market. Three types of such aid can be authorized by the Commission[337] and two by the Council.[338]

1) Authorization by the Commission

The Commission takes into account three factors when examining the compatibility of a State aid proposal with the Common Market. First, the aid must promote development which is in the interest of the Community as a whole; second, the aid must be necessary to bring about that development; and third, the modalities of the aid must be commensurate with the importance of the objective of the aid.[339]

The first category of aids which may be authorized by the Commission are those whose aim is the promotion of economic development in areas where the standard of living is abnormally low or where there is serious under-employment.[340] In assessing whether these conditions are met,

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336. Ibid., Art. 92(2)(c).

337. Ibid., Art. 92(3)(a)(b)(c).

338. Ibid., Art. 92(3)(d), 93(2).

339. Case 730/79, op. cit., Ch. II, fn. 320.

340. Rome Treaty, op. cit., Intro. fn. 25, Art. 92(3)(a).

the Commission must decide by reference to the Community as a whole, not on a national basis.[341]

Article 92(3)(b) enables the Commission to authorize aid in order to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State. These two exemptions are fundamentally different. The first one refers to the execution of an important project of a common European interest. While the manufacture of cigarettes is not such a project,[342] the manufacture of aircraft and aircraft parts is.[343] The second exemption permits aid to remedy a serious disturbance in the economy of a Member State. This exemption has been used to justify the use of general aid schemes which do not come within the exemption provided by Article 92(3)(c).[344]

The Commission can also authorize aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.[345] The compatibility of such an aid with the EEC Treaty must, once again, be determined in the context of the Community and not of a single Member State.[346] Aids authorized under Article 92(3)(c) can be either sectoral, the air transport industry included, or regional.

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341. Case 730/79, op. cit., Ch. II, fn. 320.

342. Id.

343. EC Com. 2nd Report on Competition 1979 points 89-93 (assistance for the sale of civil aircraft manufactured under European transnational programs).

344. Vaughan, op. cit., Ch. II, fn. 55.

345. Rome Treaty, op. cit., Intro. fn. 25, Art. 92(3)(c).

346. Case 730/79, op. cit., Ch. II, fn. 320.

ii) Authorization by the Council

Pursuant to Article 92(3)(d), the Council can specify other categories of aid which may be considered compatible with the Common Market. Moreover, according to Article 93(2), the Council can authorize an aid granted or intended to be granted by a Member State, in derogation from the provisions of Article 92. Such an authorization must be taken unanimously and only in exceptional circumstances. The requirement of unanimity makes apparent the difficulties in obtaining such an authorization.

Under Article 94 of the EEC Treaty, the Council, acting by a qualified majority on a proposal by the Commission may adopt regulations for the application of articles 92 and 93, and may, in particular, determine conditions for the application of Article 93(3) as well as for the categories of aid exempted from this procedure. It is in response to Article 94 that the Council adopted Regulation 1107/70 on the granting of aids for transport by rail, road and inland waterways. The Council has not yet acted on Article 94, as far as aids granted to the air transport sector are concerned. However, adoption of such a regulation is necessary, given that an increase in competition between air carriers will certainly tempt governments to increase the subsidization of their national carriers. Most aids of this kind will be considered by the Commission to be incompatible with the provisions of the EEC Treaty. While the air transport industry no longer needs special treatment, it should be given some special attention by the Council, due to the envisaged changes in the environment of the air transport industry. The need for such a regulation becomes even more apparent, since the provisions of Article 92(1) of the EEC Treaty are not directly applicable before

national courts,[347] unless they have been put in concrete form by acts of the Council adopted under Article 94 or, in particular cases, under Article 93(2).

2. Absence of a Council Regulation

The Commission dealt with the issue of State aids granted to air transport companies in its Memorandum No. 2.[348] The aim of the Commission in this instance was to monitor the scope and visibility of such aids within the EEC in order to ensure a fair and undistorted competitive environment.[349]

The Commission specified that while some degree of public aid may be necessary for socially essential routes in remote regions, air transport should see itself as a commercial business, oriented to the needs for profits and capital self-sufficiency, rather than as a branch of public service.[350] It was also recognized that State aids may be appropriate in order to compete with subsidized carriers from third countries, to overcome particularly precarious but temporary financial problems or to assist economically underdeveloped regions.[351] Assistance in the form of "normal commercial transactions" such as loans or guarantees would also be acceptable, although cases would have to be examined individually to determine if there was an impermissible aid element.[352] According to the Commission, measures to liberalize the European air transport

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347. Case 6/64, op. cit., Ch. I, fn. 23.

348. Supra, Ch. I, p. 56.

349. Thaine, op. cit., Ch. I, fn. 109 at 95.

350. Supra, Ch. I, p. 56.

351. Memo 2, op. cit., Ch. I, fn. 178 at 37, 38.

352. Ibid., at 36.

system must be complemented by action to control State aids, including the withdrawal of all aid schemes which offset airline operating losses. Such aid schemes remove any incentive for the recipient airline to improve its financial performance. Additionally, without guarantees that other airlines would compete on the same level, airlines would be reluctant to join an open market. Without such control, there would be a serious risk that any relaxation would do no more than produce a subsidy race between European States.[353]

No measures concerning State aids were adopted by the Council of Ministers. Nevertheless, the competition rules of the EEC Treaty are applicable to air transport. In particular, the provisions of Article 92 may justify pressure being brought by the Commission on States in order to achieve greater transparency in their relations with their public enterprises and, accordingly, with their flag carriers. This transparency may extend to the privatization of public airlines.[354] In this case, government aid would be considered contrary to the Community Rules on competition.[355]

Consideration should be given to the fact that airlines, both private and public, have greater funding

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353. Ibid., at 36.

354. In Europe privatization had its greatest impact, within few years, with the privatization of 8 airlines (KLM-BA-Alitalia-SABENA-Lufthansa-TAP-Air Portugal-Turkish Airlines-Austrian Airlines) having being decided and in some cases already carried out, L. Rapp, F. Vellas, "Airline Privatization in Europe", ITA Studies and Reports, Vol. 10, 83/3 at 3.

355. Ibid. at 29.

needs than other companies,[356] especially in the context of air transport liberalization. By disrupting the traditional operating conditions of airlines, liberalization is increasing competition, eroding profit margins and creating new investment needs. Public airlines are suffering more than others from this situation.

Their main and often only shareholder is a government or a public body. Such a shareholder is usually confronted with serious financial problems and must meet public service obligations. Such a company is also subject to government supervision, a disadvantage in the context of international deregulation and competition.[357] Therefore, the special features of the European air transport industry should be taken into account when considering the application of the EEC Treaty's rules on State aids to air transport companies.

SECTION VI - PUBLIC UNDERTAKINGS AND THE COMPETITION RULES OF THE EEC TREATY

Public undertakings and undertakings granted special or exclusive rights by EEC Member States are subject, pursuant to Article 90(1) of the EEC Treaty, to Treaty rules and particularly to the competition rules.[358] To the extent that the enforcement of such rules obstructs performance of the particular tasks assigned to such undertakings, Article 90(2) prevents application of these rules.

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356. According to a forecasting study by Lufthansa, the investment required to replace the fleet for the 1990-1996 period will represent a sum equal to four times the figure for 1985, ibid. at 1, 102.

357. Ibid. at 2.

358. Rome Treaty, op. cit., Intro. fn. 25, Art. 7, 89-94.

A public undertaking is "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it."[359] There may be cases where an undertaking could be "public" for the purposes of Article 90(1), although the above criteria are not met,[360] since mere State participation in the capital of an undertaking does not make that undertaking a public one.[361]

Undertakings granted special or exclusive rights can be either public or private.[362] The Commission had decided that the grant to an airline of the right to transport passengers on certain routes qualifies as such a right within the sense of Article 90(1).[363] Since European airlines are public in nature,[364] they may contend that the EEC Treaty competition rules do not govern their activities in every case where their application would obstruct the performance of the particular tasks assigned to

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359. Com. Directive 80/723, Art. 2, O.J. Eur. Com. 1980 L195/35.

360. Cases 188/80, etc., France, Italy and the U.K. v. Commission, 1982 ECR 2545, 2578, the definition of Dir. 80/723 does not reflect the concept of Art. 90 of the EEC Treaty.

361. See Bellamy and Child, op. cit, Ch. II, fn. 179 at 569.

362. Ibid. at 570.

363. Sterling Airways/SAS Denmark Tenth Report on Competition Policy 1981 Points 136 et seq.

364. See L. Rapp, F. Vellas, op. cit., Ch. II, fn. 354 at 7. See Appendix II.

them.[365] Such a claim would have a strong one since there is widespread consensus that air transport enterprises are enterprises in the sense of Article 90(2).[366] It should be noted, however, that the nature of air transport companies has changed and that there is general agreement that air carriers should not be treated differently from any other kind of enterprise.

The ECJ had not resolved this problem for a long time. However, Advocate General Carl Lenz had given special consideration to this issue. In his opinion, before Article 90(2) can exempt airlines from the competition rules, "all other avenues of redress within the Treaty must be exhausted, including Article 85(3)".[367] Since even co-ordinated tariffs may be exempted from the prohibition on cartels under Article 85(3) of the Treaty", the Advocate General said that he was "unable to see how the application of Article 85 to the fixing of air tariffs [could] be shown to be incompatible with the tasks assigned to the airlines."[368] This opinion might be one reason for the adoption by the Commission of the three Regulations exempting certain forms of cartel from the application of Article 85(1) of the EEC Treaty.[369]

The EEC had ruled that "Article 90, para. 2 cannot at the present stage create individual rights which national

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365. D. Lasok, J.W. Bridge, Introduction to the Law of the EC, 2nd ed. London, Butterworths, 1976, at 330.

366. L. Weber, "Air Transport in the Common Market and the Public Air Transport Enterprises", (1980) 5 AASL, p. 283 at 289, 290.

367. New Frontiers, 4 Com. Mkt. Rep. CCH at 16, 794-95.

368. Id. at 16, 795.

369. Supra, Ch. II, p. 153-155, 169-170.

judges must protect.[370] The fact that the Court used the term "at the present stage" means that this provision would not be directly applicable until the Commission issued rules of secondary law in the sense of Article 90(3).[371] The commission adopted Directive 80/723[372] on the transparency of financial relations between Member States and public undertakings. The purpose of the Directive was to provide for verification that public undertakings did not receive hidden aids from public authorities. Although this Directive was not applicable initially to the transport sector, its scope was extended to transport by Directive 85/413.[373]

The ECJ clarified this issue on April 1989 in the Saeed case[374] when it decided that Article 90(2) could apply to air tariffs on "public service routes", where governments oblige air carriers to maintain economically unprofitable services in the general interest.[375] The reasoning of the ECJ in this case is similar to the reason-

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370. Case 10/71, op. cit., Ch. I, fn. 244 at 484.

371. L. Weber, op. cit., Ch. II, fn. 366 at 293; Bellamy, Child, op. cit., Ch. II, fn. 179 at 577, 578.

372. Op. cit., Ch. II, fn. 359.

373. Com. Dir. 85/413 O.J. Eur. Com. 1985 L229/20.

374. ECJ Case 66/86 Ahmed Saeed Flugreisen and Another v. Zentrale zur Bekampfung Unlauteren Wettbewerbs e.v., April 4, 1989, the decision is as yet unreported; unofficial translation in DOC. EEC-WG/17 (hereinafter unofficial translation); see infra Ch. III p. 206-211.

375. See P.P.C. Haanappel, "The External Aviation Relations of the European Economic Community and of EEC Member States into the Twenty-First Century", Postscriptum (May 2, 1989) Part I published in (1989) 14 Air L., no. 2, at 69; Part 2 and Poscriptum to be published in 15 Air L. ; see infra Ch. III, p. 210-211.

ing of the Commission when it considered the issue of State aids in its second Memorandum.[376] The Court added that in each case, "the competent national administrative or judicial authorities are responsible for ascertaining whether the air transport undertaking concerned has actually been entrusted with the operation of such services by an act of public authority."[377] According to the ECJ it is the national Courts that are responsible for making the requisite factual verifications.[378]

376. See supra Ch. II, p. 56.

377. Unofficial translation, op. cit., Ch. II, fn. 374, Ground 55; see Case 127/73, op. cit., Ch. I, fn. 235.

378. Ibid., Ground 56.

CHAPTER III
A EUROPEAN AVIATION COMMON MARKET

How the Community will actually implement its political will with respect to air transport is subject to considerable debate and national manoeuvring. What is certain, however, is that EEC governments are charged with rationalizing their air transport policies and national legislation with their obligations under the EEC Treaty.

The EEC Treaty represents a significant surrendering by Member States of their individual sovereign rights. It expressly forbids discriminations between Member States affecting the right of establishment and corresponding nationality issues; in their bilateral dealings with third countries, EEC Member States also are obliged to adhere to the principles of the Treaty and to follow the decisions of the ECJ.

Although conflicts are unavoidable between the obligations of the EEC Member States under the European Community Law and their obligations under the Chicago system, they will be minor between Community Members and ECAC Member States who are not EEC members. Given the need for co-ordination between the air transport policies of ECAC and the EEC, these two organizations will have to co-operate closely.

SECTION I - FREE MOVEMENT OF PERSONS AND SERVICES

The object of articles 48 to 66 of the EEC Treaty is to ensure the unimpeded exercise, throughout the EEC, of economic activities (Article 2, EEC Treaty) by the removal of restrictions applying both to the persons or the enterprise performing the activity and to the activity itself.

1. Free Movement of Persons

The free movement of persons is intended to be secured throughout the EEC by the principle of non-discrimination and the right of establishment. The EEC Treaty makes a distinction between workers (articles 48-51) and others, who are considered under the title of establishment (articles 52-58).

a. Free Movement of Workers

Article 48 of the EEC Treaty lays down the principle of freedom of movement for workers.[1] This freedom implies the abolition of all discrimination based on nationality between workers who are nationals of the Member States, in matters of employment, remuneration, and other working conditions.[2] It also includes the rights to accept offers of employment actually made; to move freely within the territory of Member States for the purpose of employment, to stay in a Member State for that purpose and to remain in the territory of a Member State after having been employed in that State.[3] The free movement of workers also includes free access to vocational training schemes and the right to join a trade union.[4]

The term "worker" is not confined to manual workers, but comprises all wage-earners or persons subject to a

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1. Rome Treaty, op. cit., Intro. fn. 25, Art. 48(1).

2. Ibid., Art. 48(2).

3. Ibid., Art. 48(3).

4. See Lasok and Bridge, Law and Institutions of the European Communities, London, 2nd ed., Butterworths, 1976.

contract of employment.[5] The free movement of workers is subject to restrictions on the grounds of public policy, public security or public health,[6] and does not apply to employment in the public service.[7]

Article 48 and Regulation 1612/68[8] contain the rules which are applicable to the free movement of workers and which are directly applicable in the Member States of the Community. As these rules create rights for individuals and are to be respected by domestic courts, they have rendered conflicting national law inapplicable.[9]

All forms of action against workers from other Member States are prohibited, even if indirect or covert, if their effect is to put the foreign worker at a disadvantage compared with national workers.[10] The principle of non-discrimination against foreign workers has been upheld in several cases and has been interpreted to mean "equal rights

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5. ECJ Case 8/75 Caisse Primaire d'Assurance Maladie de Selestat v. Association du Foot-Ball Club d'Andlau, 1975 CMLR 383; see also Regulation 1612/68, O.J. Eur. Com. 1968 L251/2, Art. 1; see also Parry and Dinnage, op. cit., Ch. II, fn. 187 at 245-246; and Vaughan, op. cit., Ch. II, fn. 55, vol. 2 at 431-443.

6. Rome Treaty, op. cit., Intro. fn. 25, Art. 48(3).

7. Ibid., Art. 48(4); see Parry and Dinnage, op. cit., Ch. II, fn. 187 at 248-251; Vaughan, op. cit., Ch. II, fn. 55, Vol. 2 at 448-450.

8. Op. cit., Ch. III, fn. 5.

9. Case 167/73, op. cit., Intro. fn. 27.

10. ECJ Case 44/72 Marsman v. Rosskamp, 1972 ECR 1243; Case 112/75 Directeur Regional v. Hirardin, 1976 ECR, 553.

in comparable situations".[11]

The application of these provisions in the air transport sector is mandatory for EEC Member States.[12] Airlines must render their employment policies in accordance with the provisions of the EEC Treaty and Regulation 1612/68,[13] so that their personnel can move freely in the 12 EEC Member States. Furthermore, all regulations establishing a preference for national employees, compelling foreign employers to hire a certain percentage of nationals of the State of operation, and providing for administrative procedures which hamper the eligibility of foreign workers for available employment, must be abolished. Airlines, therefore, will be able to train their personnel in one State and send them to any other place in the Community where they do business, regardless of the nationality of the employees.[14]

As far as the restriction of Article 48(4) is concerned, although European carriers are mostly government-owned or -controlled,[15] they do not fall in the "public service" category. Only employment which is governed by public law is to be exempted from the application of the principle of Article 48(1).[16] Consequently, an air

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11. ECJ Case 15/69, 1969 ECR, 363; Case 152/73, 1974 ECR, 153; see also Lasok and Bridge, op. cit., Ch. III, fn. 4 at 304-306; and Parry and Dinnage, op. cit., Ch. II, fn. 187 at 247.

12. ECJ Case 80/70, op. cit., Ch. I, fn. 33; Case 246/81, op. cit., Ch. I, fn. 196.

13. Op. cit., Ch. III, fn. 5.

14. See Verploeg, op. cit., Ch. I, fn. 3 at 253.

15. See Appendix II.

16. See Weber, op. cit., Intro. fn. 26 at 184.

traffic controller employed under public law provisions will fall outside the scope of Article 48(1); on the other hand, commercial pilots could benefit from the principle of the free movement of workers, if they were employed under a private law contract.[17]

It should be noted that the principle of free movement of workers does not apply solely to foreign nationals. A State's own national also may have the right to invoke Article 48.[18]

There are many practical problems which must be solved, since the exercise of professions related to aviation is conditional upon the approximation and harmonization of national laws and customs concerning education, qualifications and professional status. The idea of such a freedom would necessitate the establishment of a rather extensive complex of rules adapting national legislation and administrative procedures of the various Member States to a common aviation policy. Consequently, all rules related to the requirement and standards for qualified personnel, such as pilots, radio operators and mechanics, must be co-ordinated. Furthermore, questions of salaries, social security, employment, working conditions, protection against occupational accidents and diseases, and vocational training should also be regulated.[19]

Under Article 100 of the EEC Treaty, the Council can on a proposal by the Commission issue directives for the approximation of such legislation and administrative provi-

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17. Id.

18. ECJ case 16/78 Choquet 1978 ECR 2293.

19. See Verploeg, op. cit., Ch. I, fn. 3 at 270; ECOSOC, Opinion on the Contribution of the EC to the Development of Air Transport Services, Dossier TRA/55, Air Transport Policy Memorandum, Brussels, July 3, 1980.

sions. An agreement in the Council would be made easier, given that all EEC Member States are Members of ECAC and ICAO. Consequently, these States follow the standards of ICAO laid down in Annex 1 to the Chicago Convention.[20] According to the EEC Commission, the directive providing for the mutual recognition of professional qualifications has every prospect of being adopted.[21]

Nevertheless, the judgment of the EEC in the Choquet case[22] can be applied to air transport. Consequently, since no harmonization has taken place, disproportional national procedures for, inter alia, recognition of pilots' licences, access to aircraft servicing and recognition of certificates of airworthiness, are unlawful.[23]

b. The Right of Establishment

Articles 52 to 58 of the EEC Treaty provide for the right of establishment. Companies, firms and natural persons working on their account are guaranteed the right to follow their calling in another State of the Community under the same conditions as the nationals or companies of that State. Legislative and administrative provisions on access to and exercise of self-employed activities must be co-ordinated. This co-ordination must facilitate the freedom of establishment and prevent competition from being

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20. Personnel Licensing.

21. Com. of the EC, Com. (88) 650 final, Completing the Internal Market: An Area Without Internal Frontiers, the Progress Report Required by Article 8B of the Treaty, Brussels, Nov. 17, 1988, p. 6 (hereinafter "Completing the Internal Market").

22. Case 16/78, op. cit., Ch. III, fn. 18.

23. See Kuyper, op. cit., Ch. I, fn. 7 at 75.

distorted by State differences in the conditions of admission to employment or to the establishment of undertakings or subsidiaries.[24]

Article 52 has been declared by the ECJ as being directly applicable to the right of establishment.[25] A person who carries on a trade or profession cannot be prevented from exercising that vocation by reason only of his nationality. This decision may even apply to a State's own national where the individual possesses a foreign qualification.[26] A private air operator, therefore, who is refused the license to operate a scheduled route and is thus excluded from competition, can invoke these Treaty provisions in the field of air transport; as well, national courts have the obligation to protect his rights. Considering the importance and complexity of this issue, a private operator should ask the ECJ for a preliminary ruling under Article 177 of the EEC Treaty.[27]

Identification of nationality presents no difficulties for individuals; for legal persons, it was deemed necessary to provide a rule for identification of potential beneficiaries. Article 58 of the EEC Treaty lays down a double criterion for businesses: under the principle of the right of establishment, companies or firms set up in accordance with the law of a Member State and having their centre of control within the Community must be treated similarly to physical persons who are nationals of Member States.

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24. Rome Treaty, op. cit., Intro. fn. 25, Art. 52.

25. ECJ Case 2/74, J. Reyners v. Belgian State, 1974 ECR, 631.

26. Dagtoglou, op. cit., Ch. I, fn. 16 at 352-353.

27. ECJ Case 115/78 Knoors v. Secretary of State for Economic Affairs, 1979 ECR, 399.

The principle of freedom of establishment is subjected by Article 52(2) of the EEC Treaty to the provisions for the free movement of capital.[28] This restriction is an important one, since it is difficult to set up a firm in another Member State without some transfer of capital.[29]

As far as the application of the above-mentioned rules to air transport is concerned, some Member States consider that they must be read in conjunction with the provisions of the EEC Treaty for services, particularly Article 61(1), according to which "[f]reedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport."[30] In the view of these Member States, the right of establishment must be dealt with in an air transport directive of the Council.[31] However, the ruling of the ECJ in the French Seamen case,[32] and the explicit exception of Article 61(1), indicate that the remaining "freedoms" of the Treaty are governed by the provisions of the Treaty related to those freedoms and not by the provisions of Title IV on transport.[33]

Therefore, articles 52 to 58 create a common market of aviation undertakings. Consequently, any airline has, in principle, the right to establish a wholly-owned subsidiary

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28. Rome Treaty, op. cit., Intro. fn. 25, Art. 67 to 73.

29. See Parry and Dinnage, op. cit., Ch. II, fn 187 at 265.

30. See Wheatcroft, op. cit., Ch. I fn. 147 at 11.

31. Id.

32. Op. cit., Intro. fn. 27.

33. See Dagtoglou, op. cit., Ch. I, fn. 16 at 350.

in any other Member State under the law of that State, to receive a license to operate the subsidiary airline under the same conditions as a national from that State and, under the same conditions, receive route concessions for scheduled[34] services.

However, there is a significant difference between a right existing under the Treaty and the method of its implementation. Although a Community airline has the right to be established in all EEC Member States, this right does not imply the actual right to start its operations. The established airline will be subject to regulations of the State of establishment for matters such as the attribution of a license to operate, provided that these regulations have no discriminatory character.[35] Moreover, a foreign airline cannot make use of the right of establishment, if the Member State where the airlines intends to establish has awarded an air service monopoly to its national carrier.[36]

The traditional substantial ownership and effective control clauses governing the issuance of licenses and designation make it impossible, as a matter of practice, for a foreign airline to establish itself in one of the Member States of the Community.[37] These clauses have a discriminatory character when applied to airline operations within the Community and infringe not only Article 52 of the EEC Treaty, but also its Article 7. EEC Member States should therefore be forced to bring their national licensing

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34. See Weber, op. cit., Ch. I fn. 14 at 247.

35. See European Airline Mergers, op. cit., Ch. II fn. 135 at 37.

36. Id.

37. See supra Ch. II, p. 136, 137; see also Appendix I.

requirements in line with the Treaty and should remove such clauses from intra-Community bilateral agreements. Instead, Member States should require that the airline be owned within the Community,[38] that the designated EEC air carriers maintain their central administration and principal place of business within the Community, or combine those two schemes.[39]

Another issue concerns the interpretation of Article 52 in respect to aircraft registration. According to the EC Commission, Article 52 renders provisions of national law inapplicable, if they require that only aircraft owned by a State's own national or under effective control of a national company can be entered on the aircraft register of that State.[40] This restriction on the application of national law is supported by the argument that it is of no use to be permitted to set up a subsidiary in another Member State without being able to register the vessels or planes used by that subsidiary. Consequently, according to the spirit of the EEC Treaty, every Member State should allow the registration in its territory of aircraft owned by nationals of another EEC State or of any other State, or of aircraft belonging to a carrier having its principal place of business and its central administration within the Community.[41]

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38. See P.V. Mifsud, "New Proposals for New Directions: 1992 and the GATT Approach to Trade in Air Transport Services", (1988) 13 Air L., no. 4/5, p. 154 at 155; see also Haanappel, op. cit., Ch. II, fn. 375.

39. See Haanappel, id.

40. Ninth General Report EC 1975, point 103; see also Weber, op. cit., Ch. I, fn. 14 at 248; and Kuyper, op. cit., Ch. I, fn. 7 at 76.

41. See infra Ch. III, p. 231.

Many carriers are interested in pressing to obtain the right of establishment so that they can extend their operations to fifth freedom routes in Europe without the need for bilateral trade,[42] operate in markets between European States of which they are not nationals and set up hubs in States of which they are not nationals.[43]

Freedom of establishment in the air transport sector does not exist de facto, since most European governments fear the aviation implications of such a right. Its exercise would affect the entire system of bilateral and national controls on market entry. While it is precisely the objective of a common market to allow competitive forces to be unleashed, Europe is not yet ready for such a move. After 1992, however, when all barriers to trade are scheduled for removal from the internal EEC market, the right to establish operations in another Community country seems certain to be a major factor in reshaping the structure of the airline industry. Consequently, the Community must deal with this matter as a question of priority; the longer it delays formulating a strategy, the more likely it is that a Court challenge will emerge.[44]

2. The Freedom to Provide Services

Article 59 of the EEC Treaty provides for the progressive abolition of restrictions on the freedom to provide services within the Community in respect of "nationals of

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42. Especially since the fifth freedom rights granted by the Council's Package of Dec. 1987 are subject to numerous restrictions, supra Ch, II, p. 128-129.

43. See Wheatcroft and Lipman, op. cit., Ch. I fn. 265 at 178.

44. Id.

Member States who are established in a State of the Community other than that of the person for whom the services are intended". Article 59 makes clear the distinction between a right of establishment, which permits movement to the State where the service or activity is to be performed or carried out, and the freedom to provide services, which generally involves retaining an establishment in one State and effecting the service in another.[45]

Pursuant to Article 61(1) of the EEC Treaty, "freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport", in addition to Chapter 3 of Title III of the Treaty.[46] The drafters of the Treaty though that, since the adoption of a common transport policy was one objective of the Treaty,[47] the issue of the freedom to provides services in the field of transport should be dealt according to the rules governing transport, so that it could be examined individually.[48]

In the European Parliament case, the Court found that the Council had failed to ensure freedom to provide services only in the sphere of inland transport,[49] even though the Advocate General was of the opinion that "the obligation to adopt a common transport policy extends not only to transport by rail, road and inland waterway but also as a matter of principle, to sea and air transporta-

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45. See Vaughan, op. cit., Ch. II fn. 55 at 463; Parry and Dinnage, op. cit., Ch. II fn. 187 at 267-268.

46. See Vaughan, ibid., at 480.

47. Rome Treaty, op. cit., Intro. fn. 25, Art. 3(e).

48. ECJ Case 13/83, op. cit., Ch. I fn. 7; see also Guillaume, op. cit., Ch. I fn. 30 at 71.

49. Op. cit., Ch. I fn. 7 at 206.

tion."[50] As a result, in matters concerning inland transport, the Council has to adopt measures provided for by Article 75(1)(a)(b) of the EEC Treaty.[51] Before the Single European Act (SEA)[52] modified Article 84(2) of the Treaty, and given the ECJ's decision, this obligation did not exist in the field of services related to air transport.[53] Since adoption of the SEA,[54] there is now a stronger link between Article 84 and Article 75.[55] Article 84(2) now states that "the procedural provisions of Article 75(1) and (3) shall apply" to sea and air transport.[56] Article 75(1) and (3) is therefore applicable to air transport,[57] placing the Council under an obligation to lay down, by a qualified majority vote on a proposal from the Commission and after consulting ECOSOC and the European Parliament, the conditions under which non-resident carriers may operate transport services within a Member State.[58] However, where the application of Community provisions could have serious effects on the standard of living and employ-

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50. Ibid. at 170.

51. See Guillaume, op. cit., Ch. I fn. 30 at 72.

52. Op. cit., Intro. fn. 29.

53. See Guillaume, op. cit., Ch. I fn. 30 at 72.

54. Op. cit., Intro. fn. 29.

55. Haanappel, op. cit., Ch. II fn. 375, Part 1 at 74.

56. Rome Treaty, op. cit., Intro. fn. 25, Art. 84, 2nd sub-paragraph as amended by SEA, op. cit., Intro. fn. 29, Art. 16(6).

57. See G. Close's opinion in T. Henkels and J.S. van den Oosterkamp, op. cit., Ch. I fn. 8 at 818.

58. Rome Treaty, op. cit., Intro. fn. 25, Art. 75(1)(b).

ment in certain areas on the operation of transport facilities, they are to be adopted by the Council acting unanimously.[59] Therefore, the Council has no discretion in adopting rules for establishment of the freedom to provide services in the field of air transport. Discretion may be exercised only with regard to the details of how the objective will be attained.[60] Freedom to provide services for air transport means that discrimination and other restrictions on grounds of nationality must be abolished and conditions of access to and exercise of air transportation must be harmonized. One of the most important problems to be resolved concerns the authorization for non-resident carriers to engage in cabotage. This permission is essential for a genuine freedom to provide services in the Community.[61] However, as long as the Council refrains from laying down provisions concerning the freedom of services in the field of air transport, this freedom cannot be invoked.[62]

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59. Ibid., Art. 75(3).

60. European Parliament Committee on Transport, Notice to Members Concerning the Judgment of the Court of Justice of the EC of 22 May 1985 in Case 13/83 European Parliament v. Council of the EC: Common Transport Policy - Obligations of the Council, June 7, 1985 at 7.

61. "Completing the Internal Market", op. cit., Ch. III fn. 21 at 17.

62. On the obligation of the Council to act within a reasonable timeframe see M. Doz, "How Will the European Market of 1992 Affect Air Transport", ICAO Bulletin, Jan. 1989, p. 33 at 34-35.

SECTION II - EXTERNAL RELATIONS OF THE EEC

ECJ jurisprudence, combined with the provisions of the EEC Treaty concerning the relations of EEC Member States with third countries, suggest that major changes are to be expected in the external relations of the Community in aviation matters. These changes will not be realized, however, without affecting the international legal aviation environment or raising legal conflicts.

1. Jurisprudence of the European Court of Justice

The ECJ has rendered three important decisions since its 1986 finding that the competition rules of the EEC Treaty apply to air transport.[63] These decisions sufficiently clarify the future of European air transport policy.

a. The Flemish Travel Agencies Case

The Flemish Travel Agencies[64] case arose from a reference under Article 177 of the EEC Treaty. The Court was asked whether certain provisions of Belgian administrative law, based on an earlier code of conduct drafted by a Belgian professional association of travel agencies and forbidding travel agencies from returning earned commissions

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63. Cases 209-213/84, op. cit., Ch. I, fn. 217.

64. ECJ Case 311/85, Oct. 1, 1989 unreported in the English language, full Dutch text contained in Nederlandse Jurisprudentie 1988, Nr. 988 and in F.A. van Bakelen, Mechanism of Restorno, The Flemish Travel Agencies' Unfair Competition ECJ Decision, Aerovision Consultancy B.V. Groningen, The Netherlands 1988 (Annex), also published in (1988) 13 Europ. Transport L., No. 4.

to clients, were contrary to articles 5, 3(f) and 85 of the EEC Treaty.[65]

The Court ruled that the legal provisions of a Member State or a regulation of its administrative law which 1) forces travel agents to respect the prices and tariffs fixed by tour operators; 2) forbids either the sharing of sales commissions with clients or their refunding; and 3) qualifies an infringement as unfair competition, is inconsistent with the obligations of Member States under Article 5 when it is read together with articles 3(f) and 85 of the EEC Treaty.[66] The Court's rationale was that such provisions aim at or result in strengthening incompatibilities with the Community competition rules.[67] The Court decided that this requirement was applicable to the provisions of the Belgian Royal Decree.[68]

It should be noted that this case is not based on a specific aviation case, but on a services one.[69] Consequently, it is not clear whether selling inclusive tours comprises scheduled air services; nor can it be determined whether and in what way discounts granted by travel agencies will influence price-setting in air transportation.[70]

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65. See Haanappel, op. cit., Ch. II, fn. 375, Part 1 at 75; and F.A. van Bakelen, ibid., p. 1.

66. Ibid., p. 75-76.

67. Id.

68. Id.

69. Haanappel, id.

70. Bakelen, op. cit., Ch. III, fn. 64 at 2.

b. The Wood Pulp Case

The Wood Pulp case[71] is a non-aviation case dealing with the extraterritorial effect of the EEC's competition rules. In this case, wood pulp producers and two associations of wood pulp producers with registered offices outside the Community brought an action, under Article 177 of the EEC Treaty, for the annulment of a Commission decision which fined them for violating Article 85 of the Treaty.[72] The fines were imposed for price co-ordination which had an impact on selling prices of wood pulp in the Common Market.

According to the Court,

> [T]he main sources of supply of wood pulp are outside the Community ... and ... the market therefore has global dimensions. Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the Common Market.[73]
>
> [W]here those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually co-ordinated, they are taking part in concertation which has the object and effect of restricting competition within the Common Market within the mean-

71. Cases 89, 104, 114, 116, 117, 125-129/85, EEC-SC/16 item 2, Att. 5, the decision is as yet unreported.

72. EC Com. Dec. IV/29.725 of Dec. 19, 1984, O.J., 1985, No. L85, p. 1.

73. Wood Pulp case, op. cit., Ch. III, fn. 71, Ground 12.

ing of Article 85 of the Treaty.[74]

> [C]onclusion of an agreement which has had the effect of restricting competition within the Common Market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.[75]

> [It is] immaterial in that respect whether or not [the wood pulp producers] had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contracts with purchasers within the Community.[76]

The Wood Pulp case will have important consequences for inter-airline agreements, (for example, tariff, capacity and commercial pooling agreements) for transportation between the Community and third countries. It should be kept in mind, however, that Article 85 of the EEC Treaty is not directly applicable to air transport, unless appropriate action is taken by the Commission, under Article 81, or by the competent national authorities, under Article 88.[77] Nevertheless, the ECJ decided in April 1989 in the Saeed case that Article 86 of the EEC Treaty is directly applicable to air transport.[78]

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74. Ibid., Ground 13.

75. Ibid., Ground 16.

76. Ibid., Ground 17.

77. See supra, Ch. I, p. 65, 66.

78. ECJ Case 66/86, op. cit., Ch. II, fn. 374.

The Wood Pulp decision is the expected consequence of previous ECJ jurisprudence.[79] The uncertainties surrounding the issue of the extraterritorial effect of the competition rules have now been removed. It is very likely that this decision will motivate the Council to adopt in the near future regulations for the application of the competition rules to air transport services between EEC Member States and third States.[80]

c. The Saeed Case

On November 28, 1985 the German Supreme Court (GSC) issued an order for a preliminary ruling by the ECJ on three questions:[81] (1) Is bilateral or multilateral airfare fixing for scheduled air services, in which at least one Member State's airline is involved, null and void according to Article 85(2), due to violation of Article 85(1), even when neither the national authorities of that Member State, under Article 88, nor the Commission under Article 89, has decided upon infringement by that airline of the provisions of Article 85?

(2) Can the exclusive use of bilateral or multilateral airfare fixing's tariffs for scheduled air services be considered as an abuse of a dominant position within the Common Market (Article 86)?

(3) Can the approval of those tariffs resulting from bilateral or multilateral airfare fixing for scheduled air services by the national competent authorities of a Member State be considered incompatible with articles 5(2)

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79. See supra Ch. II, p. 112-114.

80. See Haanappel, op. cit., Ch. II, fn. 375, Part 1 p. 79.

81. Bakelen, op. cit., Ch. III, fn. 64 at 9.

and 90(1), and void, even if the Commission did not oppose (Article 90(3))?[82]

The ECJ rendered its decision in the Saeed case (April 11, 1989) which is an aviation case, involving the phenomenon of "weak currency tickets".[83]

Interpretations were handed down for articles 85, 86, 5 and 90 of the EEC Treaty. Concerning Article 85, the Court upheld its considerations in the Nouvelles Frontières case.[84] According to the Court, when the Council has issued implementing regulations under Article 87 of the EEC Treaty, and when the Commission has not granted individual or block exemptions to airline pricing agreements, such agreements are void.[85] If the Council has not issued implementing regulations, as in the case for air transport services provided either between Community airports situated in the same EEC Member State or between Community airports and airports situated in a non-EEC Member State, pricing agreements are only void when national authorities have taken action under Article 88 of the EEC Treaty or when the

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82. Ibid., p. 9; Haanappel, op. cit., Ch. II, fn. 375, Part I, p. 77.

83. For the facts of the case see Haanappel, ibid., at 75; also see Peter Guilford, "Air Fare-Fixing Outlawed", The Times, London, April 13, 1989, p. 8, 29.

84. Case 209-213/84, op. cit., Ch. I, fn. 217; see unofficial translation, op. cit., Ch. II, fn. 374, Ground 21.

85. See, Haanappel, op. cit., Ch. II, fn. 375, Postscriptum; Guilford, op. cit., Ch. III, fn. 83, at 29; unofficial translation, ibid., Ground 26.

Commission has acted pursuant to Article 89.[86] This ruling does not take sufficient account of the EEC Treaty, since application of Article 88 by Member States of the Community and of Article 89 by the Commission, in relation to the external relations of the Community, cannot satisfy requirements for adoption of a common air transport policy under Articles 84(2) and 3(e) of the Treaty. The Court used once again the theory of the provisional validity. Not only is this theory outdated,[87] but also delays the adoption of a common air transport policy one of the objectives of the Rome Treaty.

Concerning Article 86, the first question to be examined was whether, for purposes of the application of Article 86, it is necessary to make the same distinction as that which applied in the case of Article 85, that is, distinguishing between international flights between airports of the Member States and other flights.[88] As abuse of a dominant position is not susceptible to any exemption, it was for the competent national authorities or the Commission to determine the consequences of such a prohibition.[89] It was therefore decided by the ECJ that Article 86 was directly applicable to the entire air transport sector, without the necessity of implementing regulations issued by the Council under Article 87 of the

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86. See Haanappel, id.; Guilford, id.; unofficial translation, ibid., Ground 29.

87. See supra, Ch. I, p. 66-67.

88. Guilford, id.; unofficial translation, ibid., Ground 30.

89. See Haanappel, op. cit., Ch. II, fn. 375; Guilford, id.; unofficial translation, ibid., Ground 32.

Treaty.[90]

The second problem raised by the GSC was whether the application of a tariff constitutes an abuse of a dominant position where it was the result of an agreement between two undertakings which might be prohibited by Article 85(1).[91] The Court did not exclude the possibility that an agreement between two or more undertakings only represented the formal act enshrining an economic reality which was characterized by the fact that an undertaking in a dominant position had been able to ensure that other undertakings applied the tariffs in question.[92] In such circumstances, simultaneous application of articles 85 and 86 was possible.[93] According to the Court, for Article 86 to apply, there must be a dominant position and an abuse of this dominant position leading to unfair results either for competitors or for users.[94] In certain cases, Article 86 may apply to four types of airline pricing situations: (1) pricing agreements between companies and their subsidiaries leading to a dominant position, where the subsidiary cannot freely determine its market behaviour; (2) abusive pricing on monopoly routes with only one carrier, taking into account alternate modes of transportation,

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90. See Haanappel, id.; Guilford, id.; unofficial translation, ibid., Ground 33.

91. See Guilford, id.; unofficial translation, ibid., Ground 34.

92. See Haanappel, op. cit., Ch. II, fn. 375; Guilford, id.; unofficial translation Ground 37.

93. Id.

94. Haanappel, id.; Guilford, id.; unofficial translation Ground 42.

depending on the markets in question; (3) pricing on routes with more than one carrier, where the dominant carrier charges excessively high or excessively low tariffs, in order to eliminate competitors outside a pricing agreement; and (4) pricing on routes with more than one carrier, where there is only one exclusive tariff imposed by the abusive behaviour of a carrier with a dominant position.[95]

In its third question the GSC asked whether approval by the supervising authority of a Member State of tariffs which were contrary to Article 85(1) or Article 86 of the EEC Treaty was not incompatible with Article 5(2) and Article 90(1), although the Commission had not criticized such an agreement on the basis of Article 90(3).[96] The Court decided that, although the rules of competition are related to the behaviour of undertakings and not to measures adopted by the authorities of Member States, Article 5 requires that those authorities not take or maintain in force measures likely to deprive the rules of competition of their effect.[97] The Court ruled that such measures cannot be taken or maintained for undertakings to which they grant special or exclusive rights in accordance with Article 90.[98] Nevertheless, an exemption may be made concerning those undertakings, pursuant to Article 90(2), when such an

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95. See Haanappel, id.; unofficial translation, ibid., Grounds 44, 45, 46.

96. See Guilford, op. cit., Ch. III, fn. 83 at 29; unofficial translation, ibid., Ground 47.

97. See Haanappel, op. cit., Ch. II, fn. 375; Guilford, id.; unofficial translation, ibid., Ground 48.

98. See Haanappel, id.; Guilford, id.; unofficial translation, ibid., Grounds 49-50.

exemption is necessary for the undertakings to accomplish their particular missions of general interest.[99] According to the Court, Article 90(2) could possibly apply to air tariffs on to what are usually called "public service routes", on which governments oblige air carriers to maintain economically unprofitable services in the general interest, as earlier explained.[100]

2. Provisions of the EEC Treaty

While the EEC Treaty states in Article 210 that the Community has legal personality, the Treaty does not refer to any specific attributions of capacity in international law.[101] However, the Costa v. ENEL[102] case held that the Community exercises for most purposes in external relations "real powers stemming from a limitation of sovereignty or a transfer of powers from the Member States to the Community."[103]

The Community's legal personality in international law was confirmed in the ERTA reference[104]. In that case, the ECJ observed that legal personality, as stated in

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99. See Haanappel, id.; Guilford, id.; Unofficial translation, ibid., Ground 56-57.

100. Id.

101. In constrast with the ECSC Treaty, op. cit., Ch. I, fn. 1, Art. 6; see Lasok and Bridge, op. cit., Ch. III, fn. 4 at 34.

102. Case 6/64, op. cit., Ch. I, fn. 23.

103. Ibid. at 593.

104. Case 22/70. EC Commission v. EC Council, March 31, 1971 (1971) CMLR 335, 17 ECR 263.

Article 210, "means that in its external relations the Community enjoys the capacity to establish contractual links with non-Member States over the whole field of the objectives defined in Part One of the Treaty."[105] The Community, having legal personality in international law, is a subject of public international law. Thus, the ECJ held in the International Fruit Company case that provisions of the General Agreement on Tariffs and Trade (GATT) have the effect of binding the Community within the area of Community competence.[106]

The EEC's treaty-making power for air transport matters can be based on Article 84(2) of the EEC Treaty, which empowers the Council to adopt by a qualified majority all necessary measures. The only necessary measure[107] adopted to date by the Council is Decision 80/50. This decision concerns a consultation procedure between Member States for questions relating to air transport matters dealt within international organizations and concerning the relations of EEC Member States and third States.[108] Nevertheless, in the case of a common air transport policy specialization is necessary, not only in view of the external relations of the Community but also in order to deal with intra-EEC matters. The execution of such a policy

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105. Ibid. at 354; see J. Groux, "Le Parallélisme des compétences internes et externes de la CEE", (1978) Cahiers de Droit Européen, pp. 3-32; see also G. Guillaume, "Les Incidences de la Réalisation du Marché Unique des Transportes Aériens sur les Compétences Extérieures des Communautés Européennes", (1987) 164 RFDA, No. 4, p. 488.

106. Cases 21-24/72 International Fruit Co. v. Produktschap voor Groenten en Fruit, 1972 ECR 1219.

107. Haanappel, op. cit., Ch. II fn. 375, Part 1 at 85.

108. See supra, Ch. I fn. 61 and accompanying text.

cannot be left in the hands of the institutions mentioned in the Treaty itself. Creation of a Community Aviation Body is necessary in order to guarantee the reasonable execution of a common air transport policy. Such a body should be created in a way similar to the Commission in order to guarantee both the independence of its members and the execution of the adopted measures. The body should be subject to the jurisdiction of the Commission and the Council, so long as its ability to act is not hampered by such control.

Article 229 of the EEC Treaty provides that the Commission must "ensure the maintenance of all appropriate relations with the organs of the United Nations, of its specialized agencies ... [and] ... maintain such relations as are appropriate with all international organizations." Consequently, the EEC should be represented in the ICAO, as U.N. specialized agency, or at least be given observer status.[109]

Moreover, since the EEC is founded on a full customs union, it must accord common treatment to exporters from third countries and pursue a common commercial policy. According to articles 110-116 of the EEC Treaty, Member States should co-ordinate their air transport relations with third States and pursue a common air transport policy in respect to them. However, these articles apply only to tariff and trade negotiations with third States. Since air transport is excluded at present from the GATT, these articles are not particularly relevant to the EEC's external powers concerning air transport.[110]

Article 234 of the EEC Treaty concerns the rights and obligations of EEC Member States arising from agreements

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109. See Haanappel, op. cit., Ch. II, fn. 375 at 86.

110. Ibid. at 84.

concluded before the entry into force of the Treaty between one or more Member States and one or more third States. Issues arising from Article 234 will be treated in the final section of this chapter.[111]

3. Relations Between EEC, ECAC Member States and Third States

It is important to know whether the European common air transport policy will apply only to international intra-EEC transport or whether a common attitude will be adopted by the EEC Member States towards third States as well. The latter alternative is the most probable.[112] Given the Wood Pulp case,[113] the competition rules of the EEC Treaty have extra-territorial effect, a fact that will press the Council to adopt regulations applying those rules to air transport between EEC Member States and third States.[114] This application will not be the only one of the Wood Pulp case.[115] A combination of this finding with Article 234(2) of the EEC Treaty suggests that the EEC Member States now have an additional reason to renegotiate their bilateral agreements with third States[116] because in their negotiations they will have to take account of the competition

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111. See infra Ch. III, p. 218-223.

112. For the reasons see Haanappel, op. cit., Ch. II, fn. 375, Part 2, p. 3-11.

113. Wood Pulp Case, op. cit., Ch. III, fn. 71.

114. See supra Ch. III, p. 206.

115. Wood Pulp Case, op. cit., Ch. III, fn. 71.

116. See infra Ch. III, p. 218-223.

rules. Finally the Single European Act[117] provides that "(t)he High Contracting Parties, being Members of the European Communities, shall endeavour jointly to formulate and implement a European foreign policy,"[118] obliging, therefore, at least politically,[119] EEC Member States to present a united front vis-à-vis third States.

The Community has more or less adopted the ECAC approach to pricing and capacity determination.[120] However, ECAC Member States are not entirely subject to the same rules and regulations, although these countries follow ECAC's recommendations. Additionally, there are differences between EEC and ECAC policies, mainly due to the supra-national character of the former and the fact that ECAC reflects the larger number and greater influence of conservative States. However, no problem will exist between the obligations arising from ECAC and EEC agreements, since ECAC Member States can always include a clause in their agreements similar to the one found in the 1987 Agreement on tariffs and capacity.[121] The EEC tends to be more liberal largely due to the drive of the Commission and the ever-present threat of the ECJ.[122] ECAC Member States must ensure that they do not become satellites of the single

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117. SEA, op. cit., Intro. fn. 29.

118. Ibid., Title III, Art. 30.

119. See supra, Ch. I, p. 77.

120. See supra, Ch. II, p. 106, 121-129.

121. See supra, Ch. II, p. 98, 99.

122. See Wheatcroft and Lipman, op. cit., Ch. I, fn. 265 at 63.

EEC airspace.[123] Furthermore, any airline liberalization strategy must incorporate both EEC and ECAC policy developments if there is to be a harmonized European system. Without such incorporation, ECAC's role will be reduced to that of a secondary advisor and, consequently, will leave Europe divided.[124] In view of ECAC's long-standing economic and technical contributions to European aviation developments, its wide European coverage and its links with ICAO, failure to incorporate EEC and ECAC policy developments would be a retrogade step.[125]

While the Community States will increasingly lead the move towards liberalization due to the application of the competition rules, ECAC must be a full partner in this process. Consequently, new procedures for co-ordination will be needed to achieve long-term integration. Action should be taken, therefore, to fill the gap created by the non-application of competition rules to those ECAC Member States which are not Members of the EEC. One suggestion is to follow the model of the trade agreements concluded pursuant to Article 238 of the EEC Treaty and individual EFTA countries.[126] It also would be in the interest of those ECAC Member States which are not Members of the EEC to consider a target within ECAC, compatible with the 1992 target of the EEC, in order to ensure an integrated European

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123. See I. Carré, "What Will EEC be Tomorrow", ITA M., No. 52, Nov./Dec. 1988, p. 3 at 4.

124. See Wheatcroft and Lipman, op. cit., Ch. I, fn. 265 at 64.

125. Id.

126. See Haanappel, op. cit., Ch. II, fn. 375, Part 2, at 16-17; Vaughan, op. cit., Ch. II, fn. 55, vol. 1 p. 570-573 and Vol. 2 p. 864-870.

air transport policy.

When the integrated European air transport policy is achieved, air transport negotiations between ECAC and the EEC will be conducted multilaterally. Conclusion of multilateral agreements between the EEC and ECAC may occur prior to European integration. If so, they may contribute to the adoption of uniform policies by the two organizations, including elements such as the common application of EEC competition rules,[127] a measure which will assist European nations in adopting similar policies in their external relations.

Whether these predictions are realized will depend mainly on the views of the EEC Member States, since they are members of both institutions and therefore have a greater opportunity to determine the course of events than those States which are only Members of ECAC.

The relations of EEC Member States with States outside Europe will be determined by the internal market. The more the EEC air transport market becomes integrated, the more bilaterals with non-European States will be concluded the EEC being considered a single unit. The conclusion, however, of individual bilaterals in some cases as well as the conclusion of common ECAC agreements with third States should be allowed.[128]

If the EEC becomes a unified cabotage area,[129] the multilateral approach will prevail. Accordingly, either the Commission or a new aviation authority will be required to adjust the existing bilaterals with third States. If the EEC does not become a cabotage area, the bilateral approach will be the rule. In this case, the EEC Member States will

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127. See Haanappel, ibid., Part 2 at 19, 20.

128. Ibid. at 26.

129. See infra Ch. III, p. 230-232.

have to re-negotiate their bilaterals in order to accord with Community law.[130]

SECTION III - PROBABLE FUTURE INCOMPATIBILITIES

Establishment of a regional air transport policy does not in itself contradict the objectives of the Chicago Convention.[131] There is no general incompatibility between the world's multilateral civil aviation system and the envisaged subsystem nor do incompatibilities exist between ECAC policy and the Chicago system, since the ICAO has created its own regional offices.[132]

As far as EEC policy is concerned, there are incompatibilities related to the special legal nature of the EEC as a supranational organization.

1. The Obligation to Comply with Both the Chicago Convention and the Rome Treaty

The EEC Member States were already members of ICAO before the EEC was created. Consequently, they assumed certain obligations derived from the Chicago Convention, in particular, the obligation for ICAO Member States to conform with their obligations under the Chicago Convention in accordance with its Article 82.[133] On the other hand, Article 234(2) of the EEC Treaty[134], requires EEC Member

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130. See infra Ch, III, p. 218-223.

131. Chicago Convention, op. cit., Intro. fn. 2.

132. J. Naveau, "The Interconnection between the European Developments and the Regulatory System of International Air Transport", in Rushing into a New Area, op. cit., Ch. I, fn. 156, p. 17 at 23.

133. Chicago Convention, op. cit., Intro. fn. 2.

134. Op. cit., Intro. fn. 25.

States to take all appropriate steps to eliminate incompatibilities between the EEC Treaty and their agreements with States that are not members of the EEC. Pursuant to Article 234(2), EEC Member States must at least try to eliminate such incompatibilities, re-negotiate their bilateral agreements with third states and act in concert, if necessary.[135]

In the Nouvelles Frontières judgment,[136] the ECJ, while recognizing the existence of different international agreements, pointed out that agreements relating to air transport, entered into by the French government before signing the EEC Treaty, did not oblige the current government to violate the EEC competition rules.[137] Although the Court did not explicitly apply Article 234, the Advocate General examined the problem and stressed the obligation of Member States to take all appropriate measures to eliminate any such incompatibilities.[138] These measures include renegotiation and adaptation of pre-existing international agreements, or renunciation or termination of these agreements when such adaptation is impossible.[139] In the Advocate General's opinion, when national legislation is based on international agreements concluded with third States and is in violation of or in conflict with community law, such national legislation is not validly applicable unless all measures have been taken by the Member States concerned to eliminate those conflicts in conformity with

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135. Sutherland, op. cit., Ch. I, Fn. 291 at 12.

136. Cases 209-213/84, op. cit., Ch. I, fn. 217.

137. Ibid., Ground 24.

138. Opinion of the Advocate General Lenz in case 209-213/84, ibid. at 207-208.

139. Ibid., at 208.

Article 234(2).[140] However, such conflicts may validly subsist when renegotiation of an agreement is not accepted by the contracting third State or where renunciation of the agreement is impossible.[141]

The Advocate General Lenz maintained his position concerning the Article 234 issue in the opinion he rendered in January 17, 1989 in the Saeed case.[142] The European Court did not confirm this opinion[143] even though the importance of this issue is magnified by the fact that given the Wood Pulp case[144] existing bilaterals between EEC Member States and third States will have to be renegotiated in order to take account of the competition rules.[145] The possibility of having to renegotiate such bilaterals is reenforced by the fact that according to the Flemish Travel Agencies[146] and the Nouvelles Frontières[147] cases, the EEC Member States have the obligation under Articles 5 and 3(1) of the Rome Treaty to avoid the maintenance of a legal situation which is contrary to the provisions of the

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140. Id.

141. Id.

142. Case 66/86, op. cit., Ch. II, fn. 374; Haanappel, op. cit., Ch. II, fn. 375, Part II at 6.

143. Haanappel, id.

144. Cases 89, 104, 114, 116, 117, 125-129/85, op. cit., Ch. III, fn. 71.

145. Haanappel, op. cit., Ch. II, fn. 375, Part II at 6.

146. Case 311/85, op. cit., Ch. III, fn. 64.

147. Cases 209-213/84, op. cit., Ch. I, fn. 217.

Treaty.[148]

The issue of the status of agreements existing prior to the entry into force of the EEC Treaty has been resolved now that the Treaty has been in force for 32 years, since Member States have had more than enough time to comply with Article 234.[149] However, in matters concerning aviation agreements, EEC Member States have taken no steps with a view to compliance.[150] Therefore, any violation of Article 234(2) would deprive EEC Member States of the benefit accorded by Article 234(1). This provision states that the EEC Treaty will not affect the rights and obligations arising from agreements concluded before entry into force of the Treaty between one or more Member States and one or more third countries. Consequently, because international obligations of such Member States vis-à-vis third States could be void pursuant to community law, and because the Member States would be unable to fulfill their international commitments, they could be held internationally liable vis-à-vis contracting third countries.[151]

The problem which arises is to determine which authority is competent to decide whether there is a conflict between either the EEC Treaty and the Chicago Convention or any bilateral concluded between the Member States and third States. In the case of an incompatibility between European community law and the Chicago Convention, if the EEC concludes that the EEC Member States do not violate their obligations arising from the Chicago Convention, the conflict will only be resolved when the competent ICAO

148. Haanappel, op. cit., Ch. II, fn. 375, Part II at 6.

149. Rycken, op. cit., Ch. I, fn. 306 at 12.

150. Dagtoglou, op. cit., Ch. I, fn. 16 at 352.

151. Rycken, op. cit., Ch. I, fn. 306 at 12.

authorities declare that they are of the same opinion. It might happen that the ICAO members are of the opinion that a provision of European community law or a decision rendered by the ECJ is incompatible with the EEC Member States' obligations arising from the ICAO Convention. Although the Chicago Convention contains special provisions for the settlement of such disagreements,[152] it remains unclear as to who should represent the EEC Member States in such a case -- the Commission or some other organ of the EEC. In any event, the ICAO Council is not bound to recognize this legal situation, since it is entitled to invoke the responsibility of the ICAO Member States.[153] On the other hand, the individual EEC Member State cannot control the negotiations, since it no longer has the possibility of deciding or acting unilaterally.[154] Consequently, the responsible organs of the Community should be brought into play as a party in negotiations with ICAO.[155] If an agreement is reached, the problem will be solved. If no agreement is forthcoming, the ICAO Council can bring the case before the International Court of Justice (ICJ).[156] However, the EEC cannot appear as a party in a dispute before the ICJ because the statute of the Court admits only

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152. Chicago Convention, op. cit., Intro., fn. 2 Art. 84.

153. K. Doehring, "ICAO and the EEC", in The Freedom of the Air, op. cit., Intro. fn. 5, p. 58 at 61.

154. See supra Ch. III, p. 214-218.

155. According to the Rome Treaty, op. cit., Intro., fn. 25, Art. 228; see Doehring, op. cit., Ch. III, fn. 153 at 62.

156. Doehring, id.

States before it.[157]

Therefore, conclusion of a special arrangement between the EEC and ICAO is necessary in order to avoid these problems which are more likely to arise in the future.

2. General Principles of the Chicago Convention

When considering incompatibilities which might arise from application of the EEC Treaty and the Chicago Convention, one critical area of concern is the general principles of the latter.

1. The principle of equal and fair opportunity for every nation to participate in the civil aviation[158] is potentially at stake. According to a Recommendation adopted by the Special Air Transport Conference of ICAO in 1977, this principle has been interpreted to mean "fair and effective opportunity".[159] In 1985 the Third Special Air Transport Conference adopted a definition, according to which this principle means "equitable and fair sharing of benefits".[160] Consequently, the freedom to participate in civil aviation has been construed by a majority of States party to the Chicago Convention as expressing, for all practical purposes, an "economic right" to share benefits

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157. Statute of the International Court of Justice, Art. 34(1), 59 Stat. 1055 (1945) TS No. 993 at 25.

158. Chicago Convention, op. cit., Intro., fn. 2, Art. 44(f).

159. ICAO Doc. 9199, SATC, April 13-26, 1977, Report, Recom. 4-3(c), p. 17.

160. AT Conf/3-WP/57, 4/11/85.

derived from reciprocal operations of air services.[161]

2. The principle of non-discrimination[162] will also be affected by a Common Market aviation policy. Under the same philosophy of "sharing the benefits of aviation", all States are entitled to divide among themselves the production of services.[163]

Discriminatory treatment in favour of EEC carriers, such as preferential airport access, charges or facilitation, CRS, refusal of equivalent freedom rights to third countries and cabotage rights,[164] would raise problems related to the above-mentioned principles, to other provisions of the Chicago Convention and to clauses included in bilateral agreements concluded between EEC Member States and third countries.[165] These conflicts will become apparent when EEC Member States try to withdraw from some of their bilaterals in order to comply with their obligations under the EEC Treaty and grant special treatment to the EEC carriers.[166]

3. Conflicts Arising from the Freedom of Establishment Granted by the Rome Treaty to EEC Member States

It will prove difficult for the EEC Member States to comply with their obligations under Article 52 of the EEC Treaty without adversely affecting their international

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161. See Naveau, op. cit., Ch. III, fn. 132 at 25.

162. Chicago Convention, op. cit., Intro., fn. 2, Art. 11, 44, 7, 15.

163. See Naveau, op. cit., Ch. III, fn. 132 at 25.

164. See infra Ch. III, p. 230-232.

165. See Naveau, op. cit., Ch. III, fn. 132 at 26.

166. Id.; Doehring, op. cit., Ch. III, fn. 153 at 58.

relations with their countries.

When every Member State of the Community allows the registration of aircraft owned by nationals of another Member State, legal problems will arise, given that the State of registry, under Article 29 et seq. of the Chicago Convention would be charged with international responsibility for the aircraft of a foreign company.

Problems will also arise when the EEC Member States remove the "substantial ownership, and effective control" clause from the bilateral air transport agreements concluded between Member States. In this event, third States may assert appropriate clauses in their bilaterals with individual EEC Member States and raise objections on grounds of nationality, among others.[167] The EEC should therefore proceed discretely to avoid such problems, since, the EEC Member States will be affected.

It should be noted that the principle of nationality as embodied in the Chicago Convention does not require ownership by nationals of the flag State.[168] However, under international law, nationality requires a "genuine and effective link between the flag state and its nationals and ships or aircraft."[169] It is difficult to see how this requirement would be satisfied by ownership of foreign national merely operating on the national territory of the State of registry.[170]

Another problem related to the freedom of esta-

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167. See Mifsud, op. cit., Ch. III, fn. 38 at 155.

168. Chicago Convention, op. cit., Intro., fn. 2, Art. 17-21.

169. Int. Court of Justice (ICJ), Nottebohm case, ICJ Report 1955, p. 4 at p. 22 et seq.

170. See Weber, op. cit., Intro. fn. 26 at 189.

blishment arises when determining whether an undertaking having the nationality of State A and established in State B automatically acquires the right to route concessions, particularly in light of the suggestion that the European Community law distinguishes between the right of establishment and the rights pertaining to market participation.[171]

4. Conflicts Arising from the Creation of Multinational Airlines in Europe

As far as relations between the European countries and countries outside the Europe of ECAC are concerned, problems will arise from the possibility of European nations creating new combined airlines.

The first problem concerns the traffic rights of each State involved in the creation of the multinational airline. The rights to be exercised by a new multinational airline, formed by combining two or more national airlines, will surely upset the "balance of reciprocity" underlying the individual bilateral air transport agreements concluded between every State involved with third countries. Most probably, the combination of these traffic rights will turn out to be less than the simple addition of the respective traffic rights granted in each set of bilaterals of the involved States.

The second issue relates to identification of the party who will negotiate on behalf of the combined airline. Will it be a combination of representatives of all the States involved? Who will negotiate in the case of a combined airline where some States involved are members of the EEC and the others are only members of ECAC, and where

171. Id.

the EEC Member States have delegated to the EC Commission or to a new EC aviation authority the right to negotiate their bilaterals?

The third, and probably the most important, issue involves the question of the registration of aircraft owned by a multinational airline.[172] The Chicago Convention provides that "aircraft have the nationality of the State in which they are registered"[173] and that "an aircraft cannot be validly registered in more than one State ...."[174] On the other hand, the ICAO Convention allows airlines to be multinational enterprises, subject to the provisions of the Convention.[175] Article 77 of the Chicago Convention specifies that "the Council shall determine in what manner the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies."

An ICAO Council resolution of December 14, 1967 provided that a Council determination under Article 77 can make the provisions of the Chicago Convention applicable to

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172. See M. Milde, "Nationality and Registration of Aircraft Operated by Joint Air Transport Operating Organizations or International Operating Agencies", (1985) 10 AASL, p. 133; and J.F. FitzGerald, "Nationality and Registration of Aircraft Operated by International Operating Agencies and Article 77 of the Convention on International Civil Aviation 1944", 5 Can. Yrkb. Int'l L. pp. 193-216.

173. Chicago Convention, op. cit., Intro. fn. 2, Art. 17.

174. Ibid., Art. 18.

175. Ibid., Art. 77.

aircraft not registered on a national basis.[176] According to this resolution, aircraft registration with an international organization having legal personality would be allowed, in principle.[177] "International organizations" could possibly include the EEC.[178]

In 1983, the Council made its first determination under the last sentence of Article 77, at the request of Iraq and Jordan, concerning Arab Air Congo, a joint air transport operating organization for air freight.[179] In that case, the Council decided that (1) all jointly registered aircraft operated by Arab Air Cargo must bear a common mark and not the nationality mark of any State; (2) these aircraft must be registered only in the joint register, which would be kept exclusively for the registration of aircraft operated by Arab Air Cargo and which would be separate and distinct from the national registers of Jordan and Iraq; (3) this register must be maintained by the Government of Jordan, who must perform jointly on behalf of Jordan and Iraq, the functions of the State of Registry under the Chicago Convention; and (4) the governments of Jordan and Iraq must be jointly and severally bound to assume the obligations and responsibilities which attach to

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176. ICAO Doc. 8722-C/976, 20/2/68 Resolution Adopted by the Council on Nationality and Registration of Aircraft Operated by International Operating Agencies at 49.

177. See Haanappel, op. cit., Ch. II, fn. 375, Part II at 48; Milde, op. cit., Ch. III, fn. 172 at 150.

178. See Haanappel, ibid., at 48.

179. See Milde, op. cit., Ch. III, fn. 172 at 148.

the State of registry under the Chicago Convention.[180]

An important issue in this respect is whether the ICAO Council will allow an international organization, and more particularly, a supranational organization such as the EEC, to perform the tasks of a State of registry.[181] Milde has stated that such performance is impossible, since it would necessitate an amendment to the Chicago Convention.[182] Haanappel suggests that "the possibility of the EEC performing State of registry functions should exist, even now, by way of an ICAO Council determination under Article 77 of the Chicago Convention".[183] Haanappel attaches three conditions to this possibility: (1) the EEC States must create an international operating agency or agencies; (2) these States should be severally bound to assume the obligations of the State of registry under the Chicago Convention; and (3) these States should provide sufficient guarantees of compliance with the provisions of the Convention.[184] In fact, since Article 77 of the Chicago Convention enables the ICAO Council to determine in what manner the Convention provisions for nationality of aircraft will apply to aircraft operated by international operating agencies, and following the lines of the Council

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180. ICAO Doc. 9428-C/1078 Action by the Council 110th Session, 2/12/83, 30-31; see also Milde, op. cit., Ch. III, fn. 172 at 147-150.

181. See Haanappel, op. cit., Ch. II, fn. 375, Part II at 49.

182. See Milde, op. cit., Ch. III, fn. 172 at 151.

183. See Haanappel, op. cit., Ch. II, fn. 375, Part II at 49.

184. Ibid. at 50.

resolution of December 1967,[185] the Council could determine on the request by the EEC Member States, the conditions under which the EEC could act as a State of registry for aircraft owned by a multinational airline created by two or more States Members of the EEC. This solution to the problem will not apply for registration of aircraft owned by a multinational airline created among States which are ECAC Members but not EEC Members, or such States and EEC Member States.[186]

5. The EEC as a Cabotage Area

If Europe is to achieve a unified economy, the traditional notion of air sovereignty and the complex system of bilateral air transport agreements which codify this concept must be replaced by a regime which treats all of the EEC as a domestic cabotage market.

Without nationality restrictions, cabotage among EEC Member States becomes possible, at least in theory, even if it seemed unlikely in the near future. Creation of an EEC cabotage area is a remote possibility in time because it is one thing to harmonize air policies, but quite another to create a common airspace and a common internal air transport market by legislating one jurisdiction, a cabotage area comprising the territories of participating States.[187]

The creation of one European airspace would create legal problems, since Article 7 of the Chicago Convention prohibits the granting of cabotage rights on an exclusive basis. The problem is one of interpretation: Does the

185. Op. cit., Ch. III, fn. 176.

186. See supra Ch. III, p. 216-217.

187. See H.A. Wassenbergh, "EEC - Cabotage After 1992!?", (1988) 13 Air L., no. 6, p. 282 at 283.

second sentence of this article mean that, if an EEC State permits another EEC Member to operate cabotage routes, then non-EEC States, as signatories to the Chicago Convention, have a right to demand cabotage as well? Or does the word "exclusive", incorporated in the second sentence of Article 7, sufficiently modify the meaning of this article so that non-EEC States cannot automatically claim similar cabotage rights?[188] Given the possibility of conflict, it would be easier for an EEC airline with aircraft registered in State A to perform flights between States B and C, rather than perform services between two points both situated in a State other than that of the State of registry.[189]

The fact that Article 7 of the Chicago Convention uses the term "exclusive" can also mean that EEC Member States could allow cabotage for EEC airlines, if the aircraft with which these services are performed are registered in the State concerned. EEC Member States have a legal obligation to provide for the registration of aircraft owned by nationals of another Member State.[190] However, no such obligation exists for aircraft owned and operated by nationals of non-EEC States.

According to Haanappel, Article 7 could justifiably be interpreted as "an exclusive grant of cabotage rights ... as long as this exclusivity is not specifically mentioned in the relevant bilateral air transport agreement or foreign air carrier permit."[191] Such an agreement could "contain an escape clause to the effect that granted cabotage rights

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188. See Mifsud, op. cit., Ch. III, fn. 38 at 156.

189. Wassenbergh, op. cit., Ch. III, fn. 187 at 284.

190. See supra Ch. III, p. 197.

191. Haanappel, op. cit., Ch. II, fn. 375, Part II at 37.

lapse when third states claim similar rights."[192] Given that such a clause would destroy an intra-EEC grant of cabotage rights, Haanappel suggests that the solution to the problem could be either the abrogation of Article 7[193] or a definition by the ICAO Council of a grant of cabotage rights.[194] Such a definition could state that "an exclusive grant of cabotage rights is possible as long as this exclusivity is not mentioned in the relevant bilateral agreement."[195]

Nevertheless, when European airspace becomes a unified jurisdiction, EEC Member States could also claim that there is no question of contradiction with Article 7, since no question of granting of cabotage rights exists, given that EEC Member States will have surrendered one of their sovereign rights, something which is not forbidden by the Chicago Convention.

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192. Id.

193. Ibid. at 38, 39.

194. Ibid. at 39.

195. Ibid. at 40.

CONCLUSION

The measures adopted to date by the EC Council and Commission concerning air transport are far from what would have been expected, in view of the 1992 target date for a single market. Several important practical consequences cannot be denied, however. The number of discount fares available has increased, the variety of fares is larger and their average price is lower; concurrently, there has been an increase in the overall capacity offered.[1] As well, some co-operative arrangements between carriers have been either terminated or amended, in accordance with measures for implementation of the competition rules of the EEC Treaty.[2] The ECAC measures should be considered a very important step, since no obligation of integration exists for ECAC Member States which are not Members of the EEC.

The EC Commission intends to impose a value added tax (VAT) on passenger air transportation and to adopt stricter rules on noise emission[3] and safety standards.[4] As a result, the airlines' costs will increase.

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1. L. Weber, "Effects of the EEC Air Transport Policy on the International Cooperation", in Brussels International Congress on EEC Air Regulations and Directives, Brussels, May 26, 1989.

2. Id.

3. See Proposal for a Council Directive on the Limitation of Noise Emission from Civil Subsonic Jet Aeroplanes, Com(88) 662 final, O.J. Eur. Com. No. C37/6 of 14/2/89.

4. See EC Europ. Parliament, 3 August 1987, Doc. A2-135/87/B Report Drawn Up on Behalf of the Committee on Transport on Community Measures in the Field of Air Safety.

This increase will be aggravated by the Commission's plan to abolish duty-free shops for intra-EEC air transportation, thereby resulting in a decrease in airport income, which will be offset by increased landing fees. Therefore, public expectations for lower fares in Europe are not very likely to be fulfilled.

European authorities will have to take into account some of the negative effects of liberalization. For example, airport and airway congestion will cause delays which are costly to both passengers and airlines. It is impossible to have "open skies" without sufficient provision of air terminals, runways and air traffic control systems, for coping with the additional demand. Consequently, Europeans should give EUROCONTROL the task for which it was originally created.[5]

The Council is committed to a second phase of liberalization in 1990, with a view to quasi-domestic freedom in 1992. Yet, the fact that it took so many years to conclude the first phase demonstrates that the future is more than uncertain unless the competent European authorities make a greater effort to meet their deadlines. It should be kept in mind, however, that air transport should be allowed sufficient time for all necessary adaptations. Before taking any steps in adapting to the second phase of liberalization, all questions concerning harmonization in the fields of certificates, licences, operating rules and social legislation must be tackled, since it is harmonization of this kind that will enable the EEC to take the second step toward establishment of the internal market.

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5. See EC Europ. Parliament, 3 May 1988, Doc. A-2-0056/88 Report Drawn on Behalf of the Committee on Transport on the Future of EUROCONTROL in the Context of Traffic Control in Western European Airspace; see also opinion of Commissionner C. Davis in Press Release IP(88) 381 Brussels, June 21, 1988.

The second phase will be one of consolidation. Its main effects will be:

(1) operation by carriers from any airport in one Member State into any airport in another Member State. The term international airport will become redundant for intra-EEC traffic;

(2) enlargement of tariff and capacity zones. Airlines will become responsible for setting fares, but will be controlled so as to avoid excessive or predatory pricing. Capacity will become unrestricted, with the exception of cases in which the adaptation process has not been terminated;

(3) reduction of controls on entry and multiple designation; Charter operators could begin to provide scheduled services, unless the limited availability of landing slots restricts entry of new carriers;

(4) further liberalization of regional air transport;

(5) availability of fifth freedom rights on all routes, perhaps with some limitations;

(6) tightening of the competition law regime. Action concerning State aids, monopolies and mergers will be taken; and

(7) consideration will be given to the issue of the right of establishment.

A common air transport policy cannot, however, be confined to the domestic problems of the Community. Such a policy implicates the Member States with regard to both their mutual relations and their relations with third States. It also requires them to abandon the principle of sovereignty in their airspace and create a single European airspace. Therefore, bilaterals with third States should be negotiated, with the EEC as a single unit. In that way, the negotiating power of the Member States will be reinforced and the possibility for development of the European market

will be more likely.

Because Europe is not limited to EEC Member States, it is necessary that ECAC and the EEC conclude agreements providing for their close co-operation and for co-ordination of their respective policies.

One problem mainly related to the EEC, is that the Community, in taking steps to liberalize air transport, behaves as if it were one single nation, which it is not. Therefore, the need for the creation of an aviation authority with supranational powers is obvious, particularly since problems will be created in the future concerning the redistribution of responsibilities and tasks.

Only when the second phase of liberalization has been taken, and a genuine internal market for the EEC has been created, will air transport be able to realize the positive effects of the Community's existence: new opportunities will arise for airlines to operate in regions to which they have traditionally been denied access. Competition from small markets will be eliminated; and European carriers will be able to negotiate effectively with the stronger US and Asian carriers.

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D. *National Laws: Licensing Requirements*

This survey examines those concession and licensing requirements that raise specific barriers to foreign investment in the air transport sector. It includes obstacles resulting from by the existence of public, private or mixed monopolies. Restrictions of a general, non-aviation nature, such as the need for prior notification of all direct investment by non-residents (Austria, Greece, Ireland, Norway, Portugal, Sweden) are not included. These restrictions can be found in OECD publication C(81)100, Annex II.

The following sources have been used:

- OECD Report C(81)100;
- ECAC Doc. October 15,16, 1981, Ag. Item 5: Survey of States' Policies with regard to Applications for Air Transport Licences;
- several civil aviation authorities and other institutions, which have been contacted for the purpose of the present report.

Austria

Foreign capital may be invested in the national airline and other scheduled airlines to a maximum of 50 per cent. Licensing requirements:

- a substantial part of the airlines' capital should be held by Austrians ("überwiegend im Eigentum");
- the airline should have Austrian nationality;
- if the applicant is a corporation, the enterprise must have its seat in Austria; and
- not less than two-thirds of the members of the organs of the corporation must have their residence in Austria and must be Austrian citizens

Belgium

Air transport is a public monopoly.

Cyprus

Air transport is a monopoly

Denmark

Foreign participation in limited liability companies is subject to the condition that general managers and at least half of the members of the board of directors shall be residents of Denmark or EC citizens, unless exception is granted.

The number of founders of joint stock companies must not be fewer than three, of which at least two must be Danish residents, unless an exemption is granted.

Flights within Danish territory may only be made by aircraft:

a. of Danish nationality, or
b. of foreign nationality if a treaty has been concluded granting such rights, or
c. which has a special licence from the Ministry of Public Works.

Aircraft may be registered in Denmark only if they belong to a Danish owner. Danish owners include:

a. the Danish State and institutions managed by the State;
b. Danish nationals;
c. Danish municipalities;
d. foundations solely under Danish management with their main office in Denmark;
e. associations, joint stock companies and similar organizations solely under Danish management and direction, with main offices in Denmark;
f. other companies with limited liability where the majority of members are Danish nationals, or who are deemed to be Danish nationals;
g partnerships when all the members are Danish, or who are deemed Danish nationals.

Source: IFALPA

National Laws: Licensing Requirements (cont.)

In special cases, aircraft which are frequently operated in Denmark and whose points of departure are generally in this country can be granted registration by the Minister of Public Works, even if the above requirements have not been fulfilled.
Licences shall only be granted to the persons mentioned under a-g.

Finland
Any company which wants to sell its shares to foreign individuals or companies must have approval from the Ministry for Trade and Transport. Applications are decided on a case-by-case basis.
Theoretically, it is possible for a foreign airline to acquire up to 20 per cent of the shares of a Finnish domestic airline, incorporated as a joint stock company. A larger interest would only be possible if the Council of State, for special reasons, so decides.

An authorization to carry passengers and cargo for remuneration solely between points in Finland or to carry out other commercial aviation activities in Finland may be granted only to the Finnish State, a Finnish municipality or any other similar community or institution, a Finnish citizen, a company, cooperative or society registered in Finland, or some other Finnish community or a foundation registered in Finland, unless otherwise provided for by an agreement with another State.
An authorization shall not, however, be issued to a partnership or to a limited liability partnership, if one of the partners in such a company is a foreigner, or to a joint stock company, unless its stock has been issued in the names of specific persons and the articles of incorporation of the company include provisions referred to in section 3, subsection 1 of the Act of 28 July 1939, concerning the right of foreigners and certain communities to own and govern removable property and stock, neither to a cooperative, society, foundation or other community, unless all the members of its board are Finnish citizens residing in the country.

France
There is no limitation to cross-border participation in French airlines by companies from other EEC countries, nor is governmental approval needed, but authorization for activities in the air transport area are accorded only to enterprises fulfilling nationality requirements without prejudice to contractory clauses in regular approved international conventions.
These requirements concern:
- capital: at least 50 per cent must be in the form of stock or shares held by French nationals;
- the majority of directors, associated owners or operators must be French nationals; Article R.330-2 LOI No. 82-1153 Du 30 Dec. 1982:

  "Doivent être de nationalité française:
  - Dans les sociétés par actions, le président, la majorité des membres du conseil d'administration, ainsi que le directeur-général;
  - Dans les sociétés à responsabilité limitée, le ou les gérants ainsi que la majorité des associés;
  - Dans les sociétés de personnes, tous les associés en nom;
  - Toutes personnes physiques ayant en propriété ou exploitant une enterprise de transport aérien."

The state has sovereign responsibility over cabotage traffic.

Greece
Air transport is a public monopoly.

National Laws: Licensing Requirements (cont.)

Iceland
A foreign investor can theoretically acquire a 33 per cent interest in an Icelandic airline company.

Ireland
Non-Irish citizens and companies based in Ireland and owned or controlled by foreign interests are not granted air transport authorization, unless the Minister for Communications determines otherwise. A similar restriction applies to the registration of aircraft in the State. Non-nationals are generally not permitted to carry passengers within Ireland from one point to another.

Italy
Operation of regular air transport services in Italy is reserved to unincorporated and corporate bodies who are entitled to own aircraft. National airline services may be operated under licence by non-residents if international conventions so provide.
Ownership of aircraft is reserved to state and other public entities as well as Italian unincorporated and corporate entities formed and having their registered offices in Italy:
- whose capital is at least two-thirds owned by Italian residents, and
- of which, the chairman, two-thirds of the board and general manager are Italian nationals

Requirements of nationality necessary for registration in the Register are met by those aircraft belonging wholly:
- to the state, to provinces, communes and other Italian public entities,
- to Italian citizens;
- to corporations established and located in the Italian Republic, whose capital belongs for 2/3 at least to Italian citizens and whose president or 2/3 of managers, including the managing director, as well as general managers, are Italian citizens.

Luxembourg
Requirements for a licence depend upon the nationality of board members and management. The general policy is to keep the number of air transport operators to a strict minimum.

Netherlands
A licence to operate will in general only be granted to enterprises in which:
- the majority of capital is held by residents;
- the majority of the actual management is subject to residents.

The fleet or a substantial proportion of it should belong to the applicant company

Norway
Air transport within Norwegian territory is reserved to aircraft of Norwegian nationality except where ASAs exist, or special permission is granted by the air transport authorities. A concession to operate is only given to Norwegians:
- having their registered office in Norway, and
- having an entirely Norwegian board of directors,
- in which at least two-thirds of the capital is Norwegian.

The same requirement applies to the registration of aircraft.
The King may, in exceptional cases, permit a foreign-owned airplane to be registered in Norway.

Portugal
Regular air transport is a public monopoly

National Laws: Licensing Requirements (cont.)

Spain
Foreign participation in air transport companies cannot exceed 25 per cent. Airlines, associates and capital must be Spanish held (to at least 75 per cent).

Sweden
In order to engage in aviation activities, 100 per cent Swedish nationality is required. However, authorization may be granted to limited liability companies in which at maximum one-third of the capital and voting power is in foreign hands.

Switzerland
Air transport for certain flights of general interest is a monopoly.
Aircraft may not be entered in the Swiss register if not entirely owned by Swiss nationals or companies registered under Swiss law and having their head office in Switzerland. Aircraft belonging to a commercial firm or a cooperative whose business is the carriage of persons or goods by air, may be entered in the Swiss register only if the company is neither financially nor in any other manner influenced by foreign interests.

The most important licensing requirements are:
- the company must be registered in Switzerland;
- the personnel employed in Switzerland must be of Swiss nationality, unless an exemption is granted;
- only aircraft registered in Switzerland and owned by the company may be used, unless exemption is granted.

United Kingdom
Air transport licences are not granted to applicants who are not UK nationals or to a body incorporated in the UK (or certain overseas territories) and controlled by UK nationals, unless the Secretary of State consents to the granting of the licence. "Control" is not defined.

West Germany
A licence to operate an airline can be denied to companies in which West German nationals do not exercise majority control ("der wesentliche Teil des Eigentums an dem Unternehmen und eine tatsächliche Kontrolle").

Furthermore, the licence can be denied when aircraft are used that are not registered in West Germany.
Aircraft can only be registered if they are in exclusive ownership of West German nationals, or those deemed equal, where the majority of capital and control is held by West German nationals.
In special cases, exemptions are possible.

APPENDIX II

Tableau 1.1 / *Table 1.1*

LES PRINCIPALES COMPAGNIES EUROPEENNES REGULIERES PUBLIQUES ET PRIVEES (1)
MAIN SCHEDULED EUROPEAN PUBLIC AND PRIVATE AIRLINES(1)

Compagnies *Airlines*	Statut (1) *Status*	Privatisation *Privatisation*	Passagers-km en millions (2) *Millions of passenger-km*	TKT en millions (2) *Millions of t-km carried*	Nombre d'employés en service (2) *Workforce effectively on duty*
Aer Lingus	Pub.	-	2 737 8	323 8	5 593
Air France	Pub	Projet partiel *Part project*	31 440 4	5 842 2	35 894
Alitalia	Pub	Partielle en cours *Part underway*	15 343 2	2 309 6	18 453
Austrian Airlines	Pub	Projet *Project*	1 645 7	175 8	3 097
British Airways	Prv	Réalisée *Completed*	46 299 4	5 740 4	39 684
BCAL	Prv	-	8 833 9	1 303 7	7 576
Finnair	Mixte/pub *Mixed/pub*	-	3 545 9	413 0	5 750
Iberia	Pub	-	19 402 0	2 312 4	26 417
Icelandair	Pub	-	2 534 8	256 9	1 563
JAT	Pub	-	4943 1	573 4	7 867
KLM	Mixte/pub *Mixed/pub*	Réalisée *Completed*	21 800 7	3 821 4	22 288
Lufthansa	Pub	Partielle en cours *Part underway*	31 771 0	6 240 2	38 996
Luxair	Mixte/priv *Mixed/prv*	-	128 1	12 3	850
Malev	Pub	-	1 181 2	115 5	4 551
Olympic	Pub		7 121 5	755 0	12 262
SABENA	Mixte/pub *Mixed/pub*	En cours *Underway*	5 973 5	1 095 7	9 466
SAS	Pub	-	13 207 1	1 597 6	20 942
Swissair	Mixte/priv *Mixed/prv*	-	13 724 0	2 120 7	18 818
TAP-Air Portugal	Pub	Filiale privatisée *Prv subsidiary*	4 978 3	584 4	9 547
Turkish Airlines	Pub	Projet *Project*	3 296 4	319 8	6 673
UTA	Prv	-	5 527 1	952 1	6 565
Total			246 068 7	36 926 1	

(1) Public le capital est entièrement ou presqu'entièrement propriété publique / *Public the capital is entirely or almost entirely held by the government*
Mixte public le capital comporte une majorité de capitaux public / *Mixed/public most of the capital is held by the government*
Mixte privé le capital comporte une majorité de capitaux privés / *Mixed/private most of the capital is privately owned*
Privé le capital est propriété privée / *Private the capital is privately owned*
(2) Source AEA

Source : IFALPA