EUROPEAN AIR TRANSPORT WITHIN THE INTERNATIONAL SYSTEM OF AIR REGULATION

by

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ABSTRACT

The International System of Air Transport Regulation, consisting of ICAO's essentially technical regulation, IATA's tariff and services coordination functions and the dense network of Bilateral Agreements might be challenged and profoundly modified by recent developments in the law of the European Communities.

In the framework of the creation of the European Internal Market, to be achieved before 1993, the European civil aviation industry is submitted to an accelerated integration and liberalization process. It comprises the opening of national markets to all Community carriers, the application of a common competition regime to all EEC-related flights and the transfer of regulatory functions to the EEC institutions. The EEC might, at the end of this process, acquire exclusive competences for the regulation of interior and exterior aviation matters.

The structure of the International System of Air Transport Regulation and the European air law in place and in the planning stage have to be analyzed with the aim of exploring the compatibility of the European Integrated Air Market with global legal requirements. Where the International system as well as the EEC legal order show imbalances or come into conflict potential solutions are studied.

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RESUME

Le Système International de Réglementation du Transport Aérien, comprenant la réglementation essentiellement technique de l'OACI, les fonctions de coordination de tarifs et de services d'IATA et le réseau d'accords bilatéraux entre Etats, pourrait être mis en question et profondément modifié par le droit des Communautés Européennes.

Dans le cadre de la création du Marché Interieur Européen qui devrait s'achever avant 1993 le domaine de l'aviation civile est soumis á un processus d'intégration et de libéralisation renforcé. Il va mener á la complète ouverture des marchés nationaux pour les transporteurs aériens Européens, á l'application d'un régime commun de concurrence applicable sans distinction entre compagnies aériennes, et au transfert de certaines fonctions réglementaires aux institutions Communautaires. A la fin du processus d'intégration la CEE pourra acquérir la compétence exclusive en matière de législation relative á la réglementation des relations aéronautiques intérieurs et extérieurs des Etats Membres.

La structure du Système International de Réglementation du Transport Aérien et le Droit Européen - les dispositions en place et les projets - devront être soumis á l'analyse pour ensuite examiner la compatibilité du Marché Aéronautique Intégré avec l'ordre juridique et économique mondial. Les conflits et déséquilibres potentiels créés par l'action Communautaire vont être étudiés et une solution va être proposée.

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LIST OF ABBREVIATIONS

AASL	Annals of Air and Space Law
AFDI	Annuaire Français de Droit International
CAA	Civil Aeronautics Authority
CAB	Civil Aeronautics Board
CMLR	Common Market Law Review
ECAC	European Civil Aviation Conference
EEC	European Economic Community
ECJ	European Court of Justice
EP	European Parliament
fn.	footnote
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ILC	International Law Commission
ITA	Institut de Transport Aérien
PICAO	Provisional International Civil Aviation Organization
RFDA	Revue Française du Droit Aérien
SEA	Single European Act
seq.	following
ZLW	Zeitschrift für Luft- und Weltraumrecht

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* * *

INTRODUCTION

After more than 40 years of relative stability, the International System of Air Transport Regulation has to face an unprecedented legal evolution. A supranational regional organization, the European Economic Community (EEC), being equipped with certain exclusive competences, begins to exercise regulatory functions in the aviation sector which are currently reserved to sovereign States.

In fact, the EEC, which, until recently, has been completely inactive in the field of commercial civil aviation, began in 1986 to focus on the European air industry. With the aim to establish an entirely integrated and liberalized air transport market before Jan. 1, 1993, it adopted, in a first regulatory step, a comprehensive competition regime for scheduled passenger air transport (1) and provided for a more liberal approach towards market access and capacity sharing in the EEC Member States. These legal measures, concerning only intra-EEC international flights, were in no way revolutionary and did not raise questions with regard to the functioning of the international legal and economic framework.

In 1989 and early 1990 the Commission of the European Communities advanced a second set of legislation which went far beyond the 1987 "package". Based on the vision of a "*European Aviation Area*" the Commission now intends to rapidly integrate the national civil aviation industries and to entirely open domestic, intra-EEC and extra-EEC markets. National law shall be harmonized or replaced by a common EEC regime, the principles of the Treaty, in particular, the competition rules and non-discrimination (national treatment) maxim shall apply unconditionally. In addition, the EEC institution clearly

(1) As the EEC action until now concentrated almost exclusively on scheduled passenger air transport, this thesis will not cover unscheduled or cargo operations. It is,however, not excluded that cargo flights will soon be submitted to a similar EEC regime.

intends to substitute itself to the Member States in the legislative aviation-related functions and in the international relations with third countries. If these projects materialize - and given the legal situation provided for by the EEC Treaty, political considerations may only delay but not prevent this evolution (2) - we will face, in the near future, a supranational body bearing rights and obligations, negotiating agreements and accepting flight operations in and out of the area just like a sovereign State.

The transfer of functions and competences, flowing from international law, from States to an international body is very likely to create incompatibilities and conflicts. This might, in particular, be the case in a legal field like international civil aviation where sovereignty and nationality are of fundamental importance.

It is the aim of this thesis to work out whether or not the EEC law in place or in the planning stage is compatible with the international regulatory system. For that purpose we will first present the international regulatory framework consisting of Chicago Convention, IATA coordination activities and bilateral aviation relations. (Chapter 1) Then we will turn to the EEC law which will be described in its evolution on the basis of jurisprudence, recent legislative acts and proposals. (Chapter 2) In a third step, we will analyze the EEC's interior competence to act in the field of civil aviation and the limits of application of national (supranational) law under public international law. (Chapter 3) Finally, we will study the conflicts and imbalances between EEC aviation law and the traditional International System of Air Transport Regulation. We will especially work out the incompatibilities with the Chicago

(2) For this question see especially Chapter 2 (fn. 248) and accompanying text. At this point we may note that our research covers evolutions and documents until May 1990; some important events, especially the June 1990 meeting of the Council of Transport Ministers were taken into consideration as far as the obtained unofficial information and the progress of the thesis allowed.

Convention and the IATA coordination functions. The repercussions of the EEC legislative action on IATA and on future bilateral aviation relations between EEC States and third countries will be shown. (Chapter 4)

CHAPTER 1: THE INTERNATIONAL SYSTEM OF AIR TRANSPORT REGULATION

THE HISTORICAL CONFLICT

States realized at a very early stage that aviation is a matter which cannot adequately be ruled only on a national basis. Even before the first well-known bilateral aviation agreement, the "Franco-German Exchange of Letters of July 26, 1913" (1) Governments began to consider the necessity of an international regime governing international flights. (2)

There were essentially three factors pushing the States to the negotiation table: the military import of new aviation technology, the impact on the States' sovereignty and - much later - the economic importance of civil aviation in the international context.

In an early phase it was essentially the question of the potential use of aerostats in warfare which incited the States to act. Two international conferences, held in 1889 and 1907 dealt with those questions trying to limit the use of new technology.

When Prof. Fauchille published his famous article *"Le domaine aérien et le régime juridique des aérostates"* in 1901,

(1) C.f. Journal Officiel de la République Française du 12 août 1913; and A. Roper, La Convention Internationale du 13 octobre 1919 Portant Réglementation á la Navigation Aérienne, Paris 1930.

(2) In this context reference should be made to the 1889 Hague Conference dealing among others with the use of balloons in warfare and the Paris Conférence Internationale de Navigation Aérienne, of May 1910 dealing with principles of international aviation.

the interest of States and doctrine shifted rapidly to the juridical question of State sovereignty. (3) For nearly 20 years the debate on *"dominium, imperium ou air libre"* would occupy State conferences, law associations and writers. (4) It was the 1919 "Convention Portant Réglementation á la Navigation Aérienne" (Paris Convention) (5) which set an end to the debates by confirming explicitly the principle of sovereignty over the airspace, (6) but leaving the skies open for commercial activities and exchange.

In the peacetime, between 1919 and 1939, civil aviation developed very rapidly and became a considerable economic factor. It was the awareness of the growing economic impact of the developing airline industry which incited the Nations to amend the 1919 Convention. Was it still possible on the basis of the liberal terms of art. 15 of the Paris Convention to apply an "open port policy" (7) the amendments of 1929 terminated the "liberté commerciale" in the aviation sector. (8) The freedom of international commercial aviation had found an early death.

(3) P. FAUCHILLE, Le Domaine aérien et le régime juridique des aérostates, in R.G.D.I.P. (1901) at 414.

(4) See: E. PEPIN, La Conférence de 1910, in AASL (1978) Vol III at p. 185.

(5) For materials on negotiations, drafts and States' positions see: La Paix de Versailles Vol. VIII Documentation Internationale, Paris 1931.

(6) See Art. 1 of the Convention. The Convention confirmed not only the claims of rights over the States' airspace but established a number of rules which are still of importance today such as provisions dealing with nationality of aircraft (see Chapter II, art. 5 - 10), airworthiness and licensing (see Chapter III art. 11 - 18) and rules of flight (see Chapter III arts 19 - 29).

(7) See: Haanappel, P.P.C., Bilateral Air Transport Agreements, in Int'l Trade Law J. (Vol. 5) 1979 no. 1, at p. 241.

(8) See esp. amendments to arts 15, 26 and 28.

International Civil Aviation was - and still is - submitted to a fundamental conflict of interests: on the one hand States are aware of the need for an international regulatory framework, especially in the technical field; on the other hand there are few matters in international relations where States defend more jealously their sovereign rights and economic interests than in international aviation. This rough ground pattern is at the bottom of todays existing System of International Air Regulation: the institutional and regulatory framework governing civil aviation world-wide must be understood as the direct result of a cautious balancing of States' individual interests and the common needs of the community.

THE SYSTEMATICAL CONSEQUENCE: THE CHICAGO SYSTEM AS A REGULATORY TRIAS

Todays existing regulatory legal and economical framework was essentially shaped at the 1944 Civil Aviation Conference held in Chicago. (9) Even before the end of the warfare in Europe and Asia, the allied States felt the necessity to lay down principles for a new "order in the air" in the post-war era. (10)

Due to the very unequal economic bargaining power of the 52 parties involved, the negotiators presented fundamentally different concepts of what their governments desired to achieve at Chicago. (11) With the intention to protect its weak air transport industry, official British policy aimed at a restrictive regulation of international air transport. An International Air Authority should be established which was to

(9) For detailed information on the Conference and the different national positions consult: Proceedings of the International Civil Aviation Conference, Chicago, Ill., Nov. 1 - Dec. 7, 1944, Dept. of State Publications No. 2820, International Organization and Conference Series IV, Vol. 1 and Vol. 2; and ICAO Doc. 2187.

(10) See: Cheng, B.,, Law of International Air Transport, London, N.Y., 1962 at p. 18 seq., and see: J.C. Cooper, Le droit de voler, Paris 1950 at p. 160 seq.

(11) See: J.C. Cooper, supra fn. 10, at p. 161.

have power to set up a monopoly in international air transport and to licence operators, to determine frequencies and to fix fares. (12) New Zealand and Australia went as far as to propose an International Authority which should own all aircraft used on international air routes in order to exclude all "harmful" competition. (13)

The U.S. on the other side, possessing a strong and highly developed air fleet which could dominate the international market, pressed as far as possible for freedom of the air especially in the economic field. It systematically opposed the creation of an international organization with more than purely technical competences. (14)

The negotiators' concepts of the post-war regulatory framework were fundamentally antithetical. So it is no surprise that they could not achieve their goal of replacing all preexisting international air law instruments by *one harmonized legal and economic regime* which would be adapted to the needs of a rapidly growing air industry. Instead, the Conference decided to elaborate four particular agreements, which the different States were free to join:

- The Interim Convention on International Civil Aviation (15)
- The Convention on International Civil Aviation (16)

(12) Comp.: White Paper laid before Parliament in Oct. 1944, Cmd. (Command) 6561 (1944).

(13) See: N. Mateesco Matte, Traité de Droit Aérien-Aéronautique, Montréal, Paris, 1980 at p. 129.

(14) Read extracts of the opening speech of Adolph A. Berle, chief of the U.S. delegation to the Chicago Conference reprinted in J.C. COOPER, supra fn. 10, at p. 167.

(15) Interim Agreement on International Civil Aviation, Dec. 7. 1944, Documents of the Final Act of the Chicago Conference, ICAO Doc. 2187.

(16) Convention on International Civil Aviation, (Chicago Convention), Dec. 7, 1944, ICAO Doc. 7300, 6th ed. 1980, entered into force April 4, 1947.

- The International Air Services Transit Agreement (17)
- The International Air Transport Agreement (18).

As a compromise between the different positions, the Conference distinguished between institutional and technical questions on the one hand and economical or commercial matters on the other hand. The first-mentioned are covered to a large extent by the Convention on International Civil Aviation (Chicago Convention); the Air Services Transit Agreement deals essentially with the exchange of technical rights, the so-called first and second freedoms (19). Economical rights were laid down in the Air Transport Agreement which intended to grant multilaterally Third, Fourth and Fifth Freedom rights to the participating States.

The mentioned agreements were unevenly accepted by the States' community. The predominantly technical instruments knew an almost global acceptation (20), whereas the agreement based on free economic competition concepts, aiming at the multilateral

(17) International Air Services Transit Agreement, (Air Transit Agreement), Dec. 7, 1944, U.S. Dept. of State, Proceedings of the International Civil Aviation Conference, 1948, Vol. 1, entered into force Jan. 30, 1945.

(18) International Air Transport Agreement, (Air Transport Agreement), Dec. 7, 1944, U.S.Dept. of State Publications, No. 2282, entered into force February, 8, 1945.

(19) First Freedom: overflight without landing; Second Freedom: overflight with technical landing in a foreign State. In addition to those "technical freedoms" one distinguishes the following commercial rights: the privilege to put down passengers, mail and cargo in a contracting State which were taken on in the territory of the State whose nationality the aircraft possesses (Third Freedom); the privilege to take on passengers etc. in a State destined for the territory of the State whose nationality the aircraft possesses (Fourth Freedom); and the privilege to take on mail and cargo in a contracting State destined for the territory of any other State as well as the privilege to put down passengers, etc. coming from any such territory, beyond transit traffic (Fifth Freedom).

(20) Pursuant to ICAO information: 146 ratifications

exchange of commercial aviation rights, must be regarded as "dead letter"(21).

In sum, the global post-war framework of aviation law must be viewed to a large extent as a technical ruling; the Chicago Conference and PICAO/ICAO member States showed their incapacity to agree on commercial freedoms on more than a bilateral basis. The exchange of commercial or traffic rights was left open to the States' bilateral interests and diligence.
Professor Th. Burke describes best what might have pushed the States to act as they did:

> "...(t)he Governments appear to have decided that their best interests would not be served if they became parties to a multilateral agreement which would deprive them of the bargaining advantage inherent in the bilateral type of negotiations." (21b)

It was, thus, the failure of the 1944 Conference which led to the formation of the two other structural elements of the regulatory "trias" existing in international air law today. First, and as a direct consequence, the airlines themselves, interested in an effective international machinery for the determination of rates, fares and other competition elements, created the International Air Transport Association (IATA) (22) which developed an extensive regulatory activity.

(21) Ratification only 19 States, among them only the Netherlands as major carrier State.

(21b)Burke, Th., Law and Contemporary problems 1I. at p. 599, 608.

(22) IATA was founded as a trade association of the scheduled international air carriers and incorporated in Canada, see Act of Incorporation, Statutes of Canada, 1945, Chap. 51 (Assented to 18th December, 1945) as amended by Statutes of Canada, 1974-75-76, Chap. 111 (Assented to 27th February, 1975 and IATA Articles of Association adopted April 16-19, 1945 at Havana, Cuba.

Second, the States engaged in an active exchange of Bilateral Air Transport Agreements (BATA). The International Civil Aviation Organization (ICAO) counts today more than 1523 registered and valid BATAs, creating a global network out of bilateral filaments.

This complex international system must now be analyzed with regard to its legal and economic structure:

I. THE CHICAGO CONVENTION

From a legal point of view, the Chicago Convention has a double function and as such a double personality. (23) In the first place it is a codification of public international air law, stipulating rights and duties of sovereign States. In the second place it is the constitutional instrument of the International Civil Aviation Organization (ICAO), defining its aims and functions. (24) As indicated above, the regulatory scope of the Convention with regard to the multilateral regulation of economic issues is very limited. But, as the Convention sets the basic pillars carrying the whole building of public international air law, a concise presentation of the essential elements, which are the sovereignty principle and the nationality principle, cannot be omitted.

(23) See Milde, M., Chicago Convention - 45 years later, unpublished McGill University, Montreal, at p. 6.

(24) See esp. art. 44 Chicago Convention.

1. THE SOVEREIGNTY PRINCIPLE, ART. 1 AND ART. 2

At the bottom of the international regulation are art. 1 and art. 2 Chicago Convention which recognize (25) the States' sovereignty over the airspace above the territory (art. 1) or the adjacent territorial sea (art. 2).

This basic stipulation of *complete and exclusive sovereignty over the airspace* makes clear that the airspace is definitively not "air libre" especially with regard to international commercial activities. No aircraft may thus be allowed to fly in, into or through a State's national airspace without permission, acquiescence or tolerance.(26)

Being conscious about the fact that the future development of international aviation would largely depend on the commercial use of international airways, the Conference, nevertheless, tried to mitigate the potential impact of the unconditional application of the sovereignty principle. Within the framework of the Convention it made an attempt to introduce at least a minimum of commercial rights. This effort is reflected today by art. 5 and art. 6 Chicago Convention:

a. Flight over and into Territory, art. 5 and art. 6

The rights - or on the background of art. 1 better "privileges" - designed to alleviate the burden of the sovereignty principle are exchanged between the member States of the Chicago Convention on the basis of art. 5 and art. 6. These articles distinguish between scheduled (art.6) and non-scheduled

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(25) The term "recognition" indicates that the principle of sovereignty over the airspace must be viewed as founded on customary international law, applicable equally with regard to non-member States; art. 1 is thus purely declaratory.

(26) See: Cheng, B., op. cit. (fn. 10) at p. 123.

(art.5) air services (27) and establish, at first sight, two entirely different legal regimes.

(1) Art. 5 Chicago Convention

Art. 5 para. 1 grants to aircraft not engaged in scheduled commercial and international air services the First and Second Freedom rights being subject to certain restrictions of minor character.(28) The second paragraph allows international air services based on Third, Fourth and Fifth Freedom rights being, however, subject to implicit limitation of the cabotage provisions of art. 7 and - explicit - rights of the State where a traffic stop takes place to impose such "*regulations, conditions or limitations as it may consider desirable*". Given the wording of art. 5, it could justifiably be believed that non-scheduled

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(27) The Chicago Convention as such does not define scheduled or non-scheduled international air services. The term is consequently open to interpretation leading to deviating definitions in the different member States. Being aware of that undesirable effect the ICAO raised the issue of defining scheduled services as early as in its First Assembly (1947); see ICAO Doc. 4522, A1-EC/74 at p. 15. In the following years the different ICAO organs undertook multiple attempts to develop a reference definition leading to a harmonized application of art. 5 and 6; see esp. ICAO Doc. 6894 of Aug. 26, 1949 at p. 13 and ICAO Doc. 7148 of May 12, 1951. After a discussion lasting for more than four years a definition for "guidance" of the member States was passed, including essentially four criteria for the determination of scheduled flights: those must be international in nature, for remuneration, open for the public, and eventually based on a published timetable or be a recognizable series; see ICAO Doc. 7278 -C/841 of Oct. 5, 1952 at p. 3, and the revised definition issued by the 1980 Conference on 'Regulation of International Air Transport Services', ICAO Doc. 9297, AT Conf/2 at p. 8. The definition is nevertheless not binding on the member States so that different national definitions can still be found today; see: Guldiman, The Distinction between Scheduled and Non-Sche-duled Air Services, in AASL, Vol. 4 (1979) at p. 147.

(28) Here may be mentioned (1) the observance of the terms of the Convention, (2) the right of the State overflown to require landing, and (3) the right of the State overflown to require special permission or to provide for particular routes for reasons of safety of flight.

flights are submitted to a virtually liberal economic and legal regime allowing international commercial flights being submitted only to minor restrictions or to technically justified limitations.(29) The ICAO Council interpreting that provision of the Convention has declared that:

> "(I)ndeed no instrument designated a 'permit' should normally be required even if it were automatically forthcoming upon application. Advanced notice intended arrival and similar purposes could however be required."(30)

Any requirement of prior permission should not be

> "(e)xercised in such a way as to render the operation of this important form of air transport impossible or non-effective."(31)

Nevertheless, often there is a considerable gap between theory and practical application of law. In 1944 non-scheduled international air transport played a negligible role in international aviation. Thus the Chicago Conference invested few discussions on the formulation of art. 5 which, in its imprecise wording, was not subject to extended debate.(31)

But soon, with the growing importance of charter operations, the States felt an increasing necessity of regulating these non-scheduled operations. The formula of Art. 5 para II was broad enough to allow the States all kinds of limitations that they may consider *desirable*. Despite the initial intention to keep the field of non-scheduled flights free from economic regulation, art. 5 para. II itself became the lever for restriction. A 1977 ICAO survey (32) showed that most States, among them all the

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(29) See Cheng, B., op. cit. (fn. 10) at p. 195.

(30) ICAO Doc. 7278 C 841 of May 10, 1952 at p. 9, see equally ICAO Doc. 6894 AT 494 of Aug.26, 1949.

(31) ICAO Doc. 7278 C841 of May 10, 1952 at p. 12.

(31) See Proceedings, op. cit. supra (fn. 9) Vol. I.

(32) "Policy Concerning International Non-Scheduled Air Transport", Background Documentation for Agenda Item 2, Prepared

major carrier States, (33) regulate international non-scheduled air traffic in order not to impair, unduly, scheduled airline operations. According to that survey governments do not only require prior permission but intervene unilaterally with economic restrictions such as price and capacity control, route determination as well as interventions in the sales policy of the carriers.(34)

In recent times non-scheduled operations have become equally subject to bilateral air transport agreements, imposing on them almost the same regime as on scheduled operations.(34)

Due to the fact that art. 5 para. II has eventually become inoperative, the importance of art. 5, as such, has been diminished to the multilateral exchange of Freedoms one and two. Non-scheduled air transport operations are, thus, submitted to almost the same legal regime as the scheduled international air transport, which is, in most cases, subject to the governments' discretion or to bilateral bargaining.(35)

(2) Art. 6 Chicago Convention

According to art. 6 Chicago Convention, scheduled international air services are not allowed to be operated over or into the territory of a contracting party when no special permission or authorization of that State is given. Art. 6 is,

by the Secretariat of ICAO for the ICAO Special Air Transport Conference, Montreal, April 1977 at p. 17.

(33) 52 States responded to the ICAO questionnaire, forty among them had domestic regulations in regard of permission for non-scheduled flights.

(34) ICAO Survey, fn. 32 at p. 17 seq.

(34) See: Haanappel, Bilateral Air Transport Agreements 1913-1980 in Int'l Trade L.J. 1979 (no.5) at p. 241, 259 seq.

(35) Only in two regions (Europe and Asia) charter flights are partly submitted to a multilateral regulation, see e.g. the Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, Paris, 1956 registered with ICAO Doc. 7695 (1956).

thus, the concrete application of the abstract stipulation of complete and exclusive sovereignty recognized under art. 1 Chicago Convention. It is, as such, the legal formulation of the failure of the 1944 Conference to agree on the multilateral exchange of traffic rights in international aviation.(36)

As the required permissions or authorizations are generally granted on a reciprocal basis only, art. 6 Chicago Convention must be understood as the *raison d'être* for the essentially bilateral structure of international air law today. (37)

It will be seen if and to what extent States can be substituted in their functions and rights under art. 6 by international intergovernmental organizations. (38) Recent developments indicate the tendency towards a new multilateralism or at least "regionalism" in the field of scheduled international air law.(39)

Art. 6 Chicago Convention deals exclusively with international operations into and out of a State's territory. It does not cover commercial aviation within the national boundaries. It is art. 7 Chicago Convention which provides for supplementary rules covering such activities.

(36) See J.C. Cooper, Air Transport and World Organization, in Explorations on Aerospace Law, I.A. Vlasic (ed.), Montreal 1968 at p. 357 seq.

(37) F. Deak calls art 6 "a Charter" for todays existing bilateralism, "The Balance-sheet of Bilateralism" in "The Freedom of the Air, E McWhinney/M.A. Bradley (eds.), N.Y. 1968 at p. 159.

(38) See infra Chapter 4. I.

(39) One has to observe discussions within the ASEAN and ARAB LEAGUE being regional responses to the European Commission's initiatives which will be presented in the following Chapter.

b. Flights within National Boundaries: Cabotage, art. 7

Art. 7 Chicago Convention has a dual function. On the one hand it confirms the rule stated in art. 1 that States are entitled to close and open their airspace as they like; on the other hand it tries to limit the discretionary power of States in this regard by introducing an element of non-discrimination.

The first sentence of art. 7 recognizes a nation's right under the Convention to reserve for its national aircraft all carriage of passengers, mail or cargo transported for remuneration within its territory. In order to determine the scope of this stipulation, art. 2 gives the legal definition of "territory" which, for the purposes of the Convention, shall be deemed to be land areas and territorial waters under the sovereignty, suzerainty, protection or mandate of the respective State.

This broad concept of cabotage is due to historical factors which can only be explained by economical and security interests. The draft history of art. 7 proves the States' argument that domestic transport must remain entirely under national supervision in order to insure the adequate protection of the national interests.(40) For that purpose States intended to reach a maximum geographical extension of such exclusive rights by including the existing overseas possessions (even mandates) - thus providing for "grand cabotage" (41) - and a maximum material extension by claiming an unconditioned domestic prerogative.(42) Cabotage rights were considered as means necessary to insulate national carriers from competition and

(40) See e.g.: Proceedings of the International Civil Aviation Conference, Chicago 1944, op. cit. (fn.9), at p. 61.

(41) See: Cheng, B., op. cit. (fn.10), at p. 314.

(42) See: R. Sheenan, Air Cabotage and the Chicago Convention, in Harvard Law Review 1950 (Vol 63), 1157 at 1160; and D.R. Lewis, Air-Cabotage: Historical and Modern-Day Perspectives, in J.of Air L. and Com. 1980 (Vol. 45) 1059, at p. 1163.

thereby to assure their financial viability and the State's independence and defence.(43)

It is the second sentence of art. 7 which gives rise to multiple legal debates. It stipulates that no State should try to obtain exclusive privileges or to enter into arrangements which specifically grant any such privilege on an exclusive basis. The sovereignty of the States is therefore limited in regard to the attribution of domestic air service rights. The nature of this restriction, whether qualified or absolute, whether liberal or strict, has always been subject to controversy due to the ambiguity attaching to the terms *"specifically"* and *"on an exclusive basis"*.

The second sentence can equally be understood as an unconditioned Most Favoured Nation Clause (44) or, on the contrary, as a provision entitling the States to grant exclusive rights as long as it is not explicitly stipulated that these rights are exclusive.(45) The question of interpretation of art. 7 is still not resolved.(46)

(43) See: Hesse, N.E., Some Questions on Aviation Cabotage, 1953 McGill Law J., 129 at p. 133; see equally J.E. de Groot, Cabotage Liberalization in the European Economic Community and Art. 7 of the Chicago Convention, in AASL (Vol XIV) 1989 at p. 157 (fn. 62) where the author describes a scenario of interior competition driving the national carrier out of the domestic market and leaving the vital interests of the State to uncertain foreign influences.

(44) See analysis in de Groot, supra (fn. 43) at p. 158.

(45) See D.R. Lewis, supra (fn. 42) at p. 1065.

(46) Especially in the context of the formation of the SAS consortium in Scandinavia the issue of cabotage rights was in the center of legal discussion within the ICAO. See e.g. ICAO Council, Interpretation of Article 7 of the Chicago Convention, ICAO Doc. C-WP/4406 (1966) at p. 4 and ICAO Doc. 8771, A 16-EX (1968) at p. 44.
The question of interpreting art. 7 will be of particular interest in the context of the creation of the EEC "cabotage area" and be discussed at that place. See infra Chapter 4.II.2.b.

In sum, it can be concluded that the domestic air traffic is today a *domaine reservé* of national airlines. Pursuant to indications in the literature, only a few dozen bilateral cabotage grants can be traced since the conclusion of the Chicago Convention. (47) This is certainly largely due to art. 7 sentence 2, with its uncertain scope and legal consequences.

Based on the sovereignty principle, States do not only enjoy rights allowing them to regulate national or international traffic, but are equally submitted to certain obligations of legal or technical character.

2. THE NATIONALITY PRINCIPLE, ART. 17 CHICAGO CONVENTION

As second essential element of the Chicago Convention, the Nationality Principle must be mentioned. Pursuant to art. 17 Chicago Convention aircraft have the nationality of the State in which they are registered. The so stated nationality principle is the origin of a number of obligations which can directly be deduced from the wording of art. 17 as well as, indirectly, from other provisions based on that principle.

The nationality of aircraft is a new concept which found its first formal expression in art. 6 of the 1919 Paris Convention on International Air Navigation. (48) It must equally be regarded as a principle based on customary international law. (49)

(47) See de Groot, J.E., supra (fn. 44) at p. 162.

(48) See Milde, M., Nationality and Registration of Aircraft Operated by Joint Air Transport Operating Organizations or International Operating Agencies, in AASL (Vol. X) 1985 at p. 133, 141; and G.F. FitzGerald, Nationality and Registration of Aircraft Operated by International Operating Agencies and Art. 77 of the Convention on International Civil Aviation, 1944, in Can.Y.B.Int'l L. 1967 at p. 193.

(49) See: Schwenk, W., Internationale Zusammenarbeit im Luftverkehr der Europäischen Gemeinschaft und die Staatszugehörigkeit von Luftfahrzeugen, in ZLWR (Vol. 37) 1988, at p. 4, 5.

"Nationality" in the legal system means a specific legal relationship between a person and a State and the specific rights and obligations which are derived from that legal relationship. In the historical maritime law this concept has been enhanced to ships which have been given, on the basis of custom, the status of legal "quasi-personality" and nationality attributed to the flag of the State they carried. The same is now valid for aircraft. (50)

In Public International Law it is up to the States to determine the criteria for the acquisition and loss of the nationality. (51) According to the Chicago Convention, the acquisition of the nationality is submitted to the formal obligation that there must be a registration in a national register. Thus, States are under the obligation to create a national institution registering "national" aircraft.

A supplementary restricting element has been introduced by public international law being among others reflected in the International Air Services Transit Agreement: according to Public International Law the notion of nationality requires more than a purely formal element, the material criteria of a *genuine link* must be given.(52) This principle is not only applicable to natural or legal persons but equally to ships and aircraft. It found its concrete materialization in the International Air Services Transit Agreement (52 a) where in para. 1 section 5 the

(50) See Milde, M., op. cit. (fn. 48), at p. 141.

(51) This is equally valid in air law, see art. 19 Chicago Convention confirming this principle.

(52) See with regard to "effective" nationality the Nottebohm (Liechtenstein v. Guatemala) case, Judgment II, ICJ Reports (1955) p. 4-65; and ICJ Pleadings "Nottebohm", Vols. I and II (1955).

(52 a) International Air Services Transit Agreement of Dec. 7, 1944, see above (fn. 17).

substantial ownership and effective control over an aircraft vested in nationals of the contracting Party are required. (53)

The importance the Chicago Convention attached to the nationality of the aircraft is underlined by its detailed regulation with regard to registration and publication. According to art. 18 the registration in more than one State is explicitly prohibited; every aircraft must carry nationality marks (art. 20), and the registration must be reported upon request to ICAO or any member State (art. 21). This particular attention the drafters of the Chicago Instruments paid to the establishment and publication of the nationality link between aircraft and State can only be explained by the particular responsibility and authority which can be derived from that relationship.

a. Responsibility

Besides the obligations the Public International Law imposes on the States with regard to the States' responsibility/liability for the conduct of nationals (54), it is the Chicago Convention which establishes certain particular aviation-related duties. States are thus responsible for the issuance and control of licences for personnel on board registered aircraft (art. 32); States have to respond for certificates of airworthiness issued for a domestically registered aircraft (art. 31); States have to licence radio equipment and the radio operating personnel on board registered aircraft (art. 30). These Provisions are of particular importance for the functioning of international air

(53) This formulation of the "genuine link" may equally be found in sect 6 of the International Air Transport Agreement and in numerous BATAs (designation clauses), see Cheng, B., op. cit. (fn. 10) at p. 375 seq., and in general Schwenk, W. (fn. 49) at p. 6.

(54) See as a concise attempt of "codification" of large parts of the recognized customary international law in that field the U.N. International Law Commission, Draft Articles on State Responsibility Part I, Yearbook ILC 1980, Vol. II Part 2, at p. 30.

traffic since cross-border flights are only possible if certain recognized minimum standards concerning safety and non-interference are guaranteed *by a subject of public international law.*

In addition, art. 12 imposes the duty on all contracting States to insure

> "that every aircraft carrying its nationality mark wherever that aircraft may be shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft in force at any given place".

Thus, States carry the burden of control and responsibility for those requirements for all national aircraft. The issuance of certificates and the formal registration being an exterior sign of control and conformity are the basis for State responsibility.

b. Authority

But the nationality link between aircraft and register State is not only basis for responsibility. The State can (and must) equally establish *authority* over the so bound aircraft.

The State can exercise jurisdiction to prescribe and jurisdiction to enforce with regard to all conducts or persons on board the aircraft. All national and international systems of law base the exercise of jurisdiction over aircraft among others on the nationality link. (55) States are consequently entitled to prescribe all kinds of civil, penal or administrative duties on board national aircraft which are regarded as "quasi-territory".

(55) See i.e. art. 12 Chicago Convention; art. 4 Convention on the Unlawful Seizure of Aircraft, signed at the Hague on Dec.16, 1970; art. 3 Convention on Offences and certain other Acts Committed on Board Aircraft, signed at Tokyo on Sept. 14, 1963; see equally Bin Cheng, op.cit. (fn.10) at p. 140 stating that the Chicago System relies essentially on the authority based on State's quasi-territorial sovereignty in respect of aircraft bearing the respective nationality.

In sum, the States' *responsibility* and *authority* in regard to internationally operated aircraft is based on the link of nationality. The State's rights and obligations in international aviation law can only be derived from an effective and intense link between aircraft and register State.
The nationality principle, as confirmed by the provisions of the Chicago Convention, thus, becomes the second basic pillar (besides the above studied sovereignty principle) on which the international system of air law is constructed.

Besides both principles the Chicago Convention concentrates essentially on technical questions such as safety and security, or harmonization.(56) It would, however, go beyond the scope of this thesis to enter into particulars of these regulations.

II. THE INTERNATIONAL AIR TRANSPORT ASSOCIATION

When one is dealing with the "Chicago System" with regard to the universal legal and economic regulation it is impossible to disregard the International Air Transport Association (IATA) as the second basic element of the "trias" mentioned above. It will first be discussed if and why IATA must be viewed as part of the Chicago System; then we will have a close look at its functions and recent problems.

(56) ICAO's work in this field is remarkable. On the basis of Part I Chapter VI ICAO has elaborated 18 Annexes to the Chicago Convention containing multiple international Standards and Recommended Practices being to a large extent binding on the member States and guaranteeing globally minimum standards, see: M.Milde, op. cit. (fn. 23) at p. 3 seq.

1. IATA AS AN INTEGRAL PART OF THE CHICAGO SYSTEM

The question is how a private association (57) can be regarded as part of a global system of regulation which is commonly a function of governments or States. The reason for that evolution is vested in the history of IATA. This history must be seen in close relation with the 1944 Chicago Conference and to some extent as a direct consequence of its unsatisfactory results in the economic field.

During the Conference, there was debate on international air fares and rates in different committees. In principle, almost all representatives agreed that entirely free and uneconomic cut-throat competition could not be the underlying regulatory principle for the future airline industry. Such fierce competition should be eliminated, reasonable fare levels and benefit margins should be guaranteed, maintaining a healthy international carrier structure. (58) However, there was no consensus on the way to achieve this so formulated goal. After controversial debate, it was the Canadian Representative who proposed a plan that included air rate fixing *by the airline companies* operating on the respective routes. Those tariffs should then be filed for approval to regional councils. (59) This proposal was subject to different Committee meetings. (60) A system should be developed, allowing that "tariffs for passengers and freight shall be determined by appropriate associations of

(57) see supra (fn. 22).

(58) See Proceedings of the Chicago Conference, Statement of the Canadian Representative in the Second Plenary Session, Vol. 1 at p. 71.

(59) See Proceedings of the Chicago Convention, Statement of the Canadian Representative in the Second Plenary Session, Vol. 1 at p. 71 seq.

(60) Session Joint Meetings of Committees I, III, IV, Sect I, Art. X of Doc. 442.

airline operators grouped as recognized by the Council". (61) This serious project was however blocked by the U.S. Its objections were presumably based on anti-trust as well as on policy considerations not allowing to officially associate the (in U.S. private) airlines with public government action. (62)

As a consequence, when the final draft of the Convention was adopted, no involvement of airlines in the fare fixing was mentioned and no way out of a potential tariff war was shown.(63)

So, it was no surprise that, immediately after the end of the governmental sessions at Chicago, thirty-four representatives of national carriers met in order to establish a system preventing that "cut-throat" competition feared not only by the Governments. Five months after the Chicago Conference IATA was founded by enactment of its Articles of Association in Havana (64) as an association open to all scheduled air carriers (65). It was incorporated by Canadian Statute in Dec. 1945. (66)

In sum, one has to recognize that IATA is an idea of the Chicago Conference and formed itself as a direct response to the inability of the Conference to take this step. The so created machinery gained a solid place in the international regulatory

(61) Third Revised Draft of Doc. 358 in Proceedings of the Chicago Conference, Joint Meetings I, II, IV Doc. 422 Sect 1 Art. X of Doc. 442.

(62) See Chuang. R.Y., The International Air Transport Association, Leiden 1972, at p. 24, 25.

(63) This result is certainly in contrast to the general awareness of such a danger, see Proceedings of the Chicago Conference, Minutes of the Meeting of the Joint Subcommittees I, III, IV, Doc. 453 Vol. 1 at p. 489.

(64) See supra (fn. 22).

(65) Since 1974 IATA is at least theoretically open equally to non-scheduled carriers (amendment of the Act of Incorporation 23 Eliz. II c. 111 assented to Feb. 27, 1975).

(66) See supra (fn. 22).

system of air transport, taking exactly that place envisaged for a governmental entity by a large part of the Delegates to the Chicago Conference.

2. ORGANIZATIONAL STRUCTURE AND FUNCTIONS OF IATA

The above mentioned two constitutional instruments provide for the following organizational structure of IATA. Today, the principal organs are:

- the Annual General Meeting of the 158 Member Airlines (67) holding the final authority (Art. VII (1) Articles of Association);
- the Executive Committee being charged with the day-to-day decisions of the Association;
- the Standing Committees (Financial, Technical and Traffic) having essentially assistance duties for the Executive Committee and the Member Airlines;
- the Secretariat directed by the Director General;
- the Traffic Conference, being equipped with a semi-independent status, in its today's shape is still an integral part of the association. (67a)

The functions of IATA are multiple and may be classified as trade association, service and tariff coordination tasks. According to sect. 3 of the Act of Incorporation, the association has essentially three "purposes, objects, and aims":

> (a) to promote safe, regular and economical air transport (...), to foster air commerce and study the problems connected therewith;

(67) In Aug. 1990, IATA had 158 active members and 33 associate members, see IATA Rev.2/1990 at p. 31.

(67a) The Traffic Conference being initially an organ to which adherence was compulsory is now open to voluntary cooperation. Due to criticism and legal measures in the United States and recently in the EEC its importance is steadily decreasing. Its tasks have been divided and conferred to two "Groups" dealing with tariffs (voluntary cooperation) and services (compulsory cooperation).

> (b) to provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport service;
> (c) to co-operate with ICAO and other international organizations.

These abstract objectives have materialized in five major activities of the organization:

(a) tariff "coordination";

(b) interlining "co-operation";

(c) organization of a "distribution" system;

(d) technical, economic and legal study and assistance;

(e) lobbying with international and national authorities.

a. Tariff Coordination

The tariff coordination or better rate-making function of IATA is carried out through the mechanisms of three annual Traffic Conferences, each Conference dealing with a particular geographical sector of the world. According to the words of a former Director-General of the Organization,

> "(t)he primary function of the Tariff Conference is to establish fares, rates, charges and rules and regulations for scheduled international air services in the form of resolutions which are subject to approval by interested governments." (68)

These Conferences agree, through formal decision, on the fares for the transportation of passengers, luggage and cargo individually for every city-pair. The so fixed fare is expressed in a ratio passengerkilometer/$ or tonkilometer/$. But tariff agreements go beyond mere price fixing as "tariffs" include conditions of transport and even the service offered in the different classes.(69) These regulations can be very detailed

(68) Hammarskjold, K., The Role of IATA, in "Freedom of the Air", E. McWhinney, M.A. Bradley, Leyden 1968 at p. 30.

(69) See Weber, L., Die Zivilluftfahrt im Europäischen Gemeinschaftsrecht, Berlin, Heidelberg, New York, 1981, at p.195.

and go as far as to prescribe the kind of sandwich that may be offered on board.(70)

Until 1979 the participation in the Traffic Conference was compulsory for all active member carriers. Due to certain economic and political influences this participation has become optional today.(71) The enforcement measures have been eliminated recently.

However, participation in the Traffic Conferences is still of importance for almost all carriers, being obliged to continue participation because of clauses in Bilateral Air Transport Agreements referring to the IATA tariff making machinery or because of the situation in particular markets or routes not permitting unlimited competition.(72)

Even after the above mentioned changes in the legal structure of the Tariff Conferences it is certainly wrong in this context to qualify the today's IATA simply as an "influential trade association" (73) since it is still the place where *de facto* international tariffs are shaped.

(70) See Chuang, R.Y., op. cit. (fn.62), at p. 71.

(71) Cf. Haanappel, P.P.C., Pricing and Capacity in International Air Transport, Deventer 1984 at p. 61, mentioning changes in the market structure and the U.S. pressure in the deregulation context, see the new Provisions for the Conduct of the IATA Traffic Conferences, IATA Document (Manual) March 1988.

(72) The work of the tariff machinery of IATA has repeatedly been subject to disputes as under the angle of anti-trust or competition laws, tariff "coordination" does not seem to be permissible, see infra Chapter 4. III.

(73) See Dempsey, P.S., Aerial Dogfights over Europe: The Liberalization of EEC Air Transport, in J.A.L.C. 1988 at p. 615, 625.

b. Interlining "Cooperation"

A second very important function is the interlining cooperation organized by IATA through its legal (74) and institutional framework.

This allows one carrier to act as an agent for other carriers flying on routes the air carrier does not serve himself. It sells in the name and for the account of the other carriers and shares currently the code with the other transporting airlines. This procedure has for effect that the passenger with only one ticket can use the network of several carriers more conveniently as schedule and prices are normally harmonized and the luggage is handled automatically.

However, "interlining" means not only a marketing strategy but equally complex legal and financial operations which can lead to disputes between carriers or between passengers and carriers. This is why IATA Interlining Traffic Agreements provide for a harmonized responsibility regime (75) and an extensive system of billing and settlement. (76) The payment of the charges due to the "carrying" airline(s) is normally settled through the clearance procedures of the IATA Clearing House. (77) The Clearing House settles once a month the accounts of airline revenue transactions between the parties members to interline agreements. This is actually a balance-sheet operation where credits and debts are accounted avoiding large transfers of

(74) See: IATA Multilateral Interline Traffic Agreement Manual, providing for a detailed harmonized form of bi- or multilateral Carrier Interlining Agreements.

(75) E.g. clear attribution of responsibility to airline "delivering", issuing", etc. in case of loss or damage, see art.3 of the mentioned model agreement.

(76) See art. 8 of the model agreement.

(77) If not otherwise provided in the individual inter-carrier agreement.

funds. (78) The provided framework facilitates international transportation which would be more complicated and expensive without easy inter-carrier cooperation.

c. Organization of a Distribution System

IATA does not only organize transportation but equally intervenes on the level of distribution. Within the so-called "IATA agency program" the sale of tickets for carriers organized by IATA is limited to travel agencies which must be authorized by the Association. These authorized agencies must fulfill certain requirements with regard to turnover and equipment in order to participate in the sale of more than 90 % of the entire international scheduled air transportation.(78) This controlled system of distribution guarantees stability of revenues for the air carriers and a fixed revenue margin for the agencies. This activity is, however, not without interest with regard to anti-trust and competition considerations .(79)

d. Technical and Legal Study and Assistance

IATA has a number of Committees working on questions of safety and efficiency of flight as well as on the development of the aviation law (Legal Groups).(80) These Standing Committees provide services and information not only for the other IATA organs but equally for the members of the Association. They contribute to the development of safety and facilitation in

(78) See: Aspects of World Airline Cooperation, Clearing House, IATA Publication, Montreal, Geneva, 1969, stating that normally only 10 % of the accounted sums are to be really transferred.

(78) See: Weber, L., op. cit. (fn. 69), at p. 196; Chuang, R.Y., op. cit. (fn. 62) at p. 91.

(79) See infra Chapter 4. III.

(80) For the different functions of the different Standing Committees of IATA, see Chuang, R.Y., op. cit. (fn. 62) at p. 53 seq., in the meantime slight organizational modifications have occurred, but it would go too far in this context to present them in a detailed way.

international aviation; they prepare the formulation of the Association's position in the framework of its purposes.

e. Trade Association Activities

The last but certainly not least important activity of the IATA is the work currently attributed to trade associations. On the basis of the position formulated within its organs the organization presents its views to the relevant international fora or national governments in the hope that the arguments will be taken into account. IATA speaks, thus, for the carriers in fields like airport safety or environment protection and tries to influence the national and international legal development.

3. IATA RECENT PROBLEMS

The legal impact of IATA's activities, especially in the field of rate-fixing but equally in regard of the "agency program" and the functions of the Clearing House could raise questions of competition law. In the context of U.S. "Deregulation" the long lasting discussion on the legality of those activities came to its "tentative" culmination when, in 1978, the U.S. Civil Aeronautics Board (CAB) issued the Order to Show Cause.(81) In this order, which could be named "a unilateral demand for justification" (82), the CAB qualified the IATA Traffic Conferences as a historical "anachronism" (83) and as incompatible with the anti-trust doctrine laid down in the Sherman Act.(84) Accordingly, the Board found "tentatively" that

(81) Order 78-6-78 of June 12, 1978, CAB Docket 32851 at p. 3 seq. At the moment ICAO is submitted to a second DOT review.

(82) B.W. Rein, B.L. McDonald, Legislative Hearing on IATA Traffic Conferences, in Essais in Air Law, A. Kean (ed.), The Hague 1982, p. 235 at p. 236.

(83) Order at p. 3.

(84) Order at p. 5.

the Traffic Conference Resolutions "are no longer in the public interest and should no longer be approved by the Board".(85) The threat to take anti-trust immunity away - granted to IATA since 1946 - pushed the Association in a major crisis and led to modifications in the Association's structure.(86)

The inherent anti-trust impact of IATA's activities may lead - despite the substantial changes in 1978 and recent modifications with regard to the Tariff Conference Europe (87) - to a second identity crisis due to the application of European anti-trust and competition Law. (88)

In sum, IATA fulfills a large scope of different activities which could be described as service, trade association and price making functions. Its centerpiece is still the tariff determination which has a worldwide effect on fares and rates. However, IATA and its functions would not - on the background of its historical evolution - exist in the form it shows today, if the governments had not attributed to it a quasi-legislative and

(85) Order at p. 8.

(86) In this context IATA made an effort to restructure the system of Traffic Conferences where participation became voluntary. The then issued new Provisions for the Conduct of IATA Traffic Conferences was positively sanctioned by interim approval of the CAB in May 1979. This approval was valid for one year and renewed in April 1980 (then for two year's time). In May 1981, in September 1981 and June 1982 the 1980 order was stayed. In March 1982 the order was stayed without time limitation until further order. See for further indications Rein, B.W., McDonald, op. cit. (fn. 82) at p. 25 seq., Since then IATA is obliged to present justification in a five year's rhythm: 1985 and 1990.

(87) See Weber, L., Effect of European Air Transport Policy on International Cooperation, in European Transport Law XXIV 1989 no. 4 at p. 448, 449. They concern the following measures:
- the Conference will be open not only to IATA members;
- no Agreement of carriers will be issued but a "joint proposal to governments;
- EEC Commission observers are allowed in the Conference;
- conference Reports will be provided to the EEC Commission.

(88) See infra Chapter 4. III.

quasi-public function by referring to IATA in multiple international agreements and conventions. (89) It is this repeated reference to a "private" association of carriers which attributes to IATA the role of an integral part of the Chicago System of legal and economic regulation of air transport.

III. BILATERAL AIR TRANSPORT AGREEMENTS

1. GENERALITIES

The Chicago Conference proved its inability to resolve many problems especially, in the economic field of civil aviation. Issues like the exchange of commercial rights, tariffs, route access (designation), capacity and frequencies were left open for bilateral (90) or subsequent multilateral regulation.(91)

States, based on the pre-war tradition, engaged rapidly in the exchange of Bilateral Air Transport Agreements (BATAs) so that today more than 1523 valid BATAs (Jan. 1st, 1990) can

(89) With regard to the legal character of the IATA functions see discussion in P.P.C. Haanappel, op. cit. (fn. 71), at p. 77 seq. and Chuang, R.Y., op. cit. (fn. 62), at p. 72 and 41.

(90) Lissitzyn, O.J., Bilateral Agreements on Air Transport, in J. Air Law and Com. (No. 30) 1964 at p. 248.

(91) The multilateral attempts which could be observed after Chicago 1944 were not very successful, see the ICAO Records of the Commission on Multilateral Agreement on Commercial Rights in International Civil Aviation Transport, Geneva 1947 Doc. 5230 A2-EC/10; and the ICAO Work Program for 1960-1962 stating: "One of the permanent objectives of ICAO in the air transport field is to find a multilateral basis for the exchange of commercial rights for international air transport...", in 14 ICAO Bulletin 1959 at p. 77. Despite those efforts no such agreement could be concluded. The 1956 Paris Agreement between ECAC member States did only cover economic regulation for non-scheduled flight.

be counted by ICAO. (92) The European Community alone counts more than 609 BATAs with non EEC-countries.

BATAs are public international law agreements (treaties) in the sense of the Vienna Convention on the Law of Treaties (93) concerning trade (in services) (94) concluded between governmental authorities of two States regulating the performance of air services between their respective territories.(95) The denomination of those agreements is not uniform. Currently they may be called "Air Services Agreement", "Memorandum of Understanding" (MoU), "Transport Agreement", or the like.(96) As with all international treaties, BATAs require ratification or/and implementation pursuant to the constitutional provisions

(92) According to art. 83 Chicago Convention States are under the obligation to register BATAs with ICAO. However, the ICAO statistics cannot be regarded as complete. ICAO has no means of enforcement in cases of non-compliance with art. 83 so that a number of existing BATAs or especially secret MoUs may not be taken into account. The registered and valid BATAs may be found under ICAO Doc. 9460 LGB 382 (1986) with annual updates, Doc. 9460 LGB 382, Suppl. 1986, Suppl. 1987, Suppl. 1988, Suppl. 1989

(93) United Nations Conference on the Law of Treaties, Doc. of the Conference U.N. Doc. A/Conf. 39/11/Add.2.

(94) With regard to the discussion of the qualification of aviation services as "trade in services" in the sense of the GATT, see Draft Statement by the Council of ICAO to the Group of Negotiations on Services, C-WP/9029 (1989) and Doc. A27-WP/60 EC/12 (Trade Concepts and their Principles and Application to International Air Transport).

(95) Comp. Haanappel, P.P.C., Bilateral Air Transport Agreements 1913-1980, in The Int'l Trade Law J. 1979 (Vol. 5) at p. 241.

(96) The terms vary from country to country due to different constitutional traditions; see: Naveau, J., International Air Transport in a Changing World, London, Dordrecht, Boston, 1989 at p. 91, and Gertler, Bilateral Air Transport Agreements, Non-Bermuda Reflections, in J.of Air L. and Com. 1976 (Vol. 42), at p. 779, 806 seq.

(97) in order to become effective and to allow airlines to derive rights from those public international law instruments. The contents of BATAs depend on multiple factors since international aviation is submitted to a large number of different elements: It is essentially the bargaining power of the negotiating States which influences the concrete formula of the agreement. This bargaining power may be determined by deeds like the size and population of the country involved as well as by its "traffic generating power". The United States has a strong position solely due to the number of passengers and the gateways which may be made accessible. Canada e.g. may invoke its size and strategic situation. (98) The interests which may influence the States in their negotiations are essentially of economic character, but equally political or military considerations may play a role.(99) Consequently, the scope of the exchanged rights varies from agreement to agreement. However, it is not impossible to classify the existing BATAs as a certain standardization can be observed.

(97) One may remind the U.S. tradition to consider BATAs as mere executive agreements which do not supersede domestic law; see Lowenfeld, A.F., Aviation Law, N.Y.,1972 at II 17-18; and the U.K. principle that from governmental agreements no individual rights can be derived; see PanAm v. Dept. of Trade, Lloyd's L.R. 1976 at p. 257; According to art. 80 of the 1950 Air Navigation Act foreign airlines are formally required to apply for a permit in order to benefit from an internationally agreed traffic right.

(98) See the Canadian denunciation of the Canadian-U.K. BATA in 1988.

(99) See Haanappel, P.P.C., Bilateral Air Transport Agreements, loc. cit. (fn. 95), at p. 263.

2. THE CHICAGO STANDARD AGREEMENT AND BERMUDA I (100)

It was the 1944 Chicago Conference which recommended to participating States a "Standard Form of Bilateral Agreement for the Exchange of Commercial Rights in Scheduled International Air Services" in order to secure a minimum degree of uniformity in bilateral arrangements. (101) This standard agreement became then, with certain considerable modifications and renamed "Bermuda Agreement", the ground pattern for the major part of international air transport agreements.

The Chicago Standard Form Agreement itself did not exchange traffic rights or regulate other factors of economic importance. This was in full accordance with the spirit of the Chicago Conference. (102) With the exception of route determination, which was confined to the annex of the agreement, the text remained silent with regard to tariffs, capacity and frequency to be applied on such routes. The body of the agreement dealt essentially with ancillary provisions reaffirming or applying provisions of the Chicago Convention. (103)

Since the Standard Form did not allow the solution of the fundamental economic questions and since only the U.S. showed interest in concluding bilateral air transport agreements on that

(100) Bermuda I must be distinguished from Bermuda II, the agreement following the British denunciation of Bermuda I.

(101) Standard Form of Bilateral Agreements for the Exchange of Commercial Rights of Scheduled International Air Services, included into the Final Act of the Chicago Conference after submission by the U.S. Delegation, in Conference Proceedings Vol. II Conf. Doc. 19 at p. 1268. This Standard form has been modified (as recommendation to its members) by ECAC in 1959, ECAC Third Session, Records Vol. I, Report Doc. 7977, ECAC/3-1 (1959) and later by ICAO (as guidance to States) ICAO Doc. 9228-C/1036.

(102) See supra (fn. 63) and accompanying text.

(103) Such as the recognition of licences, non-discrimination etc., see Haanappel, P.P.C., Bilateral Air Transport Agreements, loc. cit. (fn. 95), at p. 246.

basis (104), the problem of how to reach an exchange of traffic rights came again to the negotiation table at Bermuda in 1946.

Finally a compromise could be reached between the U.S. and U.K. positions: the British side no longer insisted on its concept of (protective) governmental or intergovernmental predetermination of capacity and frequency, whereas the American side agreed to a less liberal tariff regulation including governmental approval of rates and fares (105). The Bermuda Agreement (106), as such, is to a large extent the mere copy of the Chicago Standard Agreement. The important differences are to be found in its art. 1, in the Final Act of the Bermuda Conference and in the joined Annexes, where, for the first time after 1935, a substantial exchange of traffic rights between U.K. and U.S. could be achieved.

It is typical for this type of treaty to lay down the basic elements in a vaguely formulated text which is, then, regarded as *the* international treaty, and to give precision, interpretation and technical details in the annexes. The so created instrument has the advantage of being more flexible since the annexes can normally be modified or amended without reratification on the basis of a formal or informal understanding which can equally be secret.

The Annexes to the Bermuda I Agreement contain the following ruling: Annex I defines the in art. 1 Bermuda exchanged traffic rights in the form of Freedoms I - IV. (107) Annex II contains an extensive ruling of tariffs and price fixing procedures. According to para. (a) of Annex II, the rates and fares applicable on routes between both countries shall be subject to

(104) See for the negative British position: Cheng, B. op. cit. (fn. 22) at p. 235-238.

(105) See Haanappel, P.P.C., Bilateral Air Transport Agreements, loc. cit. (fn. 95), at p. 247.

(106) For the text see: T.I.A.S. 1507.

(107) see supra (fn. 19.

approval by *both governments* (double approval principle). Para. (b) provides that rates and fares to be submitted to the competent authorities shall be negotiated within the rate conference machinery of *IATA*, "the Civil Aeronautics Board of the U.S. having announced its intention to approve" such a procedure. (108) In this point, the U.S. Government made a major step towards the British position leaving its policy considerations of the Chicago Conference aside. This implicit recognition of IATA in an agreement of that symbolic character between the two most important carrier States of that period led to the definitive confirmation of todays existing tariff-fixing machinery.

Of importance is eventually lit. (h) of Annex II establishing the principle of "reasonableness" of tariffs. The fixed tariff shall correspond to the costs of operation and allow reasonable profit. Not less and not more. This quite vague formula allows, however, to exclude tariffs which are too low (dumping) or excessive (abuse).

Annex III, together with Annex IV, determine the routes on which the rights mentioned in Annex I and the tariffs as found according to Annex II apply. Annex III and the amendment procedure in Annex IV mention all city-pairs and intermediate points allowed for U.K./U.S. carriers.

Finally, Annex V regulates the change of aircraft during one flight between two points. This *change of gauge* can be interesting for carriers on long-haul flights with intermediate stopping places. It allows the airline to always use the adequate size of aircraft, avoiding overcapacities and uneconomic fuel consumption. Due to its particular economic importance,

(108) See supra Chapter 1 II 3, concerning problems of U.S. IATA approval (Show Cause Order). The formal involvement of IATA pursuant to Annex II Bermuda I became possible only after the CAB exemption from anti-trust legislation on Feb. 19, 1946, see: 6 CAB Reports 639 (1946), Agreement no. 493.

change of gauge is only allowed if the carrier is explicitly entitled to do so. (109)

As to the volume of the transported traffic, the Bermuda package contains regulation with regard to capacity in para. 3-6 of the Final Act. Capacity is normally regarded as the traffic carrying ability of an airline determined by such factors as type of aircraft, frequency of flights, often based on the determination of tonkilometers. The mentioned provisions provide for "*fair and equal*" opportunity for the carriers of both States to operate on air routes, for a *proportionate relationship* of offer and demand of capacity (reasonable load) and for the obligation to "*take into consideration the interests of the carriers of the other State*". These rules come close to a vague Code of Conduct for carriers but don't stipulate as such a precise sharing of the available market on one route. They can thus only be understood as an attempt to avoid "cut-throat" competition on U.K. - U.S. routes, allowing the carriers of both parties to maintain regular services "*consistent with sound economic principles*". (110) The Final Act para. 9 establishes an *ex post facto* governmental control mechanism, allowing the governments to review the attributed and effectively transported capacity in form of regular consultations. The liberal character of these clauses was strengthened by para. 6 which can be interpreted as multiple designation clause. Is was, thus, possible to designate as many carriers as may be consistent with "sound economic principles".

The adoption of this liberal capacity and frequency system must be viewed as a major concession of the British side. The

(109) Change of gauge has already caused major diplomatic and legal problems between the U.S. and France when France prohibited the disembarkation of passengers on a flight on the U.S. - London - Paris route; see: 54 International Law Reports 1979 at p. 304 seq.

(110) See para. 1 of the Final Act; and Wheatcroft, St., The Economics of European Air Transport, Manchester 1956, at p. 221.

U.K. had pressed at the 1944 Chicago Conference for strict control by governments of capacity and traffic volume. (111)

In sum it can be concluded that the Bermuda I Agreement on the basis of the Chicago Standard Agreement regulated all essential technical and ancillary questions. It provided, furthermore, for a tariff making system as well as for a liberal capacity clause on the basis of a clearly defined route catalogue.

3. BERMUDA I AS 'MODEL AGREEMENT', BATA TYPOLOGY

Bermuda I did as such not only represent a compromise between the two major aviation powers of that time but showed in the aftertime to be a convincing model for a large majority of BATA negotiating countries. Due to their particular economic situation a number of States tried, nevertheless, to impose a different capacity regime based on more precise traffic volumes; others modified their treaty strategy on political grounds. Today one is, thus, able to distinguish, roughly, three types of Bilateral Air Transport Agreements: the "Bermuda Type", the "Predetermination Type", and the "Liberal Type".

Bermuda Type agreements are in principle shaped according to the above presented U.K. - U.S. Bermuda I Agreement including tariff and capacity regulation. In the concrete case these provisions can be found either in Annexes or in the body of the Agreement itself. (111 a)

(111) See for the former U.K. position Cheng, B., op. cit. (fn. 22) at p. 18.

(111 a) As indicated above, Bermuda I must be distinguished from Bermuda II (the Air Services Agreement between the Government of the U.S.A. and the Government of the U.K. of July 23, 1977, in T.I.A.S. 8641 (1977)) which replaced the Bermuda I Agreement revoked by the U.K. with the intention to achieve a more favorable capacity regulation. In its regulatory essence the agreement did, however, not bring the intended changes, it

Predetermination Type agreements generally replace liberal and market force oriented clauses of the Bermuda model by an *a priori control*. (112) Carriers share the market according to fixed quotas subject to government approval or separate carrier agreement (113) which often amounts to a fifty percent partition (equal sharing). Predetermination Type agreements may be felt necessary in cases of unequal bargaining power of the involved States in order to protect the national carrier of a weaker partner.(114)

Under the deregulation influence in 1978 the U.S. policy in relation to air transport agreements changed. According to Sect. 17 (8) of the 1979 International Air Transportation Competition Act (115) "opportunities for carriers of foreign countries to increase their access to United States points if exchanged for benefits of similar magnitude" should be included in the new U.S. negotiating policy. New gateways should be created in order to increase competition. (116) Apparently it was the declared intention of the U.S. Government to "export" deregulation when it

reiterated Bermuda I with some restrictions especially with regard to the designation clause. Due to the fact that this agreement did not substantially change the preexisting compromise and did not gain importance as a model agreement, the Bermuda II agreement will not be presented more extensively in the following.

(112) See Haanappel, P.P.C., Pricing and Capacity Determination in International Air Transport, Deventer 1984, at p. 35.

(113) With regard to predetermination evolutions in post-war BATAs see esp. Cheng, B., op. cit. (fn. 22) at p. 426 seq.

(114) See the example of the Canadian-Chile BATA of 1973 art. 7 in CATC (1973) at p. 197.

(115) The International Air Transport Competition Act (P.L. 96-192, Feb. 15.1980, 94 Statutes 35) amends sect. 1102 of the Federal Aviation Act (49 U.S.C. 1502).

(116) Sect. 17 (7) of the International Air Transport Competition Act.

concluded about twenty Liberal Air Transport Agreements in the 1978-82 period. (117)

The Liberal Type differs in almost all economic aspects from the till then faithfully adhered Bermuda I model. In tariff questions it refers no longer to the IATA tariff machinery but leaves it to the forces in the market place to form the rates. The tariff is no longer submitted to prior approval (118) but to systems such as "dual disapproval", "country of origin disapproval", or so-called "fare band systems" requiring no individual approval as long as the tariff ranges in a determined margin.

Other economic factors like designation (access), routes and capacity remain almost unregulated and unlimited (119) leaving those issues to the decision of the concerned carriers. The U.S. exchanged in this way very often *hard rights* (gateways and routes) against *soft rights* (favorable economic conditions) which has not always been to the U.S. carriers' advantage. (120) This liberal policy has changed after 1982. No such agreements have been concluded any more. The existing liberal "deregulatory" agreements remain nevertheless valid.

(117) See Haanappel, P.P.C., op.cit. (fn. 112), at p. 42, and Merckx, A.L., New Trends in the International Bilateral Regulation of Air Transport, in European Transport Law (Vol. 17) 1982 at p. 107.

(118) See e.g. the U.S. - Belgium agreement (art. 12), in T.I.A.S. 9231 (1978).

(119) See for the characteristics of liberal BATAs in detail: P.P.C. Haanappel, Bilateral Air Transport Agreements, loc. cit. (fn. 95) at p. 262.

(120) P.P.C. Haanappel quotes the example of K.L.M. having presumably occupied about 90 % of the U.S. - Netherlands market, in Bilateral Air Transport Agreements, loc.cit. (fn. 95), at p. 262.

4. THE ROLE OF BATAs IN THE CHICAGO SYSTEM

In conclusion one has to state that the third pillar of the international regulatory system is marked by bilateral relations based on Bermuda I Type and Predetermination Type agreements. These agreements regulate in general routes, refer with regard to tariffs to the IATA tariff-making machinery and regulate capacity sharing between the involved designated carriers. In those treaties - which have often to be viewed as the formal expression of the government's tutorship for the national air industry (121) - governments try to balance the political and especially economic interests. Though airline interests are certainly the most important factors influencing the contents of BATAs, considerations of prestige, national pride and military character may equally determine the governments' positions.

The so shaped global network out of bilateral filaments shows an intricate complexity since, besides the above outlined ground pattern, every BATA contains individual elements. This lack of uniformity is certainly one of the major defects of this system which, together with the above mentioned lack of publicity (122), makes it merely uncontrolable.

But on the other hand one has to take into consideration that every State, even every route shows a different structure to which the legal and economic instruments have to respond. It is doubtful if multilateral economic regulations can ever adequately reflect the justified but often incompatible interests of States and air carriers around the world. (123) It can, however, not be excluded that multilateral uniform structures can be achieved

(121) See Naveau, J., International Air Transport in a Changing World, London, 1989 at p. 93.

(122) See supra (fn. 92).

(123) See for the failure of almost all attempts to regulate multilaterally the exchange of traffic and commercial rights, supra Chapter 1. II. 1.

between markets of similar magnitude and showing a comparable economic situation. (124)

IV. CONCLUSION

In sum, one can speak of *one* integrated system of international air regulation. This system consists, nevertheless, of three parts working together on the basis of function sharing.

There is at the bottom the Chicago Convention creating ICAO which elaborates a vast mainly technical regulation. The Convention underlines that international aviation is founded on the sovereignty principle and the nationality of aircraft. It is now up to the States to regulate economic aviation relations on a bilateral level. In BATAs they develop a system of *regulated competition* and exchange ancillary and technical rights. IATA eventually is an instrument of economic regulation born within the Chicago context and constantly confirmed by State practice in bilateral agreements; it is thus an integrated element of the Chicago System.

The so established framework of international air regulation proved its reliability in more than 45 years' work. In this period international aviation has undergone major changes (125) to which the system in place could react with sufficient flexibility.

The system of international air regulation, being a compromise between different approaches of legal, economic and ideological character and being consequently a common denominator on a very low level, can, however, not satisfy all parties

(124) This argument may be based on the successful exchange of rights between certain ECAC States and the U.S., ECAC - United States Memorandum of Understanding, signed in Montreal 25 September 1989 and the almost uniform application of ECAC Standard Clauses in BATAs between ECAC members.

(125) See the technical development from-short haul to long-haul wide-body aircraft changing fundamentally the economic and safety deeds of international aviation to which the law had to respond.

concerned. The U.S. deregulation movement of the late seventies and early eighties proved for the first time that the global legal system lacks economic freedom which can lead to situations where national (or supranational) laws and principles can no longer be brought into compatibility with the international situation.

Today we face a new development in Europe where the integration of twelve independent States in a Common Market brings supranational legal principles to application, equally in the aviation sector. This might lead to conflicts of adaptation and even to threatening the balanced and experienced "Trias of International Air Law".

CHAPTER 2: EUROPEAN AIR TRANSPORT LAW IN ITS RECENT EVOLUTION

I. GENERALITIES

In 1987, some 30 years after the signature of the Treaty of Rome (1), the Council of the European Communities (EEC) (2) took the first time noteworthy steps in order to regulate civil aviation in the twelve Member States of the EEC. Under the key

(1) Treaty establishing the European Economic Community, 298 U.N.T.S. 3 (entered into force Jan. 1, 1958); herinafter: EEC Treaty.

(2) Acting on initiative of the European Commission (herinafter: Commission); for the institutional structure of the EEC see art 4 of the EEC Treaty. The 1967 "Merger Treaty" (Treaty establishing a Single Council and a Single Commission of the European Communities, OJEC No. 152, July 13, 1967) reorganized the institutions of the three European Communities (EEC, ECSC and EAEC) and formed one common Council and Commission.

word "Liberalization in European Air Transport", it issued a number of regulations, directives and recommendations (3) essentially with the aim of introducing an increased element of competition into a market segment which had, traditionally, been subject to protective national and anti-competitive international regulation. (4)

1987 was the turning point in a long-lasting legal development: for almost 20 years air transport in the EEC had been a taboo subject where neither the national nor the supranational (5) authorities dared to intervene in the national regulatory practice with a Common European Air Transport Policy. Then, due to external and internal influences (6), the Commission began to prepare legal and economic studies and proposals for legislative acts. The Commission's action was largely supported by the Court of the European Communities (7) feeling that the system in place, based on bilateral interstate relations, nationality and sovereignty principles, is incompatible with the Community concepts of integration and non-discrimination. (8)

(3) For the legal nature and effect of those legal instruments see art. 189 EEC Treaty.

(4) See Sedemund, J., Montag, F., Liberalisierung des Luftverkehrs durch europäisches Wettbewerbsrecht, in Neue Juristische Wochenschrift, 1986, p. 2146, at p. 2147.

(5) For the notion of supranationality see: Schweitzer, M., Hummer, W., Europarecht, Frankfurt/Main, 2nd ed. 1985 at p. 211.

(6) Here may be mentioned the U.S. deregulation movement, the increasing dissatisfaction of passengers with high tariffs and the repeated pressure by the European Parliament, see esp. Vincent, Position de la Commission Europeenne, La Politique Commune du Transport Aerien, in European Transport Law (No. 21) 1986, at p. 99.

(7) Herinafter ECJ.

(8) See Soerensen, F., The Air Transport Policy of the EEC, in European Transport Law (Vol XXIV) 1989, No. 4, at p. 411 seq. and Dempsey, St., Aerial Dogfights over Europe: The Liberalization of EEC Air Transport, in J.of Air L. and Com. (Vol. 53) 1988 p. 615, at p. 682, comparing the totally different legal situations of a dutch industrial company and a dutch air carrier wanting to

These efforts led finally to the 1987 liberalization "package" which should be understood as a first step towards a comprehensive Community policy on civil aviation. Since 1987, a number of implementing regulations and recently a second set of legal proposals by the Commission and decisions by the Council have followed. (8a) These legal texts allow to sketch the projects the Commission has in order to accomplish the Internal Market equally in the aviation sector before 1993.

Before one can turn to presenting the system of economic and legal regulation the European institutions are now in the process of modifying, it is necessary to highlight some basic patterns of the background of the European Airline Industry and the legal principles governing every EEC action. The regulatory development from 1957 to 1992 will then be analyzed with the aim of determining what the legal structure of the existing "European Air Market" will be.

II. THE NEED FOR INTEGRATED EUROPEAN AIR TRANSPORT : BACKGROUND

European Air Transport is characterized by multiple economic and legal particularities. The most important must be known in order to understand the efforts of the Commission to create one harmonized aviation area.

1. ECONOMIC STRUCTURE

One has to underline that, today, it is impossible to speak about one European Air Market. Within the legal framework of the EEC there still exists, in the aviation sector, twelve nearly independent domestic structures with particular national

establish themselves and to exercise profession in another Member State.

(8a) See infra Chapter 2. II. c., d., e.

regulations, distinct international relations and different economic and geographical situations. The market must be characterized as strongly segmented. Besides this segmentation we have to look at the different exterior and interior competition factors and eventually to highlight the dangers which could threaten the European Air Market from outside.

a. Size of the Market

Europe's geographical situation cannot be more favorable in order to generate, receive or transit traffic. Placed half-way between the American continent and Asia and being traditionally strongly linked to Africa, together with its high development and financial power, Europe is a natural for air traffic.(9) Europe's theoretical traffic generating power could be quite considerable given the approx. 320 million population in the EEC Member States. The market as such is, however, much less important and developed than in the U.S.A. (10)

b. Segmentation

Its comparatively small size could be due to the market segmentation which is proper to Europe. Segmentation means that national borders and regulations cause distinct economic and legal conditions in each Member State leading to structures hindering economic development. In Europe - like in many other parts of the world - each country has developed one or more

(9) See ICAO Doc. 114 AT.29 (1973). Pursuant to the World Tourist Organization (WTO) about 70 % of all passengers for holiday purposes come from, got to or through Europe; see statistical deeds quoted by E. Estienne-Henrotte, L'Application des Régles Générales du Traité de Rome au Transport Aérien, Bruxelles, 1988, at p. 25.

(10) See OECD Statistics (1988) on Aviation Traffic, reported in Button, K., Swann, D., European Community Airlines - Deregulation and its Problems, in Journal of Common Market Studies (Vol. XXVII) No. 4, 1989, p. 259, at p. 261. According to these statistical indications the Intra European and European domestic air traffic represents less than 50 % of the U.S. traffic expressed in passengers carried and in passengerkilometers.

political/economic centers forming natural hubs for civil aviation (11), often to a large extent reserved for the national "flag carriers".(12) Obstacles are put to the Carriers' growth: cabotage (domestic traffic) is normally reserved for national carriers; on intra- and extra-EEC routes, on the contrary, heavy competition between the approx. 130 Europe-based carriers can be observed. The intra-EEC traffic depends on often restrictively granted traffic rights.

Compared to U.S. carriers the size of European airlines is consequently relatively small. (13) Of major importance is, eventually, the segmentation of factors of operation: every country provides for distinct social, labour, and safety requirements, different taxation and monetary regimes which influence directly or indirectly the cost structure for operation and service. The totally heterogeneous situation in a region where eight States can be overflown in less than one hour does not favor the evolution of European carriers, leads to high tariffs for the consumer and to a loss of competitiveness for the Air Industry as such. (14)

(11) See Villiers, J., For a European Air Transport Policy, in IATA Magazine (no. 57) 1989, p. 3, at p. 4.

(12) E.g. Air France generates more than two thirds of its traffic at Paris Airports, Lufthansa about 54 % at Frankfurt, see Villiers, J., idem.

(13) See Button, K., Swann, D., op. cit. (fn. 10) at p. 267; and E. Estienne-Henrotte, op. cit. (fn. 9) at p. 26 seq. This might, however, change in the near future. At the moment we can observe a rapid expansion of British Airways (after the merger with British Caledonian), qualified by TIME Magazine of June 18,1990 at p 70, as the world's largest international airline, and the merger of Air France with UTA and AIR INTER in France (yet subject of EC Commission's approval).

(14) See Memorandum (Commission) to the Council, Air Transport : A Community Approach, in Bulletin of the European Communities 1979, supplement 5/1979.

c. Competition

European Scheduled Air Carriers have to face another severe problem: they are exposed to competition with charter services and extra-EEC carriers. Charter accounts today for approx. 60 % of the total European Air Traffic. (15) Based on an already liberalized regime, this kind of transportation deprives the scheduled carriers from a large part of their low-yield revenues. (16)

The pressure on the market is increased by extra-EEC carriers operating on intra-EEC routes on the basis of Fifth Freedom rights, taking up passengers in one Member State and setting them down in another. (17) Given the often considerable size and financial strength of those "mega carriers", European Airlines feel particularly threatened.(18)

Different from the situation observed in Canada and the United States, the ground transportation by rail and road is a considerable supplementary competition factor in Europe. In large parts of the EEC new ultra-rapid railway networks are under construction and will soon link major cities on the continent. Especially this mode of transport is likely to take market shares from the airline hampered by congestion problems.

(15) See statistical indications: Button, K., Swann, D., op. cit. (fn. 10) at p. 265.

(16) See Villiers, J., op. cit. (fn. 11) at p. 5.

(17) See report in ITA Magazine, No. 36, 1986 at p. 20. The pressure is especially important with regard to the transatlantic market through which U.S. carriers have access to 37 (!) gateways often combined with the mentioned Fifth Freedom rights.

(18) See Braure, E.J., Perspectives nouvelles pour les lignes aériennes européennes, in European Transport Law (Vol XXIV) No. 4, 1989, p. 441 at p. 443

2. JURIDICAL STRUCTURE

The heterogenity within the EEC air transport market in the economic field has essentially juridical reasons.
Until recently - as no Common Air Transport Policy was in place - aviation has been one of the rare European economic activities to be governed exclusively by domestic law of the Member States. Airlines were mostly State-owned or dominated (19), leading to an interest-identity of carrier and State. As a consequence, almost everywhere a protective attitude of the States with regard to their airlines could be observed on the international level. This is reflected in EEC Commission's statistics showing the exchanged traffic rights between Member States of the EEC: on 988 intra-EEC routes only 48 provided for multiple designation and only 88 for Fifth Freedom rights granted to other Community carriers. (20) Capacity sharing, regulated in the BATAs, was mostly based on the equal sharing principle (or otherwise coupled with compulsory revenue sharing pools). (21)

Tariffs had generally to be filed for prior double governmental approval. Only national (substantially owned and effectively controlled) airlines could be designated for services on international (EEC internal and external) routes. Domestic

(19) See statistics by International Foundation of Airline Passengers Associations (1988) reprinted in Button, K., Swann, D., op. cit. (fn. 10) at p. 266.

(20) EEC Commission, Seventeenth Report on Competition Policy, Brussels 1988.

(21) A "pool" or a "pooling agreement" provides generally for a sharing of revenues between two or more carriers in a certain predetermined proportion, even if the actually carried capacity shares do not correspond. In a fifty percent pooling agreement each carrier will earn 50 % of the total turnover (or net benefit) even if the capacity has been carried in a 60%:40% relation.

laws currently exempt national civil aviation from anti-trust or competition laws. (22)

The legal heterogenity was - and still is - increased by dispersed international extra-EEC aviation relations of the Member States. In 1989, the European Commission counted more than 609 different BATAs the Member States had concluded with non-Member States.(23)

In sum, one can note that the principles of the law of international air transport as shown in the precedent chapter apply almost entirely in the EEC. Sovereignty and nationality still dominate the air sector despite progressing economic integration in all other fields. This resistance of the States concerning the air transport market could not satisfy the European Institutions in charge of ensuring "the proper function and development of the Common market" (24) or of ensuring that in the interpretation and application of the Treaty the law is observed. (25)

III. THE EEC LEGAL FRAMEWORK

We have to distinguish so-called primary and secondary EEC law. We will first analyze the basic norms of the EEC Treaty in the light of the Single European Act (26) and then focus on the

(22) See L. Weber, Die Zivilluftfahrt im Europäischen Gemeinschaftsrecht, Berlin, Heidelberg, New York 1981, at p. 317 seq.

(23) See Communication of the Commission to the Council on Community relations with third counties in aviation matters, Brussels, Jan. 1990. Some countries (Netherlands and United Kingdom) e.g. concluded a number of very liberal BATAs, whereas others (Germany and France) remain essentially based on Bermuda Type agreements.

(24) Here for the Commission, see art. 155 EEC Treaty.

(25) Here for the Court of Justice, see art. 164 EEC Treaty.

(26) Instrument amending and reforming the EEC Treaty in order to promote the creation of the Internal Market, done in Luxemburg, February 17, 1986 and at The Hague 28, 1986, in Treaties

legal acts and norms based on this "traitè constitutionnel". Special attention will be paid to the role of the ECJ.

1. PRIMARY EEC LAW AND AIR TRANSPORT

Air Transport finds special mentioning only in art. 84 para. 2 of the EEC Treaty providing

> "(t)hat the Council may, acting by a qualified majority, decide wether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport." (27)

In its very broad formula art. 84 para. 2 presents a number of particularities and problems. (28) It cannot be understood in itself but must be seen in its proper systematic setting in the EEC Treaty. Art. 2 of the Treaty deals with the tasks and purposes of the EEC to

> "(p)romote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, (...) and closer relations between the States belonging to it"

by establishing a Common market and approximating the economic policies of the Member States.

Art. 3 enumerates the acts and means to be applied for reaching the mentioned purposes. In its lit. (e) it expressly states that a Common policy in the sphere of transport should be adopted.

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establishing the European Communities, Office des Publications Officielles des Communautès Europèennes, Luxemburg 1987.

(27) Art. 84 para. 2 has been amended by the Single European Act Art. 16 para. 5 changing the unanimous approval to a qualified majority in order to facilitate the creation of the Internal Market equally in the transport sector.

(28) As early as during the negotiation of the EEC Treaty problems with regard to the status of maritime and air transport within the EEC did arise; the drafters decided to leave this question open as it hindered further progress in the negotiation, see E. Estienne-Henrotte, op. cit. (fn. 9) at p. 39.

Part II of the Treaty determining the "Foundations of the Community" contains a title dealing with transport. This title consists of 10 detailed articles of which the first provides that the objectives of the Treaty should be pursued within the framework of a *Common Transport Policy*. The second article (art. 75) is the general legal basis for Community actions, prescribing, in particular, the procedure to be taken by the EEC organs in order to regulate the transport sector. (29) The articles 76 to 83 regulate different issues such as discriminatory national measures, State aids, charges and conditions. Due to art. 84 para. 2 those provisions are, however, not directly applicable to maritime and air transport.

Immediately after 1958 the question arose on the interpretation of the imprecise formula of this article, whether the authors of the Treaty intended air and maritime transport to be excluded just from the application of the rules laid down in the transport title or - and this would have very far-reaching consequences - from the Treaty as such including the rules governing competition and State aids. (30)

Both interpretations could be defended on the ground of the Treaty. (31) One side held, with reference to the wording of art. 84 para. 2 and to the draft history of the Treaty, that the

(29) Pursuant to art. 16 para. 6 Single European Act art. 84 para. 2 EEC Treaty makes now clear reference to art. 75 para. 1 and 2 thereby providing for unanimity decisions in case of serious effects on standard of living, and on employment, and on the operation of transport facilities. This procedural provision will be of major importance for the rapid progress of EEC law in the aviation sector.

(30) At this place one should note that the Freedom to provide Services (art. 59 EEC Treaty) does only apply to the field of transport to the extent provided for by the Title relating to transport (art. 61 EEC Treaty).

(31) For a comprehensive approach to the spectrum of possible interpretations consult: Weber, L., Wettbewerb der Luftfahrtunternehmen und Europäisches Gemeinschaftsrecht, in ZLW (Vol 30) 1981, p. 146 at p. 147 (esp. fn. 7 and 8); and Erdmenger, J., Die Anwendung des EWG Vertrages auf Seeschiffahrt und Luftfahrt, Hamburg 1962 at p. 143 seq.

air sector was too specific to be submitted to the general Treaty provisions. (32) Others argued with reference to the *Principle of universality* of the EEC Treaty (33) that art. 84 para. 2 could dispense air and maritime transport from the provisions of the "Transport" title but in no case from the Treaty as such. (34) Today, this controversy has lost its practical relevance. After 14 years of complete uncertainty the ECJ pronounced judgment in the so-called *"French Seamen Case"* adopting clearly the latter principle. (35) This judgment is of major importance as it finally brought clarity in a completely open debate and gave guidelines for the further treatment of maritime and air law in the EEC framework. As will be seen, it was just the first step in a chain of important decisions by the ECJ promoting the development of European air law.

(32) See e.g. Schwenk, W., Die Rechtslage des Luftverkehrs nach dem EWG-Vertrag, in Europaeische Wirtschaft, (Vol. 5) 1962, p. 256 at p. 258; and Cartou, L., La structure juridique du transport aérien a la veille du Marché Commun, in RFDA (Vol. 2) 1958, p. 101 at p. 124 seq.

(33) Meaning that the EEC Treaty as a "basic law" for economic activities in Europe is universally and without exceptions applicable to all economic activities.

(34) See Staberow, W., The International Factors of Air Transport under the Treaty Establishing the European Economic Community, in J. of Air L. and Com. (Vol. 33) p. 117, at p. 119 seq.; see equally "Commission Memorandum on the Applicability to Air Transport of the Rules of Competition set out in the EEC Treaty and on the Interpretation and Application of the Treaty in Relation of Sea and Air Transport" of Nov. 12, 1960, European Parliament, Documents of session 1961-1962, Doc. No. 4 Supp. II. of March 1st, 1961.

(35) Case 167/73 Commission v. French Republic, in ECR 1974, at p. 359 seq. or CMLR (Vol. 2) 1974 at p. 216.

2. ART. 84 PARA. 2 IN THE INTERPRETATION OF THE EUROPEAN COURT OF JUSTICE

a. The "French Seamen Case"

This case found its origin in art. 3 para 2 of the "Loi Française du 13 dec. 1926 portant Code du Travail Maritime" providing for certain proportions of exclusively French personnel on French vessels. This was felt by the Commission to be an infringement of art. 48 of the EEC Treaty granting freedom of movement for workers within the EEC. (36) The French Government argued *inter alia* that the general rules of the EEC Treaty were not applicable to maritime transport unless it was explicitly decided by the Council. The Court rejected this argument and stated the first time explicitly that art. 84 para. 2 is

> "(f)ar from excluding the application of the Treaty to these matters, it provides only that the special provisions of the Title IV shall not automatically apply. (...)it remains on the same basis as the other means of transport, subject to the general rules of the Treaty." (37)

(36) See art. 48 and the implementing EEC Regulation 1612/68 of Oct. 10, 1968 governing the status of personnel coming from other EEC Member States, O.J.E.C. L 257 of 1968.

(37) See Case 167/73, loc. cit. (fn. 35) Grounds 17 seq., here 31 and 32. The Court could have gone much farther seen the almost parallel jurisprudence of 1974 in the fields of freedom of movement of goods, of persons and freedom of establishment, where in default of adequate legal action within the transitional period, the Court, based on an "obligation to achieve the results of the Treaty", decided to apply directly the pertinent provisions and liberalized certain activities by the way of judgement; see: Van Binsbergen v. Bedrijfsvereiniging voor de Metaalnijverheid, Case 33/74, ECR 1974, 1299 seq.; Reyners v. Belgium, Case 2/74, ECR 1974, 631 seq.; Procureur d"Etat v. Dassonville, ECR 1974, 837 seq.; This reasoning can be found explicitly in the case Charmasson v. Minister of Economic Affairs and Finance, ECR 1974 at p. 1383 seq.

This now constant jurisprudence (38) brought a solution with regard to the determination of the scope of art. 84 but at the same time gave rise to a new problem: what is meant by "general rules" of the Treaty? (39) This question cannot be resolved theoretically, as this term does neither reflect the language of the Treaty nor correspond with the usage of the EEC organs. (40) It was up to the ECJ to bring clarification in this field.

b. From "French Seamen" to "Nouvelles Frontiéres"

(1) Before "Nouvelles Frontiéres"

It was the Court who answered this question progressively in its further case law. In the "Belgian Railway Case" (41) it applied the competition rules of the Treaty to the rail transport sector, making unequivocally clear that the competition provisions of the Treaty must be viewed as "general rules". In the "Defrenne Cases" (42) it applied art. 119 (social provision of the Treaty) to air transport.

In this way the Court could progressively reduce the extent of the legislative gap that the Council had left open in the transport sector. A further step in this direction has been made in the "European Parliament Case". (43) Based on art. 175 of

(38) The French Seamen dictum was confirmed by the later jurisprudence in the case 43/75, Defrenne v. Sabena (I) and case 149/77 Defrenne v. Sabena (II) as well as in the "Belgian Railway Case", Commission v. Belgium, Case 156/77, ECR 1976 at p.455 seq., ECR 1978 at p. 1365 seq. and ECR 1978 at p. 1881.

(39) See Guillaume, G., Observations sur l'arrêt de la Cour de Justice des Communautés Européennes du 4 avril 1974 et son application au transport aerien, in RFDA (Vol. 30) 1976, p. 534 seq. and Estienne-Henrotte, E., op.cit. (fn. 9) at p. 48 seq. It will be seen infra that the French Government has argued in the "Nouvelles Frontiéres Case" that the "general rules" do not comprise the competition rules of the Treaty.

(40) See Weber, L., op. cit. (fn. 22) at p. 101.

(41) See supra (fn. 38).

(42) See supra (fn. 38).

the EEC Treaty the European Parliament requested the Court to establish the failure of the Council to act in the transportation field. (44) It based its action on the argument that the formulation of a Common Transport Policy was a requirement flowing directly from the Treaty. Even if the finding of the ECJ did not entirely adopt the Parliament's position (45) it must be understood as a cautious interpretation of the Treaty with regard to the Common Transport Policy provisions and especially art. 84 para. 2 as a *"pactum de contrahendo"* (46) obliging the Council of Ministers to act.

(2) The "Nouvelles Frontiéres" Judgment

On the background of this jurisprudence, the 1986 "Nouvelles Frontiéres Case" was, to a large extent, no surprise. (47) What the Commission and the major part of the doctrine had advocated for a long time (48) has finally been confirmed by this dictum.

(43) Case 18/83 European Parliament v. Council, ECR 1985 at p. 1556 seq. This case was preceded by the case "Lord Bethel v. Commission" Case 246/81 in ECR 1983, p. 2277, based on the alleged omission of Community action against tariff concertation within IATA. This action was rejected on procedural grounds; comp. Kuyper, P.J., Airline Fare Fixing and Competition: An English Lord, Commission Proposals and US Parallels, in CMLR (Vol. 20) 1983 at p. 203 seq.

(44) The Commission joined the EP as intervening party which underlines the importance of the controversy created by the Council's omission to act pursuant art. 75 and 84 para. 2 EEC Treaty.

(45) The ECJ found only an infringement with regard to inland transport.

(46) See Haanappel, P.P.C., The External Aviation Relations of the European Economic Community and of EEC Member States into the twenty-first Century, Part I, in Air Law (Vol. XIV) No. 2 1989, p. 122 at p. 126 seq.

(47) Joint Cases 209 - 213/84, Ministere Public v. Asjes et al., ECR 1986 at p. 1425 seq.

(48) See e.g. Commission Memorandum "Contribution of the European Community to the Development of Air Transport Services" of July 6, 1979, Doc (Com) 8139/79 in Bull. EC 1979 Suppl. 5/79;

This case had been referred to the ECJ by the Tribunal de Police of Paris under art. 177 EEC Treaty and concerned the sale of tickets undercutting those approved by the French Minister for Civil Aviation. Pursuant to the French Law (49) those infringements can be criminally prosecuted as "contravention". The French Tribunal considered the allegedly infringed provisions of the French Code to be incompatible with the competition rules of the Treaty. (50) The Court had to deal with three major issues:

- if the competition law applies to air transport;
- what are the consequences of the lack of implementing provisions to art. 85 and art. 86 EEC Treaty; and
- what are the obligations of the Member States with regard to national procedures of approval of tariffs.

The first issue on applicability to air transport of the competition rules of the EEC Treaty had, in fact, already been answered in the affirmative twelve years earlier by the judgment the "French Seamen Case" (51) in which the Court had stated that

Kuyper, P.J. op. cit. (fn. 43) at p. 77 seq.; Weber, L., op. cit. (fn. 22) at p. 186 seq.

(49) Code de l'Aviation Civile L 330-3, R 330-9 and R 330-15.

(50) The Court changed the inadmissibly formulated questions of the French Court into one abstract question covering three main issues. It was thus to analyze "wether and to what measure it is contrary to the obligations imposed on Member States by art. 5 para. 3 lit. f and art. 85, particularly paragraph 1 of the EEC Treaty to ensure the maintenance and free play of competition within the Common Market:
- for a Member State to apply provisions which establish a compulsory approval procedure for air tariffs,
- and which may involve the penalties provided for under criminal law for failure to comply with such tariffs,
- if it is established that these tariffs are a result of an agreement, decision or concerted practice contrary to the above-mentioned Article 85". (see judgment, loc. cit. (fn. 47) ground 17; see equally Dagtoglou, P.D., Air Transport after the Nouvelles Frontiéres Judgment, in Liber Amicorum P. Pescatore "Du Droit International au Droit de l"Intégration, Capotorti, F. et al. (eds.), Baden Baden, 1987.

(51) See supra (fn. 35).

air transport remains - like all other modes of transport in Title IV - subject to the "general rules" of the Treaty.

With regard to the competition rules of the Treaty the Court based itself on a systematic analysis of the Treaty: the place of art. 84 in the Treaty as well as the provisions of art. 61 and 42 prove that the competition rules would *only not apply in case of existence of a particular provision providing for such an exception.* (52)

Up to this point, the judgment did not contain anything new. (53) The second item the Court had to deal with, concerned the problem of application of the Treaty's competition rules in absence of an implementing legislation. The competition law is laid down in art. 85 and in art. 86 EEC Treaty. Art. 85 prohibits generally conducts being incompatible with the Common Market which prevent, restrict or distort competition; art. 86 focusses on any abuse of a dominant position which would lead to the same effect.

Pursuant to art. 87, however, appropriate regulations or directives are required in order to give effect to these principles. As no such implementation for the sea and air sector was in place at that period (54), different views were put

(52) See ECJ in judgment "Nouvelles Frontiéres" loc. cit., grounds 44 and 45.

(53) See van Bakelen, F.A., Nouvelles Frontiéres, European Court of Justice Decision 30 April 1986, in European Transport Law (No. 21) 1986, p. 498, at p. 502; and Dutheil de la Rochére, J., Application des Régles de la Concurrence du Traité CEE á la fixation des tarifs de transport aérien, in Rev. Trim. de Droit Europ. 1986, p. 519, at p. 525 seq.

(54) It is true that the Council had adopted Regulation No. 17/62 on Feb. 6, 1962 (Official Journal, English Special Edition 1959 - 1962 at p. 87 seq.) establishing general rules of application of the competition provisions of the Treaty by the Commission. By virtue of Regulation No. 141 of Nov. 26, 1962, transport was, however, exempted (Official Journal, English Special Edition 1959 - 1962) p. 291 seq.). Regulation 1017/68 eventually led to the (re)application of competition rules to land-based transport leaving air transport definitively outside the scope of Regulation No. 17. (Regulation 1017/68 Official Journal, English Special Edition 1968 (1) at p. 302 seq.). The later specific proposals by the Commission in the field of air transport

forward as to the consequences of their absence. (55) First it was debated whether the responsibility to ensure that art. 85/86 are complied with belongs either exclusively to the national authorities or to both the national authorities and the Commission. Secondly the Court asked itself whether a national Court could decide directly, on the basis of art. 85, if a conduct by undertakings was compatible with the competition rules without the prior intervention of "competent national authorities" or a Council regulation determining adequate implementing rules. (56)

Partly contrary to the Commission's view (57), the Court judged in favor of the literal application of art. 88 and art. 89 EEC Treaty, reserving to the States, in case of non-existence of an implementing Community legislation, the obligation (58) to ensure the compliance with European competition law. The Commission is, thus, limited, according to art. 89 para. 1, to

(Official Journal 1982 No. C.78 at p. 2) have never been adopted by the Council. However, the 1987 package may be understood as a late result.

(55) In order to allow the most effective use of the EEC competition law, the Commission interpreted Regulation 141 in a narrow way. Consequently it investigated in the "Olympic Airways Case" with regard to the allegedly abuse of a dominant position in ground handling services (see: Fifteenth Report on Competition Policy, Brussels 1986, point 74) and in the "Sabena/London European Airways Case" with regard to an abuse of a dominant position in CRS systems (see: Seventeenth Report on Competition Policy, Brussels 1988, point 86). The Commission viewed baggage handling and CRSs as distinct from "transport" and consequently as covered by regulation 17/62; see Argyris, N. The Rules of Competition and the Air Transport Sector, in CMLR 1989, p. 5 at p. 6.

(56) See judgment grounds 52, 55-57 and 60, loc. cit. (fn. 47).

(57) See: Defalque, L., La Position des Partis, les Conclusions de l'Avocat-Général et l'Analyse de l'Arrêt Nouvelles Frontiéres, in European Transport Law (Vol. 21) 1986, p. 524, at p. 530.

(58) Prof. Dutheil de la Rochère underlines that this judgment makes clear that art. 88 does not only entitle the States to act against anti-competitive conducts, but "obliges" them to do so, op. cit. surpa (fn. 53) at p. 528.

propose "appropriate measures". In case of further non-compliance it can only prepare a "reasoned decision" and authorize Member States to take measures. The Commission is, thus, not (on the basis of art. 89) entitled to take steps *itself* against the conduct. In addition, it becomes clear that the mere fact that an agreement, decision or other practice falls within the ambit of art. 85 does not suffice to consider it immediately to be prohibited by art. 85 para. 1 and to be automatically void under art. 85 para 2. (59) The Commission's power is consequently limited to investigation and law suit against the respective Member State under art. 169 EEC Treaty.

On grounds of *"legal certainty"* the Court rejected the thesis of direct applicability of art. 85 without particular implemen-tation (60); this is not in conformity with the current jurisprudence of the Court. (61) Nevertheless, we have to note that, without States' or Council's action in order to determine terms for the application of art. 85 and art. 86 neither the Commission nor national courts are entitled to act.

As to the third issue concerning the obligations of the Member States with regard to national procedures of approval of tariffs, the Court could base itself on its constant jurisprudence. (62) The Court stated that the practice of the States to approve currently tariffs resulting from agreements of carriers e.g. within the IATA Tariff Conferences (63) being as

(59) See judgment ground 63, loc. cit. (fn. 47).

(60) See criticism in Dagtoglou, P.D., op.cit. supra (fn. 50) at p. 122; Dutheil de la Rochère, op. cit. supra (fn. 53) at p. 529 seq.

(61) See e.g. case 127/73 BRT/SABAM of Jan. 30 1974, ECR 1974 at p. 51 ground 15, see equally Defalque, L., op. cit. supra (fn. 57) at p. 532.

(62) See: case 14/68, "Walt Wilhelm", ECR 1969, p. 1, at p. 14; case 13/77 "Inno", ECR 1977, p. 2115 at 2145; and case 229/83 "Leclerc", reported in CMLR (Vol. 22) 1985, at p. 787.

(63) See supra Chapter 1 (fn.69) and accompanying text.

such prohibited under art. 85 EEC Treaty, was incompatible with the States' obligations under art. 5 EEC Treaty (64) in conjunction with art. 3 lit. f (65) and art. 85 (effet utile doctrine). However, as long as no implementing ruling pursuant to art. 87 or no decision by a Member State based on art. 88, has been adopted or no steps by the Commission according to art. 89 have been taken, the tariff agreements or other anti-competitive conducts within or outside IATA as well as the national approval of such agreements by the Member States are entirely valid. (66)

(3) After "Nouvelles Frontiéres"

In addition to the findings presented above which have to a large extent been the mere application and confirmation of current principles of the Court's jurisprudence, the judgment equally had the merit to bring the Council in a position where it could no longer ignore the need for and the obligation to design a Common Air Transport Policy. (67)

Since 1986 two more aviation-related cases interpreting the EEC Treaty were decided by the ECJ, giving more substantial guidelines as to what the European Air Transport Market should amount.

(64) Art. 5 para. 2 reads: "[The States] shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty".

(65) Art. 3 lit. f defines as purpose of the Treaty inter alia "the institution of a system ensuring that competition in the common market is not distorted".

(66) See Kuyper, P.J., Legal Problems of a Community Transport Policy; with special reference to Air Transport, in Legal Issues of European Integration 1985/2, p. 69 at p. 80; Haanappel, P.P.C., op. cit. supra (fn. 46) at p. 128. Sedemund,J., Montag, F. op. cit. (fn. 4) at p. 2148.

(67) For steps undertaken by the Council in the aftermath of the decision see: Dagtoglou, op. cit. supra (fn. 50) at p. 131; and see infra.

(a) The "Flemish Travel Agencies Case"

The "Flemish Travel Agencies Case" (68), referred to the Court under art. 177, concerned the question of whether provisions contained in Belgian administrative law ruling the commercial conduct of travel agencies were contrary to art. 5 para. 2 and art. 3 para. 1 lit. f in conjunction with art. 85 EEC Treaty. A Belgian Royal decree provided for an interdiction to return commissions of travel agents to the client.

The Court found that:

> "(a) Member State's legal provision (...) which
> - forces Travel Agencies to respect the prices and tariffs fixed by Tour Operators
> - interdicts them the sharing of the commission received as a result of the selling of holidays with clients or to allow to these clients restornos
> - and qualifies such practices as unfair competition
> is inconsistent with the obligations of Member States (...) in case it aims at or results in the strengthening of the incompatibility with the competition rules of art. 85."(69)

This Statement of the Court, even if not directly related to aviation pricing, tariff and cooperation agreements or government approval of such conducts, sheds a bright light on such activities in the aviation sector. (70)

(68) Case 311/85 of Oct. 1, 1987, unreported, partly communicated in van Bakelen, F.A., Mechanisms of Restorno, the Flemish Travel Agencies "Unfair Competition", in European Transport Law (Vol. 13) 1988, p. 410, at p. 414 (grounds 9-33). The Case is indirectly aviation-related as it deals with the sale of flight tickets.

(69) See judgment ground 24.

(70) Due to the fact that the selling of holidays and flight tickets underlies the regime of Regulations No. 12/62 and 141/62 (see supra fn. 54) the case was finally decided to the disadvantage of the restorno granting travel agents; see equally Haanappel, P.P.C., op. cit. supra (fn. 46.) at p. 129.

(b) The "Saeed Flugreisen Case"

The case 66/86 "Fa. Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V." (71) is the most recent aviation-related case brought to the Court under art. 177 EEC Treaty. The German Bundesgerichtshof (BGH) referred three questions to the ECJ:

> "1. Are bilateral or multilateral agreements regarding airline tariffs applicable to scheduled flights (for example, I.A.T.A. resolutions) to which at least one airline with its registered office in a Member State of the EEC is a party void for infringement of Article 85 (1) of the EEC Treaty as provided for in Article 85 (2), even if neither the relevant authority of the Member State concerned (Article 88) nor the Commission (Article 89 (2)) has declared them incompatible with Article 85 ?
>
> 2. Does charging only such tariffs for scheduled flights constitute an abuse of a dominant position in the Common Market within the meaning of Article 86 of the EEC Treaty ?
>
> 3. Is the approval of such tariffs by the competent authority of a Member State incompatible with the second paragraph of Article 5 and Article 90 (1) of the EEC Treaty and therefore void, even if the Commission has not objected to such tariff approval (Article 90 (3)) ?" (72)

As to the problem of application of art. 85 and with explicit reference to the "Nouvelles Frontiéres" judgment (73), the Court found that only if the Council has approved implementing regulations under art. 87 governing the concerned activity and provided the Commission has not granted exemption from competition law, such agreements of bilateral or

(71) Case 66/86, judgment of April 11, 1989, reported in European Transport Law (Vol. XXIV) No. 2, 1989 at p. 229 seq.

(72) See ground 4 of the judgment, loc. cit., at p. 4. The questions were related to a case pending before the German Federal Court concerning "weak currency tickets" sold by German Travel Agencies in contravention of Article 21 Luftverkehrsgesetz (German Law concerning Air Transport). See with regard to weak currency tickets, explanations in Haanappel, P.P.C., op. cit. supra (fn. 46) at p. 129.

(73) See supra (fn. 47).

multilateral nature on tariffs applicable to international flights are prohibited (art. 85 para. 1) and void (art. 85 para. 2) .(74)

Turning to art. 86 EEC Treaty the Court had to deal with two questions. First, whether art. 86 is applicable to all kinds of national and international (intra-, extra-EEC) flights, and, secondly, whether the application of an agreed tariff may constitute an "abuse of a dominant position". The ECJ answered very shortly to the first issue raised by the German Court. It stated that art. 86 of the Treaty

"is fully applicable to the whole of the air sector". (75)

This means that art. 86 prohibits, as such (without the need for an implementing legislation in the sense of art. 87, art. 88, art. 89 EEC Treaty) (76), any "abuse" (77) of a dominant position. It is consequently up to the competent national authorities or the Commission to act on such infringements of art. 86 not withstanding the nature of the flight.

In addition, the Court found that art. 85 and art. 86 can, in certain cases, concur, especially in circumstances where an undertaking in a dominant position has succeeded in imposing on other carriers the application of excessively high or excessively low tariffs or the exclusive application of only one tariff on a given route. (78)

(74) See ground 29 of the judgment, loc. cit. (fn. 71); the reference to the Council's action includes implicitly the equivalent action of national authorities under art. 88 EEC Treaty or the Commission's action under art. 89, see "Nouvelles Frontiéres" judgment, supra (fn. 47).

(75) See ground 33 of the judgment, loc. cit. (fn. 71). It had been suggested by the U.K. Government and the Commission to limit the scope of art. 86 to intra-EEC flights; see ground 31.

(76) This question has been left aside by the Court.

(77) For a particular aviation-related definition of abuse, see grounds 41 and 44 of the judgment, loc. cit. (fn. 71).

(78) See grounds 34 - 41 of the judgment, loc. cit (fn. 71).

An entirely new problem was raised by the German Court under art. 5 in conjunction with art. 90 EEC Treaty with regard to governmental approval of carrier agreements on tariffs. The question concerned the legality of approval by the supervising body of a Member State of tariffs contrary to art. 85 para. 1 or art. 86 of the Treaty. In the line of the "Flemish Travel Agencies" case (79), the Court found that the Member States (and not only the undertakings) are under the obligation not to adopt or to maintain in force any measure which could deprive the competition rules from their effectiveness. This is equally valid in regard to undertakings to which Member States grant special or exclusive rights (art. 90 para. 1), such as rights to operate on an air route on a preferential basis, or in regard of *public undertakings*. (80) However, the Court allowed one exception in cases where the direct application of competition rules would obstruct the operation of services of general economic interest. This may essentially be the case of a carrier obliged, by the authorities, to operate on routes which are not commercially viable but which must be served for reasons of public interest. (81)

(4) Evaluation of the ECJ Jurisprudence

In sum, we can state that the "Saeed case" has contributed on the line of the above-presented jurisprudence to the clarification of the rules of the EEC Treaty. It was the last

(79) See supra (fn. 68).

(80) The relevance of this statement becomes clear on the background of the IFAPA Statistics on ownership of major EEC carriers, showing the extent of direct or indirect Government ownership, which could lead to a preferential treatment of a huge number of airlines; statistics reproduced in K.Button, D.Swann, op. cit. supra (fn. 10).

(81) See grounds 54 and 55 of the judgment, loc. cit. supra (fn.71); see equally the prior case 127/73 Belgische Radio en Televisie v. SABAM, ECR 1974 at p. 313 as a precedent for this "public service exemption".

necessary element in order to make clear the exact scope and application of the Treaty's provisions.

The jurisprudence of the ECJ has established that the general rules of the Treaty are applicable. The general rules include equally the competition chapter of the Treaty. The competition rules of art. 85 are, however, only applicable after implementing action by the EEC organs or the Member States. The rules governing the abuse of a dominant position on a particular market apply directly. These rules are generally valid notwithstanding the special status States would like to confer to public enterprises or undertakings holding exclusive rights.

As to the approval by national authorities of tariff agreements, the governments are under the obligation to act against such uncompetitive conducts where they may represent an infringement of art. 85 or art. 86 EEC Treaty and are not covered by a particular exemption.

By its interpretation the ECJ has clarified, in a binding way, the scope of application of art. 84 para. II. In addition it is the merit of the Court to have incited and supported the competent EEC organs to act corresponding to the obligations the EEC Treaty imposes on them. The European Court is, thus, the "engine of the European Air Transport Policy".

2. SECONDARY EEC LAW AND AIR TRANSPORT

As the jurisprudence of the ECJ and the wording of the EEC Treaty underline, the implementing legislation with regard to the "Common Air Transport Policy" and the competition rules is of major importance. When the Court established that the "general rules of the Treaty" apply equally to the air sector, it obliged the EEC organs to include in the future EEC air law and policy the Freedoms granted by the Treaty of Rome, such as the *freedom of establishment for undertakings* (art. 52), the *freedom of movement for workers* (art. 48) (82), and *for capital* (83); it

(82) Including social rights.

meant the unconditioned application of the non-discrimination rules of the Treaty (art. 7) and as final objective, in the spirit of art. 6 of the Treaty and the preamble of the Single European Act (SEA), the establishment of the European Union equally in the air sector.

However, the Treaty and the SEA do not give any concrete guidance with regard to the means and ways for achieving those aims. (84) Based on the formula of art. 84 para. 2 EEC Treaty, it is the function of the so-called secondary EEC law to form a legal framework accomplishing the purposes of the Treaty. The only mandatory guidelines can be found in art. 2 and 3. (85) and in the interpretation of the Treaty provisions by the Court.

It is now interesting to see how the secondary air law in this field has been developing and to what extent it is compatible with the intended Common European Market.

a. The legal development until 1986

For nearly 15 years after entering into force of the EEC Treaty, air transport was not a subject of legal debate within the EEC. Due to the imprecise formula of art. 84 para. 2 and to the will of the Member States to keep this economic field out of the supranational ruling neither the Commission nor the Council took noteworthy steps towards regulation of air transport on the EEC level. (86)

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(83) Pursuant to art. 61 EEC Treaty the freedom to provide services (art. 58) is not applicable to the air transport sector.

(84) L. Weber, op. cit. supra (fn. 22) at p. 136 seq. analyses the characteristics of the Treaty and comes to the conclusion that there is a "regulatory deficit".

(85) See supra (fn. 27) and accompanying text.

(86) See esp. Memorandum 51/61 (Commission) on the "General Lines of a Common Transport Policy" of April, 10, 1961, or the Memorandum (Council) 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 the Sea and Air Transport, of Nov. 12, 1960. Both Memoranda remained without any consequence on the EEC air transport policy.

As late as In the period between 1970 and 1976 the Commission and the European Parliament (EP) began to focus more and more on the air industry and presented the first ambitious projects. (87) These projects intended to proceed rapidly to a complete transfer of national authority in the air sector to the European institutions. (88) As those far-reaching proposals were not taken up by the Council the Commission issued some years later its somewhat moderated "Action Program for the European Aeronautical Sector" (Spinelli Report). (89) But even this mitigated request for Community action in the air transport sector - and this after the ECJ judgment in the "French Seamen Case" (90) - could not instigate the Council to decide on

(87) One may mention here inter alia the Commission Proposals for the development of intra- and extra-EEC air services and for the coordination of tariff policies, Doc. COM (1972), 695 final, in OJEC 1972 No. C 110 of Oct. 18, 1972 at p. 6; the reaction on this report by the EP laid down in the Report NOE, E.P. Word Doc. 195/72 of Sess 1972/73 P.E. 30 at p. 248.; the Resolution of the E.P. on the Principles of the Common Transport Policy of Sept. 25, 1973, OJEC 1974 No. C 127/24 of Oct. 18, 1974, urging the Council to act in the field of the Common Aviation Policy.

(88) Including the use of the airspace, the "structural" development of the air transport industry, the organization of "Commercial links" between the carriers, and the use of aircraft. Estienne-Henrotte criticizes those broad proposals as unrealistic and showing a lack of knowledge concerning the functioning of the international air transport; see E.Estienne-Henrotte, op. cit. supra (fn. 9) at p. 198.

(89) The program was influenced by a more intense dialogue between the Commission and the Governments on the basis of the NOE Report (see supra fn. 87) in which the creation of a "Community Air Space" has been proposed the first time; see "Action Program for the European Aeronautical Sector, Doc COM (75) 475 final of Oct. 1, 1975, Communication and Propositions of the Commission to the Council, Bull. EC suppl. 11/1975. The "Spinelli Report" intended, in close co-operation with the national Governments and the carriers, to create a European Air Space, regulated on the EEC level according to the rules laid down in the Treaty (competition included).

(90) See supra (fn. 35).

measures leading to the application of the Treaty to the air transport sector.

In 1978 the Council of Ministers could be convinced to take a first preparatory step by creating a working group (91) which should lay down a first program for further EEC action in the field of air transport. This new approach might be due to two factors. First, it may be considered as a late consequence of the "French Seamen" judgment and the repeated efforts by the EP and the Commission urging the Council to act according to its Treaty obligations. Secondly, it coincides with the *U.S Deregulation Movement* which led, in the short period between 1975 and 1978, to the legal transformation of the major air transport market of the world from a highly regulated and protected one to a market where the air transport industry is entirely submitted to the laws of supply and demand without governmental intervention in the economic field. (92) The "shock waves" (93) of the deregulation were feared by the European Governments and carriers as it was expected that more competitive American carriers would change the already difficult market situation over the North Atlantic and

(91) This working group had to work on the following issues
- elaboration of common standards restricting aircraft emissions;
- facilitation, simplification of formalities concerning freight transport;
- common technical standards;
- state aids and competition;
- mutual recognition of licences;
- right of establishment and working conditions
- improvement of interregional services
- accident inquiry.

See Decision of the Council 462nd session in OJEC of June 14, 1978 at p. 17.

(92) See the U.S. Federal Airline Deregulation Act, Pub. L. No 95 - 504, 92 Stat 1705 (1978); see equally the famous statement by A.E. Kahn, in Deregulation in Air Transport, Getting from here to there, Speech delivered at Northwestern University, Ill, Nov. 6, 1977, at p. 2; see for comments on the deregulation and its economic effects: Villiers, J., L'Expérience américaine de la Déréglementation, in RFDA (Vol. 162) No. 1988, p. 195 at p. 208 seq., Haanappel, P.P.C., Air Transport Deregulation in Jurisdictions other than the United States, in AASL (Vol. XIII) 1988 p. 79 at p. 81 seq.

(93) See Haanappel, P.P.C., op. cit. supra (fn. 92) at p. 80.

even compete in Europe (on the basis of existing Fifth Freedom Rights). (94)

The efforts of this working group resulted in only one Directive governing noise emissions from subsonic civil aircraft. (95) Its priority list was then transferred to the Commission for further study in close co-operation with the Member States. In the aftertime the Commission issued two Memoranda being the expression of a strengthened effort for the realization of a European Air Law System.

(1) Civil Aviation Memorandum I

The first Memorandum by the Commission (96) laid down the long-term goals of the Commission based on the Council's priority list. It contained essentially the following issues: the Commission held that market entry opportunities should be increased with the long-term prospect of complete freedom of access. The tariff structure should be reshaped in favor of cheap fares. With regard to competition and State aids, the Commission felt the necessity for the rapid establishment of an implementing legislation with regard to art. 85 and 86 EEC Treaty as well as for the elaboration of a policy regulating subsidies by Member States to air carriers. Furthermore it was underlined that the right of establishment (art. 52), although directly applicable, required regulation in order to overcome existing legal and

(94) In fact, e.g. Air France has lost almost nine per cent of its market share over the Atlantic between 1983 and 1987, see Villiers, J., For a European Air Transport Policy, ITA Magazine No. 57 1989, p. 3 at p. 8.; and Tegelberg-Aberson, E.E., Freedom in European Air Transport, The Best of Both Worlds ? , in Air Law (Vol. 12) 1987 p. 282 at p. 284.

(95) The contents of the Directive was almost undisputed as it took up technical regulations laid down in one of the annexes to the Chicago Convention, see Directive 81/51 of Dec. 20, 1979, OJEC 1980, L 18 at p. 26, of Jan. 24, 1980.

(96) Memorandum (Commission) on the Contribution of the European Communities to the Development of Air Transport Services, Doc., 8139/79 adopted July 4, 1979, See EEC Bulletin, July 6, 1979, suppl. 5/1979.

practical obstacles. Eventually the Commission suggested the development of regional cross-border services connecting regional centers.

Memorandum I was, first of all, the expression of the Commission's new "go slow" approach in the formation of the EEC air law (97) but it must equally be seen as a programmatic forecast of the Commissions action in the years to come. (98) From todays perspective its main merit was to indicate the legal fields where the Commission intended to propose legal action of the Community.

(2) Civil Aviation Memorandum II

Memorandum II (99) differs from Memorandum I in its general approach. After a concise appreciation of the results obtained since Memorandum I, it issues a number of *concrete proposals* with regard to measures to be taken in the near future. Not aiming at the introduction of a new economic and legal basis for the European Air Industry "ab initio" (100) and not wanting to return to close and detailed governmental regulation, the Commission forwarded a complex package of interlinked economic measures which intended to liberalize the air transport within

(97) See Soerensen, F., Progress towards the Development of a Community Air Transport Policy, in IATA Magazine June/July 1985 p. 3 at p. 6.

(98) Memorandum I had as a direct legal consequence only the adoption of the Council Directive concerning the Authorization of Scheduled Inter-regional Air Services for the Transport of Passengers, Mail and Cargo between Member States, Directive 83/416/EEC, OJEC, No.. L 237 of Aug. 8, 1983 at p. 19. This Directive is, however, only of minor importance which is due to capacity restrictions and the exclusion of major airports; see for a short evaluation, Haanappel, P.P.C., External Aviation Relations of the EEC, op. cit. supra (fn. 46) at p. 133.

(99) Memorandum (Commission) "Progress towards the Development of a Community Air Transport Policy" in COM (84) 72 final.

(100) See Thaine, C. The Way ahead from Memo 2: the Need for More Competition a Better Deal for Europe, in Air Law (Vol. X) No. 2, 1985 p. 90 at p. 93.

the EEC in full conformity with the Treaty. (101) The model of European "deregulation" (better: liberalization) should, however, not take the shape of the U.S. example. (102) The new elements, when compared to the 1979 Memorandum, were as follows:

- air fares should be subject to a zone of flexibility system and , thus, be submitted to (limited) competition bringing down the tariffs. (103)
- capacity sharing should be handled in a less restrictive way. (104)
- the agreements between airlines should be subjected to control; capacity agreements and revenue sharing agreements would only be permissible under certain restrictive conditions.
- as to designation, the Memorandum II does not touch at the dominance of "flag carriers" in the (remaining) bilateral agreements.

The Commission underlined that bilateral agreements, inter-carrier agreements as well as State aids would be entirely submitted to the provisions of the Treaty. This means that such agreements or aids would only be permitted after explicit individual or block exemption granted by the Commission. (105)

(101) See Depsey, St., op. cit. supra (fn. 8) at p. 659.

(102) See Memorandum II, loc cit. supra (fn. 99) at p. 9 underlining the different structural elements of both economic regions.

(103) A reference fare level and a zone of reasonable variation around it would be agreed to in a double approval system, air fares within the zone of flexibility would then be subject to country of origin approval or double disapproval.

(104) On a route between Member States there should be a right to oppose a build up of traffic by one carrier only when one country's share has fallen under 25 %.

(105) For more details see: Thaine, C., op. cit. (fn 100) at p. 93 seq., or Dempsey, St., op. cit. (fn 8) at p. 659 seq. The Commission, based on this legal opinion, charged the first time formally ten airlines with infringement of the competition rules; at the same time it invited these carriers to discuss with the Commission possible ways in which their agreements could be brought into conformity with the Treaty, see Seventeenth Report on Competition Policy, Brussels , 1988, point 46.

Memorandum II is of major importance for the development of the European Air Law System since the Commission indicated in this communication what concrete projects were to be realized in order to create a structure of the air industry in Europe compatible with the Treaty. Even before "Nouvelles Frontieres" (106) it was clear that, in the opinion of the Commission, the competition rules of the Treaty would become the centerpiece of the future legislation. The Commission intended to place itself progressively in the center of regulation and control of the future European Air Market.

(3) Conclusion

The first phase of development towards a Common European air regulation till 1986 can be characterized by the relative ineffectiveness of the action taken. In 1986 only two European instruments of minor importance could be counted. It was at the same time a period of apprenticeship for the European Commission which had to become familiarized with the particularities of this economic activity. Then, the better instructed Commission (107) had to face the constant resistance of the national Governments and the Council. Due to repeated attempts to convince both, the Commission had to elaborate a more and more refined and balanced legal position which found its final expression in Memorandum II.

(106) See supra (fn. 47).

(107) As the information on air transport has been held by the Member States it was necessary for the Commission to seek for assistance from the States (e.g. under art. 89 EEC Treaty). As the States showed a certain reluctance to communicate e.g. the texts of BATAs or carrier agreements, the Commission had to take procedural measures under art. 169 EEC Treaty. Only then, the States provided the Commission with copies of those agreements allowing an evaluation of the competition situation in the market; see Fifteenth Report on Competition Policy, Brussels, 1986 at point 32.

b. Legal Development until 1989: the 1987 and 1988 Measures

The Commission had done the preparatory work in its Memoranda when the "Nouvelles Frontieres" judgment by the ECJ (108) gave the necessary impulsion on the Council to make it act in the aviation sector. (109) In fact, two month later, in its June 1986 summit, the European Council decided to take rapidly "appropriate measures to regulate tariffs, capacity and market access" creating the Common Market equally in the field of air transport before Jan. 1, 1993.(110)

(108) See supra (fn 47).

(109) See Button,K., Swann, D., op. cit. (fn. 10) at p. 273.

(110) See Estienne-Henrotte,E., op. cit.. (fn. 9) at p. 243; Tegelberg-Aberson, E.E., op. cit. (fn. 94) at p. 287.

The 1987 set of legislation (111), designed to establish a Community air transport policy and to make art. 85 and 86 EEC Treaty applicable to the scheduled civil air transport industry, must be understood as *a first step* towards the Internal Air Transport Market; its scope is limited: the two Regulations, one Directive and one Decision, forming the package, only cover intra-EEC international traffic leaving outside their scope every extra-EEC traffic and domestic flights. (112) In addition, the package focuses clearly on competition and deals with capacity and market access in a much less decided manner.

(111) The 1987 (1988) "package" consists of (Council) "Regulation 3975/87 of Dec. 14, 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector", OJEC 1987 L 374, p. 1; (Council) "Regulation 3976/87 of Dec. 14, 1987 on the application of art. 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector", OJEC 1987 L 374, p. 9; (Council) "Directive 87/601/87 of Dec. 14, 1987 on fares for scheduled air services between Member States", ojec 1987 L 374, p. 12; (Council) "Decision 87/602/87 of Dec. 14, 1987 on the sharing of passenger capacity between air carriers and on access for air carriers to scheduled air service routes between Member States", OJEC 1987 L 374, p. 19. On the basis of Regulation 3976/87 the Commission issued on July 26, 1988 the "Regulation 2671/88 on the application of art. 85 (3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning joint planning and coordination of capacity, sharing of revenue and consultations on tariffs on scheduled air services and slot allocations at airports", OJEC 1988 L 239, at p. 9; the "Regulation 2672/88 on the application of art. 85 (3) of the Treaty to certain categories of agreements between undertakings relating to computer reservation systems for air transport services", OJEC 1988 L 239, p. 13; the "Regulation 2673/88 on the application of art. 85 (3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning ground handling services", OJEC 1988, L 239, p. 17.

(112) The 1987 package covers consequently only approx. 25 % of the over-all traffic volume of the European air carriers (in terms of earnings on the level of 1984), see Memorandum II, supra (fn. 99, at p. 9; for the territorial application of the EEC instruments see art. 1 para. 2 of Regulation 3975/87, art. 1 of Regulation 3976/87, art. 1 para. 1 of Directive 601/87 and art 1 of Decision 602/87.

(1) Competition-related Provisions

Regulations 3975/87 and 3976/87 provide for the implementing legislation pursuant to art. 87 EEC Treaty necessary for the application of the competition rules to air transport. (113) Regulation 3975/87 provides for general rules of procedure for the application of the EEC Treaty, whereas Regulation 3976/87 entitles the Commission to grant so-called "block-exemptions".

(a) Regulation 3975/87

The aim of the Regulation is, pursuant to its preamble, to provide the Commission with means of "investigating directly cases of suspected infringement of art. 85 and 86" and "powers of its own to take decisions and impose penalties as are necessary for it to bring to an end" the infringements. A second category of norms contained in the Regulation deals with procedures applicable to exemptions from the competition provisions.

The rules relating to investigations by the Commission, the rights and obligations of Member States or individuals and the fines and modes of payment are laid down in art. 8 - 18 of the Regulation. These procedures are characterized by, first, the obligation of the Commission to closely co-operate with the States and, second, the duty imposed on States and enterprises to give complete information to the Commission. (114) On the basis of the information obtained, the Commission is entitled to take decision if art. 85 (1) or art. 86 of the Treaty or other provisions of the Regulation have been infringed and to impose fines which can reach 1,000,000 ECU or more. (115)

(113) As mentioned above air transport was covered neither by the scope of Regulation No. 17/62 nor by Regulation No. 1017/68, see supra (fn. 54), consequently the rules of the Treaty could not be applied; see supra "Nouvelles Frontieres" judgment (fn. 47).

(114) This may be the direct result of the reluctant attitude of Member States and air carriers to co-operate and disclose information after the 1986 request by the Commission, see supra.

(115) European Currency Unit approx. 2 $ US.

With regard to exemptions from the competition provisions of the Treaty the Regulation contains three norms. Art. 5, 6, and 7 provide for a special "objections-procedure". Undertakings and associations of undertakings (116) wishing to seek exemption under art. 85 para. 3 EEC Treaty for their agreements, decisions, and concerted practices are required to submit an application to the Commission which, after establishing that the application is admissible, is accompanied by all the requisite evidence. If no infringement procedure has been initiated against the conduct in question, the Commission shall publish the application. (117) Exemption is deemed to have been granted unless the Commission notifies the applicant within 90 days of the publication that there are doubts concerning the possibility of granting an exemption. (118) The exception is normally valid for six years and has retroactive effect. (119)

(b) Regulation 3976/87

In order to ease the transition of the EEC air transport industry from a structure "governed by a network of international agreements, bilateral agreements between States and bilateral and multilateral agreements between air carriers" (120) towards a more competitive environment, additional exemptions are allowed to certain categories of agreements unique to the air transport sector. (121) Art. 2 of the Regulation grants to the Commission

(116) The latter may inter alia include IATA and the Association of European Airlines (AEA), see for the functions of the latter: Weber, L., op. cit. supra (fn. 22) at p. 79.

(117) See art. 5 para. 2 of Regulation 3975/87.

(118) See art. 5 para. 3 of Regulation 3975/87.

(119) See art. 5 para. 4 of Regulation 3975/87; the decision may, nevertheless, be revoked pursuant to art. 6.

(120) See preamble of Regulation 3976/87.

(121) Banowsky, D., Cutting Drag and Increasing Lift: How Will a More Competitive EEC Air Transport Industry Fly?, in The Intern. Lawyer, (Vol. 24) No. 1, 1990, p. ,.179 at p. 190.

the power to exempt certain categories of agreements between undertakings. This general clause is followed by a (non-exhaustive) catalogue of agreements to which such an exemption may be applied by way of Regulation. There are *inter alia* pooling agreements, revenue sharing agreements, tariff proposals, slot allocations and CRS (122) agreements.

The Commission which suggested this proceeding, including the general prohibition linked with possible block exemptions, in its Memorandum II, views this Regulation as the essential element of the air transport package: on the one hand it allows to relax the regulatory constraints on fares and other elements of competition, thus creating a climate in which airlines are free to compete while, at the same time, the procedural regulation 3975/87 gives the Commission effective powers to enforce the competition rules. On the other hand it allows to ensure a smooth adaptation of the airline industry which is only possible in a larger period on the bases of exemptions from the strict competition regime. (123)

(c) Commission Regulations Nos. 2671/88, 2672/88, 2673/88

These three Regulations (124) are legally based on the Council Regulation 3976/87 granting the Commission the power to issue block-exemptions by way of regulation. This power has namely been exercised in the case of agreements, decisions and concerted practices relating in the first case to joint planning and coordination of capacity, sharing of revenue and consultations on tariffs on scheduled intra-EEC air services and

(122) Computer Reservation System.

(123) See Argyris, N., The EEC Rules of Competition and the Air Transport Sector, in CMLR (Vol. 26) 1989, p. 5 at p. 19, for a complete analysis of the Regulation evidencing the dynamic balance established by the package; see equally: Vandersanden, G., L'application des règles générales de concurrence aux transports aériens, in European Transport Law (Vol. XXIV) No. 4, 1989 p. 419, at p. 424.

(124) See supra fn. 111 for the sources.

slot allocations at airports. The second Regulation covers computer reservation systems (125), the third ground handling services.

It is the first-mentioned Regulation which is in of particular interest. Art. 2 provides for particular conditions for joint planning and coordination of capacity. They can be subject to block-exemptions provided (inter alia) that such capacity pooling agreements do not prohibit modifications of schedule or capacity at any moment, so that the carriers can adapt to greater demand without incurring penalties.
Revenue sharing, the financial counterpart of capacity sharing, is governed by art. 3 and strongly limited. First, it is only allowed as compensation of loss incurred as a result of capacity sharing in less busy times and provided that it does not exceed 1 % of the revenue earned on the route concerned. With regard to slot allocations, such agreements are only subject to exemption provided all interested air carriers could participate in the negotiations and no discrimination on grounds of (EEC) nationality can be established.

(d) Conclusion and Comment

In sum, with regard to competition the EEC ruling by the Council and the Commission shows a clear picture: they recognize, in principle, the unlimited application of the competition and anti-trust rules laid down in art. 85 and art. 86 EEC Treaty. However, in order to mitigate the effects and to ease the adaptation to the new market situation they allow for a transitional flexible period. (126) It is, however, open if this

(125) For an interesting presentation of the competitive impact of CRS, see Banowsky, D., op. cit. supra (fn. 121) at p. 191, esp. fn. 93.

(126) The Commission Regulation 2671/88 will expire on Jan. 31, 1991, see art. 3 of Regulation 3976/87 and art. 8 of Regulation 2671/88.

limited transition regime will be prolonged; Council Regulation 3976/87 provides for a revision in summer 1990. (127)

The granting of block exemptions with regard to pooling agreements permits, in the meantime, to continue the current practice of air carriers. Given the restrictions charged on such agreements, the number of legal pooling agreements will, nevertheless, be limited. The Commission shows, especially in this field, a strict attitude concerning the granting of exemptions. (128)

The presented competition ruling will not leave the structures of carrier-cooperation untouched in Europe. A minimum standard based on the principles of non-discrimination and non-obligation must be observed in any commercial inter-carrier contact.

(2) Tariff-related Provisions

(a) Directive 87/601

An integral part of the 1987 package is Directive 601/87 (129) laying down criteria for the approval of air fares by the aeronautical authorities of the Member States and establishing procedures for the submission by air carriers of proposed fares. This Directive, to be implemented by the different national legislations, must be viewed in close connection with Commission Regulation 2671/88.

Art. 3 of Directive 601/87 states that the Member States shall approve fare applications provided that they are "reasonably related to the long term fully allocated costs of the air carrier". They must equally take into consideration the needs

(127) See art. 8 of the Regulation; and see infra (fn. 248) and accompanying text for the result of the Council decisions of June 1990.

(128) See Vandersanden, G., op. cit. supra (fn. 123) at p. 435; Argyris, N., op. cit. (fn. 123) at p. 25.

(129) See supra (fn. 111).

of consumers, the need for a satisfactory return of capital and the need to prevent dumping. The authorities are not allowed to disapprove competitive fares only because they are lower than those offered by other carriers.

The lines of this Directive leave, thus, the competence for tariff regulation with the Member States and within a bilateral structure. (130) It is remarkable that it does not establish free price competition on the market since it provides for a regulatory tariff approval system limiting at the same time the room for manoeuvre for the States and the carriers: if States desire to disapprove fares they are exposed to a consultation and arbitration procedure in which they can be overruled by the EEC institutions. (131)

The centerpiece of the fare Directive is the fare approval system with *zones of flexibility*. (132) Based on a reference fare, the Directive provides for discount margins. Provided certain conditions are met, fares can be reduced below the reference by different amounts. The "discount zone" below the reference fare extends from 90 % to 65 % of the economy fare, the "deep discount zone" from 65 % to 45 %. An additional flexibility zone can reach down to 35 % of the reference fare ("deep deep discount zone"). The approval in these zones is automatic and not submitted to a double approval rule any more.

(130) See art. 4 of the Directive.

(131) See art. 7 of the Directive.

(132) See art. 5 of the Directive.

(b) Commission Regulation 2671/88

The Commission Regulation 2671/88 (133) has equally importance for tariff-making within the EEC as it provides for special provisions for agreements or consultations on tariffs. As shown in Chapter 1, tariffs are currently the product of tariff agreements between two or more carriers within Tariff Conferences which are then approved by Governments. Such agreements are a priori prohibited by art. 85 para. 1 EEC Treaty as they are restricting or distorting the competition within the Common Market, unless they are exempted under art. 85 para. 3.

It is art. 4 of the Commission Regulation 2671/88 which provides for such an exemption on certain conditions. Block-exemptions can, thus, only be granted provided that the consultations (and not agreements) do *not* lead to a binding obligation of the *voluntarily* participating carriers (134), do *not* contain capacity restricting provisions, and apply uniformly without discrimination on grounds of nationality or place of residence. The consultation must be notified to the concerned Member States and the Commission.

(c) Conclusion and Comment

The ruling by the EEC organs is a substantial step towards liberalization but remains within the traditional framework of international transport regulation: the tariffs are still to be determined by carriers and then approved by the Governments. The difference is, however, that the carriers remain free to do better and to offer cheaper fares in an approval procedure which is designed to be a mere formality. Competition on the price level is eased by a flexible approval system allowing new competitors to fight for market shares within the limits of reasonableness. One has to note that Directive and Regulation have major importance for IATA tariff activities as not only

(133) See supra (fn. 111).

(134) See art. 4 para. 1 lit (d) and (e) of the Regulation.

intra-EEC traffic is concerned but equally Fifth Freedom Traffic on intra-EEC routes. (135)

(3) Capacity-related Provisions

Eventually, the 1987/1988 package contains in the Council Decision 602/87 (136) provisions for the sharing of passenger capacity between carriers of Member States and access for EEC air carriers to international routes they do not already operate on.

(a) Capacity

Unlike the ambitious and very liberal proposal in the Commission's Memorandum II (137), the capacity provisions in the 1987/88 package do not entirely liberalize the capacity sharing in one city-pair. After a transitional period in which the capacity parity should not exceed 45 % : 55 %, the Council Decision provides for a max. 60 % : 40 % relation from Oct. 1st, 1989 on. (138) Provided that a carrier suffers "serious financial damage", due to this sharing, the concerned Member State may request a new decision by the Council. Adjustments and shifts within the mentioned margins are subject to automatic approval. This ruling is to be revised in summer 1990. (139)

(b) Multiple Designation

The Decision allows multiple designation between two Member States. It distinguishes, nevertheless, between "country-pairs" and "city-pairs". Multiple Designation is only the rule, according to art. 5 of the Decision, on heavily travelled city-

(135) See art. 1 of the Directive.

(136) See supra (fn. 111).

(137) See supra (fn. 99)

(138) Unless a decision has been taken in a particular proceeding under art. 4 of the Decision.

(139) See art. 14 of the Decision.

pairs. From 1991 on, multiple designation must be applied on all intra-EEC routes where more than 180,000 passengers were carried in 1990 and on which there are more than 1,000 return flights p.a. (140)

(c) Market Access

The third subject covered by the Decision concerns two aspects of market access giving air carriers - admittedly in a very limited extent - the possibility to operate on routes which were not yet operated before. In extension of the 1983 Directive 416/83, liberalizing to some extent the interregional traffic between regional airports of minor importance (141), the 1987 Decision provides in its art. 6 for similar interregional services between important hub-airports (142) and regional airports. (143)

Art. 8, finally, allows (with many restrictions) the establishment of new Fifth Freedom routes as an extension of a service from or as a preliminary of a service to its State of registration.

Both measures are, due to the multiple conditions imposed, certainly not apt to increase considerably the number of routes within the EEC. However, they are both directed at the creation and strengthening of so-called hub-airports serving as a collecting and distribution center for national and international traffic.

(140) See art. 5 para. 2 of the Decision.

(141) See supra (fn. 98.)

(142) Defined as "category one" airports, see Annex II to the Decision.

(143) Defined as "category two" and "category three" airports, see Annex II to the Decision.

(d) Conclusion and Comment

The 602/87 Decision addressed to the Member States is a first cautious step away from equal capacity sharing principles, mono-designation and restrictive market access regulations which are still current in the international air transport system. As 1988 statistics show (144) the intra-EEC traffic evidences still a very restrictive exchange of multiple-designation routes, and Fifth Freedom rights. The Directive will contribute to improve the situation and to create a more dense network of international intra-Community air routes. The Decision must consequently be seen as a long-term structural measure.

(4) The 1987/1988 Package: Result

The 1987/1988 package with its provisions related to competition, tariffs, capacity and market access represents a compromise between liberal (e.g. United Kingdom and Netherlands) and more restrictive (France and F.R.G.) economic approaches and also between supranational and national interests (Commission v. Member States). It is the expression of a cautious approach to a new structure within the European Air Market and tries, as such, not to erase the existing system. The 1987/1988 package maintains, thus, the bilateral inter-State relations and preserves the traditional competences in regard of air regulation with the Member States.

However, and this seems to be the key element of the new EEC air transport policy, it introduces, on the EEC level, harmonized rules, means of control and enforcement, limiting in a flexible way the States' discretion and powers. The lever for the achievement of a Common European Air Market is apparently the

(144) See EEC Commission, Seventeenth Report on Competition Policy according to which in the intra-EEC air market 988 routes are operated; only on 48 routes multiple designation and only on 88 routes Fifth Freedom conditions had been granted by the Member States.

regulation of competition which (despite the possibility to grant block exemptions) will deploy important legal effects. This has been completed by provisions allowing, at least to a limited extent, more liberal access to routes, more liberal designation procedures and a more liberal tariff regime.

It is difficult to evaluate today what the concrete structural and economic consequences will be for European airlines and consumers, but one can note that in some important issues the situation has changed for both existing carriers and operators who intend to accede to the European market: State-owned carriers will be submitted to the legal regime of the EEC competition rules, leading to equal conditions for all competitors and bringing, at least to a limited extent, the market forces to application. This can ease the entry of new airlines wanting to compete on existing (now multiple-designation) routes or new (hub-category II) routes. Fare competition becomes possible within the flexible zones allowing the newcomers, within reasonable economic fare margins, to conquer market shares independent from restrictive national approval practices. In addition individuals and undertakings can bring action to national courts for competition reasons which had often been excluded under national laws.

As positive as this effect might be, the 1987/88 package can, however, only be viewed as a first piece of mosaic in the whole picture of a European air market. It does not cover essential matters and is geographically limited in scope. In fact, almost 75 % of the air traffic involving the EEC (domestic and extra-EEC traffic) is not subject to this liberalization initiative. Furthermore, "flanking measures", always regarded by the Commission as necessary in order to bring the freedoms granted by the Treaty (freedoms of establishment, movement of workers etc.) to full application, have not been taken. (145) Without further detailed regulation in that field the "general

(145) See Soerensen, F., op. cit. supra (fn. 97) at p. 414.

rules" of the Treaty will only with difficulty deploy their effects e.g. allowing a Belgian pilot to fly an Air France aircraft.

The Commission did, consequently, continue its efforts in that direction with the preparation and proposal to the Council of a second set of legislation, the September 1989 "package".

c. Legal Development in 1989/1990: the Second Commission Package

Being aware of the weakness and the limited extent of the measures taken in 1987/1988, the European Commission laid before the Council a second set of proposals in September 1989. (146) This communication had for purpose to introduce the second phase of a Common European Air Transport Policy, adapting and liberalizing this particular economic activity with regard to the realization of the Internal Market 1993. It intends to create a "*genuine Community system in the air transport sector*". (147)

Knowing that the EEC Treaty and the European Air Transport Policy embedded in its framework require far more than just a liberalized and competition-related air fare structure, the Commission now approaches the goals of the Common Policy in a much broader way than in 1987. In the opinion of the Commission, it is not only necessary to create a Community air transport network unhampered by national barriers but also a liberalized market structure allowing (consumer friendly) low cost services without neglecting safety of flight. In this market it should be possible to create an economic environment enabling the carriers to reduce the operating costs and to increase their productivity.

The Commission makes clear that its activity will not be limited to the mere application and supervision of competition

(146) Commission of the European Communities, COM (89) 373 final of Sept. 7, 1989; and COM (89) 417 final of Sept. 7, 1989.

(147) See Communication by the Commission COM 317 final, at p. 3.

rules. It has been criticized that "flanking measures" have been omitted in the 1987 package; the Commission wants now to take action in order to prevent situations of conflict, both legal and economic in nature. The regulation on the European Level of working conditions and access to the airline professions must, thus, be part of the European Transport Policy; airport capacities and infrastructure must be improved (148) in order to prevent avoidable important losses of the air carriers or pollution near airports. Measures may equally include the aeronautical industry which will then be submitted to harmonized technical standards bringing down operation costs. Eventually it is the intention of the Commission to eliminate State aids and all elements which could distort the competition on the market.

These general objectives formulated by the Commission have been partly translated into the 1989 package proposal laid before the Council after extensive consultations with interested national private and governmental parties as well as with international bodies. (149)

(148) A liberalized market structure leading to increased traffic could result in the deterioration of the already problematic congestion situation over European centers, see e.g. Smeathers, K., European Liberalization - Turbulence en Route, in IATA Review 1/89, p. 3 at p. 5.

(149) The 1989 Draft Package comprises: "Proposal for a Council Regulation (EEC) on fares for scheduled air services"; "Proposal for a Council Regulation (EEC) on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States", "Proposal for a Council Regulation (EEC) amending Regulation (EEC) No. 3976/87 of Dec. 14, 1987 on the application of art. 85 (3) of the Treaty to certain categories of agreements and concerted practices in the Air Transport Sector"; "Proposal for a Council Regulation (EEC) amending Regulation (EEC) No. 3975/87 of Dec. 14, 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector"; and a second "Proposal for a Council Regulation (EEC) amending Regulation (EEC) No. 3976/87 on the application of art. 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector"; "Proposal for a Council Regulation (EEC) on the application of art. 85 (3) of the Treaty to certain categories of agreements and concerted practices in the Air Transport Sector". These draft proposals are accompanied

The 1989 package can be divided into three major issues of regulation going far beyond the scope of the 1987 package. The first part elaborates on the items of the 1987 legislation, bringing modification in the fields of tariff, capacity, market access and competition as well as new rules concerning State aids and working conditions. The second part deals with the application of the Treaty to domestic air traffic. The last part covers issues of the EEC and Member States' exterior relations, including bilateral agreements and multilateral relations. The most important issues will be summarized in the following:

(1) Modification and Development of the 1987/1988 Package

The 1989 draft articles bring some major modifications to the 1987/88 package which must shortly be presented as they indicate the ground pattern of contents and procedures underlying the European Air Transport Market after 1992. The regulated issues can be grouped under three headlines: (a) Air Fares, (b) Access and Capacity and (c) Competition.

(a) Air Fares

The new proposal by the Commission rejects the 1987 zonal tariff approval system which is equally the basic instrument of tariff regulation in ECAC tariff agreements. (150) The Commission justifies its step with experiences made since the introduction of the "flexible tariff zones", giving quasi automatic approval for tariffs ranging in predefined margins. Apparently no carrier has ever used the zonal system in order to modify the tariffs

by two Memoranda (Commission) on a) Community relations with third countries in aviation matters (with a proposal for a Council Decision on a consultation and authorization procedure for agreements concerning commercial aviation relations between Member States and third countries and on the negotiation of Community agreements); b) the opening of negotiations between the EEC and EFTA countries on scheduled air passenger services (with a Recommendation for a Council Decision).
See: Communications COM (89) 373 final, in OJEC C 258/1989 at p. 3, and COM (89) 417 final, in OJEC C 248/1989 at p. 7.

(150) See supra (fn. 132) and accompanying text.

(151), a fact which proves, in the opinion of the Commission, the lack of competitive incitement in such a system. The Commission suggests now a system of double disapproval, considered to be more liberal as it allows the airlines to decide freely which fares to offer on the basis of their commercial judgment and in response to consumer demand. This new centerpiece of the European air fare regulation would, pursuant to the will of the Commission, be limited by the obligation of the Member States to examine in detail a proposed fare which is 20 % higher or lower than the corresponding fare in the previous season. (152) The proposal distinguishes systematically between the formation of tariffs and the procedure of approval, imposing obligations both on carriers and States.

Tariffs can only be filed by the carriers provided they are reasonably related to the long-term fully allocated relevant costs, including the need for a satisfactory return on capital and for an adequate benefit margin to ensure satisfactory technical and safety standards. (153) Only "Community carriers" can play the role of "price leaders", which means that they are entitled to introduce lower air fares undercutting the existing ones on routes within the EEC. (154) The so formed air fares (155) have to be filed with the competent national authorities.

(151) See: "Development of Civil Aviation in the Community (Communication by the Commission) COM (89) 373 final, loc. cit. supra (fn. 149) at p. 4.

(152) See art. 3 para. 4 in connection with art. 4 para. 3 of the Proposal for a Council Regulation (EEC) on fares for scheduled air services, loc. cit. supra (fn. 149).

(153) See art. 3 para. 1 of the draft proposal on fares for scheduled air services. The safety element is new in comparison with Council Directive 601/87 (see supra fn. 111) taking into account the tendency of airlines to reduce the investment costs during phases of strong competition which can lead to aging air fleets and safety problems; see equally Villiers, J., op. cit. supra (fn. 11) at p. 7.

(154) See art. 3 para. 6.

(155) Pursuant to the definition air fares include prices to be paid for the carriage of passengers and baggage and the

The filing procedure shows a number of particularities. First, the draft articles provide for the legal fiction that an air fare is considered to be approved *unless both authorities have not notified their disapproval* within the short period of 30 days. (156) Secondly, an explicit approval will not be necessary any more when another carrier just joins (matches) the tariff already approved on the same city-pair. (157) Both measures are intended to facilitate the free exercise of the market forces in the price formation process. The Member States are confined to a mere control function assuring that the consumer's interests and the competitive market situation are taken into consideration and that the carriers act on a sound economic basis. The Commission is convinced that these measures will, better than the "flexible tariff zone system", contribute to a more intense competition in the field of tariffs, bringing down the price level in general.

According to art. 1 this regulation shall apply with respect to air fares charged on routes within the Community and between the Community and *third countries.* It is the first time that the Commission issues regulation in the air sector concerning not only Member States and traffic between points in those States but equally extra-EEC traffic. Art. 3 states, however, that the criteria laid down in that provision apply only to "Community air carriers". (158) This means that carriers designated by third

conditions under which those prices apply, together with remuneration for agency services; see art. 2 lit. a of the Fare Regulation Proposal.

(156) See art. 4 para. 3 of the Fare Proposal.

(157) See art. 3 para. 5 of the Fare Proposal.

(158) A definition of Community air carriers can be found in art 2 lit. e of the Air Fare Proposal which reads:
"Community air carrier means:
(i) an air carrier which has its central administration and principle place of business in the Community, the majority of whose shares are owned by nationals of Member States and/or Member States and which is effectively controlled by such persons or States, or

States are not covered by the Regulation. In this regard, the draft proposal seems to contain a regulatory gap because it does not make clear what criteria will be applicable with regard to non-Community air carriers flying on routes to/from/through the EEC. It must be supposed that on the same route two different sets of criteria and two different procedures of approval will coexist. (159) This might lead to a discriminatory treatment of one of the concerned carrier groups. In addition, it is not excluded that this solution might bring Member States in conflict with either the EEC Treaty or the obligations under BATAs with third States.

(b) Access and Capacity

The 1989 package contains a multitude of modifications with regard to market access and capacity regulation, making a huge step toward intra-EEC liberalization. (160)

(ii) an air carrier which, although it does not meet the definition set out in (i), at the time of adoption of this Regulation:
(1) either has its central administration and principal place of business in the Community and as been providing scheduled or non-scheduled air services in the Community during the 12 month prior to adoption of this Regulation.
(2) or has been providing scheduled air services between Member States on the basis of third- and fourth-freedom traffic rights during the 12 month prior to adoption of this Regulation."

(159) The approval procedure laid down in art. 4 of the Fare Proposal establishing a system of double disapproval cannot be binding on non-EEC States according to the public international law principle that international treaties have just inter partes and never inter omnes effect and never bind third parties against their will.

(160) These proposals are contained in the Draft for a Council Regulation on access for air carriers to scheduled intra-Community air service routes and on sharing of passenger capacity between air carriers on scheduled air services between Member States, loc. cit. supra (fn. 149).

- **Market Access**

Pursuant to the EEC Treaty, non-discriminatory access to the market of other EEC countries is one of the fundamental elements of the Common Market. With regard to the air sector this means that airlines must be allowed not only to fly to or from other EEC airports but equally to establish a branch in the respective country and to employ national or foreign (EEC-)personnel for their intra-EEC services. It is this proposal which tries now to establish a regime of equal treatment for all European air carriers (161), creating a situation of equal market access to national and international routes. In order to ease the transition to this European Air Market the Commission had to suggest a number of "flanking measures" concerning registration and licensing, traffic rights and designation.

Art. 3 of the draft proposal provides for an obligation of all Member States to grant, on a non-discriminatory basis, an operating licence to all air carriers establishing themselves on their territory, provided they comply with economical and technical general requirements. All carriers so established shall then be entitled to operate air services within the Community.

This measure enables every Community air carrier to take a seat in one of the Member States and to exercise profession as provided for in the Treaty. Art.3 of the draft proposal must, thus, be understood as a measure effectively enforcing the air carriers' European-wide right of establishment.

The established (national or licensed Community) carriers shall then be authorized by the Member States to operate Third and Fourth Freedom air services and to combine those services in the airports of the State of registration. (162) Art. 4 grants

(161) Decision 602/87 (see supra fn. 111) underlined that its provisions did not affect the relationship between Member States and their own carriers so that a different treatment of national and other EEC carriers was still possible (e.g. revers discrimination).

(162) This kind of service combination is often referred to as Sixth Freedom right, allowing the carriers to establish a

these rights under the one condition that these services do not concern routes between regional airports. For a three year period newly operated regional services will be protected in order to prevent these services from being exposed to harsh competition from much stronger carriers during their phase of consolidation.

In addition, the Commission intends to oblige the Member States to exchange multilaterally Fifth Freedom rights, allowing all Community air carriers to operate between combined points in different Member States provided that the traffic rights are exercised on a route which constitutes an extension of a service from, or as a preliminary of a service to, its State of registration and that the carrier's volume of Fifth Freedom passengers does not exceed 50 % of its total volume of passenger transportation. (163)

This *"multilateral exchange"* of traffic rights is coupled with an unconditioned obligation of Member States to accept multiple designation, which will, from 1992 on, cover all routes with more than 100,000 passengers carried. (164)

In sum, the draft proposal by the Commission is going far beyond the 1987 Decision 602/87 (165) as it leads to a nearly unconditioned and effective exchange of rights within the EEC. These traffic rights, which can be combined in different manners, would allow every EEC carrier to fly to almost all EEC airports on intra-EEC routes from any airport in the country of

valuable traffic link between three points out of two Third or Fourth Freedom routes. Organized in a coordinated way this may lead to the creation of hub-systems and improve the carrier's position in the market place; see equally Haanappel, P.P.C., op. cit. supra Chapter 1 (fn. 112), at p. 11 seq.

(163) See art. 5 para. 1 and 2 of the access and capacity Regulation proposal.

(164) See art. 6 of the access and capacity Regulation proposal.

(165) See supra fn. 111.

registration. (166) As every Community carrier enjoys the right of establishment in other Member States, including registration and operation licensing, it becomes possible to the European carriers to operate on all thinkable city-pairs on the basis of Third, Fourth, Fifth and Sixth Freedoms. Thus, the EEC "territory" becomes a single *"European Interior Air Market"* (167) allowing carriers to operate freely between the airports situated in the EEC.

A so structured European air market has the obvious advantage to finally allow the application of the Treaty's rules, keeping at the same time the States and their authorities as fundamental regulatory elements in which responsibility and authority is vested pursuant to the current public international air law.(168) The Commission's approach must, thus, be understood as a balanced compromise between total integration and total national separation, by which at least the economic aims of the Treaty can be realized.

- Capacity

The 1987 Decision 602/87 (169) introduced the first steps towards a progressive liberalization with regard to capacity sharing in a 40 % : 60 % relation to be realized within a three year transitional period. With its new Regulation proposal, the Commission goes further in its way of progressively reducing capacity control by proposing a two-steps modification in the capacity sharing ratio, so that, by April 1st, 1992, it would

(166) If the registration State allows so, refusal by the destination State is excluded.

(167) The European Commission currently uses the term of "Community Cabotage Area". The term is as such misleading, as - under public international law - the relations between the Member States remain international relations, whereas "cabotage" implies that these relations are considered as domestic, see infra Chapter 4.

(168) See Chapter 1 I.

(169) See supra (fn. 111).

stand at 75 % to 25 %. (170) In addition, regional air services are entirely exempted from capacity regulation with the intention to encourage such services. This could relieve the pressure on large congested airports. (171)

The Community Transport Ministers did not agree in their Council session of June 18-19, 1990 to eliminate capacity sharing systems pursuant to the Commission proposal. (172)

- **Conclusion and Comment**

With regard to the intra-EEC air market the Regulation proposal establishes, if adopted as such, one common market effectively liberalized in the fields of access and capacity. Based on extensive rights the economic development of carriers operating within the EEC will be favoured. EEC carriers, in comparison with carriers of third countries, will be treated by the Member States in a preferred manner giving them, at least in the intra-EEC market new opportunities of development, they did in no way have before. (173)

(c) Competition

The implementation of the rules of competition of the Treaty played a major role in the 1987 package, giving effect to these rules equally in the air sector. After a two years of experience, the Commission feels that in general the application of the competition rules together with a mechanism of exemption has proved to be a successful means for a progressive adaptation of the air sector. It suggests, nevertheless, a number of

(170) This ratio has been the objective of the Commission as laid down in Memorandum II.

(171) See Commission Memorandum on Development of Civil Aviation in the Community, loc. cit. supra (fn. 149), at p. 8.

(172) See "EC ministers edge nearer to air liberalization accord" (Tim Dickson) in Financial Times of June 19, 1990, at p. 3; and see infra (fn. 258) and accompanying text.

(173) See in comparison the state of the European air market today, supra (Chapter 2 II).

modifications and adaptations in the field of competition in its proposals for a Council Regulation amending Regulation 3976/87 and amending Regulation 3975/87. (174)

The 1989 package contains two different proposals aiming at the modification of Regulation 3976/87. On the one hand the Commission intends to strengthen the competitive element by redefining the catalogue of possible block-exemptions, on the other hand it wants to maintain - on a permanent basis and with an enhanced scope of application - the system introduced by the 1987 Regulations allowing flexible interventions by the EEC organs. The proposals would modify Regulation 3976/87 in the following manner. By amending art. 2 para. 2 a restricted catalogue of possible exemptions shall be introduced considering the following specific areas:

- joint planning and coordination of capacity to be provided on scheduled air services. (175) This modification would lead to the deletion of a more restrictive formula, allowing block exemptions only "insofar as it helps to ensure a spread of services at the less busy times of the day". (176) The Commission suggests at the same time to extend the scope of the formula to the coordination of schedules. (177)

- consultations for common preparation of proposals on tariffs, fares and conditions for the carriage of passengers and baggage on scheduled air services. (178) The Commission indicates in its Memorandum that it is of the opinion that exemptions in that field should - despite the broad formulation

(174) See supra (fn. 111).

(175) See art. 1 para. 2 of the proposal for a Council Regulation amending Regulation 3976/87.

(176) See art. 2 of Regulation 3976/87, supra loc. cit. (fn. 111).

(177) See: Memorandum on Development of Civil Aviation in the Community, op. cit. at p. 10.

(178) See art. 1 para. 2 of the Proposal for a Council Regulation amending Council Regulation 3976/87.

of the provision - be confined to fares normally sold to the public and be more closely related to the purpose of fixing the terms of interlining agreements. (179) This indicates that the Commission has the intention to proceed in a more restrictive way in its practice to grant block exemptions for fare consultations in the future.

- slot allocations at airports and airport scheduling. (180) On the contrary to the wording of Regulation 3976/87 the proposed text does not any more define the criteria those agreements must fulfill in order to be eligible fo exemption. According to the Commission Memorandum (181), it will be less the preservation of "historically acquired" rights of the air carriers but the reduction of difficulties of new entrants at congested airports which will be focussed on by the future exemption policy.

- computer reservation systems (time tabling, reservation, ticketing) as well as ground handling of passengers, mail, freight and baggage at airports and flight catering agreements.

- revenue sharing, being subject to a detailed ruling in the 3976/87 Regulation and eligible for exemption is *no longer* considered by the Commission as being justifiably exempted from the competition rules of art. 85 para. 1 EEC Treaty. (182) In its proposal the provision covering that kind of agreements has

(179) See Memorandum on the Development of Civil Aviation in the Community, op. cit. at p. 10.

(180) See art. 1 para. 2 of the Proposal for a Council Regulation amending Regulation 3976/87.

(181) Memorandum on the Development of Civil Aviation in the Community, loc. cit. If this project materializes, new draft proposals for a slot allocation Commission Regulation are in discussion at the moment, the Commission will face conflicts with major airlines. Such a policy would bring carriers like British Airways (London Airports), Lufthansa (Frankfurt, Duesseldorf, Munic) and Alitalia (Milano) in trouble at already overcrowded hub airports; see equally Smeathers, K., op.cit. supra, at p. 5 seq.

(182) See Memorandum on the Development of Civil Aviation in the Community, loc. cit.

consequently been deleted, thus, exposing all kinds of carrier pooling agreements to the competition regime.

In addition, an important modification will be brought in by art. 2 of the proposal modifying art. 3 of Regulation 3976/87. Until now it was impossible to establish a permanent regime for block exemptions, planned initially only as transitional instruments. It will, according to the opinion of the Commission, be useful to give block-exemptions a permanent function in the future system of EEC air regulation. (183)

The second proposal of the Commission amending Regulation 3976/87 and the proposal for a Council Regulation amending Regulation 3975/87 (184) enhance the scope of the 1987 Regulations from international intra-EEC traffic to all EEC traffic including the traffic within the Member States and traffic with third countries. In this way the Commission intends to establish a "framework of certainty", bringing to an end the unclear legal situation in the competition field with regard to some major parts of EEC-related traffic. (185)

In sum, the proposals indicate the will of the Commission to bring the airline industry in complete compatibility with the rules of the Treaty. By tightening the conditions for the permissibility of certain uncompetitive conducts and increasing the powers of the Commission, the latter will be able to impose progressively, and without further interference by the Member States, the general EEC competition regime on all kinds of commercial aviation activities. These proposals must be understood as the logical complement to the above-presented new

(183) Art. 3 of Regulation 3976/87 provided for a limited validity of all regulations taken by the Commission.

(184) See supra (fn. 149).

(185) See Memorandum of the Commission on the Application of the Competition Rules, COM 417 final, loc. cit. supra (fn. 149).

regime of market access and capacity enhancing the opportunities of Community air carriers within a Single European Air Market.

(2) Cabotage (Traffic within one Member State)

The European Council of June 1989 called on the Council of Ministers to intensify its work in the air transport sector, particularly on the question of cabotage. As a consequence, the Commission proposes the progressive introduction of cabotage for Community air carriers within the Member States. According to the preamble of the Proposal for a Council Regulation (186) this Community action must be regarded as a first step to the complete opening of domestic air markets.

The proposal's art. 9 provides for a general grant of cabotage rights for all Community carriers between combined points within the same Member State. The exercise of cabotage rights is, however, submitted to the following conditions: first, cabotage shall only be exercised as an extension of air services from or as a preliminary of an air service to the State of registration and, secondly, it shall only be operated on routes between two places, at least one of which is a regional airport. Eventually the cabotage volume shall not exceed 30 % of the annual seat capacity of the carrier.

The proposed cabotage regulation is very similar to the 1987 solution for the progressive exchange of Fifth Freedom rights (187) : an until now almost entirely protected market is opened in a first step on routes of minor importance (here Category II airports) to a limited quantitative extent and on routes forming an extension of international routes. On the basis of the

(186) See Proposal for a Council Regulation on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States, loc. cit.(fn. 149).

(187) See Council Decision 602/87 and esp. its art. 8, loc. cit. (fn. 111); and see Chapter 2. III. 2. b. (3) (c).

parallel Fifth Freedom example, being now subject to far-reaching proposals liberalizing entirely the Fifth Freedom traffic in Europe, it is likely that cabotage will be entirely freed from national prerogatives in a third phase of harmonization.

The question of European cabotage is, however, not without importance under the angle of public international law as the granting of cabotage rights to one or several States can lead to conflicts under art. 7 of the Chicago Convention. (188)

(3) The Exterior Relations of the EEC in the Aviation Field

The efforts of the European Commission to liberalize the European air transport market until 1989 concentrated essentially on the international intra-EEC traffic and did not directly aim at the relations with third countries. Encouraged by the ECJ judgment in re "Ahmed Saeed" (189), the Commission proposes now a comprehensive project with regard to the future exterior relations which goes beyond the application of existing regulations. In its "Communication to the Council on Community Relations with Third Countries in Aviation Matters" (190), the Commission - after analysis of the existing international environment - sets out its concept concerning the development of extra-EEC aviation relations. Based on a long-term strategy, the Commission makes several regulatory proposals distinguishing between relations with third countries in general and preferred relations with countries of the European Free Trade Association (EFTA).

(188) See supra Chapter 1.I.1.b., and infra Chapter IV.

(189) See supra (fn. 71).

(190) Communication to the Council on Community Relations with Third Countries in Aviation Matters, Preliminary Version, unpublished, Brussels, January 1990.

(a) Legal Impact of EEC Aviation Law in Place on Relations with Third Countries

Before approaching the question of what the EEC proposals could change in the international relations of the EEC Member States, one has to have a short look at the impact of EEC law in place with particular reference to BATAs and competition.

- Bilateral Air Transport Agreements

Neither the EEC Treaty nor the Single European Act known specific provisions governing the exterior aviation relations of the Member States. (191) Consequently the EEC organs did not yet directly intervene in those relations. Until now the Council adopted only one decision obliging the Member States *to consult* the Commission on questions related to air transport matters dealing with international organizations (e.g. ICAO) and on transport developments between Member States and third countries (including BATAs). (192)

As mentioned above, the external relations in the aviation field are marked by a profound segmentation leading to a heterogeneous structure of more than 600 individual BATAs concluded by the Member States with third countries outside the EEC. Such a vast number of non-aligned agreements form a legal framework which no longer corresponds with the purposes of the EEC (193) of creating a harmonized Internal Market.

(191) With regard to EEC competences in that field, see infra Chapter I.1.

(192) Decision 80/50 pertaining to consultations between EEC Member States and the Commission on questions regarding air transport matters, in OJEC 1980, L 18/24 of Jan.24. 1980.

(193) See esp. art. 8 a EEC Treaty introduced by the Single European Act.

Since the "Nouvelles Frontiéres" case (194) and the judgment of the ECJ in re "Ahmed Saeed" (195), it is clear that the general rules of the Treaty apply to all aviation activities of the Member States. These rules have direct consequences for the contents of BATAs.

BATAs currently contain provisions related to designation and modalities of exercise of traffic rights. It is especially the question of designation which raises problems concerning the Treaty's non-discrimination principle. In almost all BATAs, as well as under the International Air Services Transit Agreement (196), only *national* carriers are allowed to exercise rights of technical or commercial nature. (197) Under the general principle of "non-discrimination" in the EEC law (198), the Member States are obliged to designate EEC carriers without discrimination on national grounds.

This conflict has been seen by the Commission which addressed, after the "Ahmed Saeed" judgment in Sept. 1989, a letter to all Member States requesting them to amend their BATAs according to Community law, which meant, in particular, that clauses requiring the Member State's nationality of the designated airline(s) should be replaced by a so-called "Community Clause" (199):

> "The ownership of the air carriers designated to operate the services provided for in the Annex to the Agreement on behalf of the Party that is a member of the European Communities must have its central administration and principle place of business in the Community, the majority

(194) See supra (fn. 47.).

(195) See supra (fn. 71).

(196) See supra Chapter 1 (fn. 17.).

(197) For the criteria of substantial ownership and effective control, see supra Chapter 1 (fn. 52 and corresponding text).

(198) See supra Chapter 2.III.

(199) See: Communication on Community Relations with Third Countries in Aviation Matters, loc. cit. supra, at p. 4.

of whose shares are owned by nationals of Member States and/or Member States and which is effectively controlled by such persons or States."

It is not known to what extent the States have followed that advice which is in full conformity with art. 234 para. 2 of the Treaty providing for the States' obligation to take all appropriate steps in order to eliminate incompatibilities of their treaties with the EEC legislation. It seems, however, to be doubtful that the introduction of such a formula can easily be achieved: BATAs are normally carefully balanced legal instruments taking into consideration the legal and economic particularities of the two involved States. The application of such a clause would, in fact, enhance the number of potentially designated airlines on a route to an almost uncontrollable extent, disturbing the mentioned balance (199 a). The complete renegotiation of the BATA is consequently almost probable.

- Competition

As seen above, the competition rules of the Treaty are not directly applicable to the different aviation sectors as long as no implementing legislation has been adopted. This is, nevertheless, not true for art. 86 governing the abuse of dominant positions. (200)

With regard to art. 86: according to the ECJ the rules of art. 86 are directly applicable equally to aviation relations touching third countries. This means that a carrier is submitted - like all other EEC carriers - to sanctions under EEC law, provided it can be considered as "dominant" (201) and it abuses

(199 a) See supra Chapter 1. III. 4.

(200) See the ECJ jurisprudence in "Ahmed Saeed", supra (fn. 71.).

(201) For the definition see case "Deutsche Grammophon v. Metro", ECR 1971, p. 487 at p. 501.

its position leading, as a direct consequence, to negative effects on the trade between Member States.

It is, nevertheless, questionable under public international law if the application of law (national of supranational) to conducts outside the territory of a State (or the EEC) is permissible. (202) In addition, one can doubt the effectiveness of such a direct application of art. 86 to non-EEC carriers as a decision under art. 86 requires investigations. The Commission will only, in few cases, be able to establish such abuses without the cooperation of non-Member State governments.

With regard to art. 85 para. 1: the implementing legislation contained in the 1987 civil aviation package regulating the intra EEC international air traffic, is, however, not without implications for carriers being of an extra-EEC origin. First, Council Directive 601/87 on fares (203) provides in its art. 4 para. 5 that only Third and Fourth Freedom carriers shall be permitted to act as "price leaders", which means that foreign carriers flying on the basis of fifth Freedom rights within the EEC are directly limited in their price policy since they are not allowed to undercut existing fares.

Furthermore, Council Regulations 3975/87 and 3976/87 on competition in the intra-EEC international air traffic apply without limitation to Fifth Freedom operators so that foreign airlines are submitted, at least on the EEC part of their flight, to the rules governing agreements, decisions or concerted practices which are incompatible with art. 85 para. 1 and para. 3 of the EEC Treaty.

In conclusion, one can note that the European Air Law in place covers only in a fragmentary manner the extra-EEC relations since it concerns only the problem of designation and the

(202) See infra Chapter 3. II.

(203) See supra. (fn. 111).

question of competition on Fifth Freedom routes located on the "EEC territory".

Given the repercussions of international EEC-related traffic from and to third countries and the immediate consequences that traffic has for the Internal Market (204), it is not surprising that the Commission now takes legislative action in regard of extra-EEC aviation relations. (205)

(b) The 1989/1990 External Relations Initiative

With the declared aim to set an end to the fragmentary condition of the EEC legislation covering the extra-EEC aviation which creates "a climate of serious uncertainty in which carriers do not know what practices and arrangements they may legitimately engage in" (206) and bringing the States in a situation of uncertainty when approving fares filed by carriers operating on routes from or to the EEC, the Commission now issues a number of proposals for measures to be taken in this field. (207)

The Commission's external relations initiative comprises two proposals for Council Regulations and one proposal for a Council Decision accompanied by a Communication on "Community Relations with Third Countries in Aviation Matters". (208) These legal

(204) See Argyris, N., op. cit. (fn. 123) supra, at p. 13.

(205) This evolution was foreseeable given the parallel activities of the EEC in the maritime field, where by means of Regulation 4056/86 traffic between Community ports or an EEC port and a port in a third country were submitted to an exclusive EEC regime.

(206) See: Memorandum on the application of the Competition Rules to Air Transport, op. cit. supra at p. 4.

(207) For the latter problem see esp. the "Ahmed Saeed" judgment, supra (fn. 71) reaffirming the States' obligations under art. 5 and 90 EEC Treaty.

(208) These proposals are partly contained in the 1989 package, partly in a Jan. 1990 Communication by the Commission to the Council. See namely: Proposal for a Council Regulation (EEC) amending Regulation (EEC) No. 3975/87 of Dec. 14, 1987; Proposal for a Council Regulation (EEC) on the application of art. 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector; both COM (89) 417 final,

instruments contain provisions related to competition and to negotiation of BATAs.

- **Competition**

The proposal for a Council Regulation amending competition Regulation 3975/87 (208) intends to delete the limitations of this Regulation which confined its scope only to international intra-EEC traffic. (209) Consequently, the prohibitions laid down in art. 85 para. 1 of the Treaty would apply to all agreements between air carriers, decisions by associations of airlines and concerted practices which may affect trade between Member States and which have as their objective the prevention, restriction or distortion of competition within the Common market even if those agreements concern extra-EEC traffic.

The second proposal, aiming at the application of art. 85 para. 3 to certain categories of agreements and concerted practices in the air transport sector (210) has for purpose to provide for a flexible system of block exemptions (211) equally on those extra-EEC routes.

OJEC C 248/1989 at p. 7 - 11; "Community Relations with Third Countries in Aviation Matters", Communication to the Council (Commission, preliminary version) unpublished, Brussels, Jan. 1990. and a "Proposal for a Council Decision on a consultation and authorization procedure for agreements concerning commercial aviation relations between Member States and third countries and on the negotiation of Community agreements" (joint).

(208) See supra (fn. 111).

(209) Art. 1 para. 2 of the Regulation 3975/87.

(210) See supra (fn. 149).

(211) In its function it is similar to Regulation 3976/87 (see supra fn. 111); due to the generally less distorting effect restrictions on routes outside the EEC would have for the interior EEC market than distortions on routes within the EEC, the Commission suggests a less strict catalogue of criteria allowing more cooperation between carriers on extra EEC routes. See in comparison criteria in Commission Regulation 2671/88, supra fn. 111.

So far both regulations do not bring much innovation in comparison with the system in place for intra-EEC traffic. The Commission is, nevertheless, aware of the fact that the application of EEC competition rules with effect outside the "EEC territory" and, coupled with means of investigation and enforcement, can lead to conflicts on two levels: first, conducts of airlines can be the direct result of provisions adopted by third countries' legislations or of rules contained in BATAs between one Member State and a third country. Secondly, the application and enforcement of a competition regime agreed on between a local group of States (EEC) on relations with third States may be incompatible with general public international law. (212) Without further legal analysis the Commission decided to propose a pragmatic approach based on a system of consultations and negotiations. It suggested to amend Regulation 3975/87 with art. 18 a which reads:

> " Conflicts of international law
> 1. Where the application of this Regulation in a particular case is liable to lead to a conflict with provisions laid down by law, regulation or administrative action of a third country, the Commission shall, at the earliest opportunity, hold with the competent authorities of the country concerned consultations aimed at resolving the conflict. The Commission shall inform the Advisory Committee referred to in Art. 8 of the outcome of these consultations.
> 2. Where the Commission finds that the application of this Regulation in a particular case is liable to lead to a conflict with the provisions of an international agreement between a Member State and a third country, it shall, after consulting the Advisory Committee referred to in Art. 8, notify the Member State concerned of this finding. The Member State shall, within three month of the receipt of such notification, inform the Commission of the measures it intends to take with a view to resolving the conflict.
> 3. Where agreements with third countries need to be negotiated by the Community, the Council, acting on a proposal by the Commission, shall authorize the Commission to open the necessary negotiations." (213)

(212) See infra Chapter 3. II.

(213) See Proposal for a Council Regulation amending Regulation No. 3975/87, loc. cit. supra (fn. 111) art. 1. This art. 18a is referred to in the second proposal amending Regulation 3976/87

This formula shows two basic patterns: first, the Commission is convinced that the extraterritorial application of competition law is internationally legal; secondly, there is a tendency in the Commission's policy to substitute itself to the Member States in the international aviation relations in every case, where EEC interests are involved.

- **Modification of the System of Bilateral Aviation Relations**

According to the opinion of the Commission, Bilateral Air Transport Agreements should clearly no longer be a matter of Member States' jurisdiction since, in the light of the developing Community air transport policy, BATAs cannot be considered to have a merely national impact but an influence on the evolution of the Community as such. (214) Based on this consideration the Commission lays before the Council the "Proposal for a Council Decision on a consultation and authorization procedure for agreements concerning commercial aviation relations between Member States and Third Countries and on the negotiation of Community agreements". (215)

Similar to the cautious 1987 approach taken when opening the first time the intra-EEC aviation sector for EEC regulation, the Commission attempts to be *progressively* empowered to regulate and even negotiate the future EEC aviation relations. It becomes clear in the Communication to the Council on "Community Relations with Third Countries in Aviation Matters" (216) and in the nature of the suggestions to be found in the Decision Proposal

(art. 7 para. 4 in cases where the withdrawal of block-exemptions could lead to a similar conflict of international law. Compare infra Chapter 3. II.

(214) See: Commission Communication to the Council on Community relations with Third Countries in Aviation Matters, para. 28, loc cit supra (fn. 149).

(215) For the source see: supra (fn. 149)

(216) See supra (fn. 149).

that the Commission's final objective is to integrate the different national competences in the field of exterior aviation relations into the hands of a single European authority.

The Commission highlights two advantages of such a Community power. First, there is the fear that non-EEC countries take advantage of the lack of Community unity, exploiting gaps left open by national negotiation policies. (217) This could be avoided by coordinated exterior relations. Secondly, it is of the opinion that the Community, as such, would have a stronger negotiation position vis-a-vis third countries than twelve individually negotiating States. (218)

The Commission apparently feels that a single European authority negotiating and representing all EEC Member States could achieve better results e.g. in the relations with the U.S. It intends to establish relations based on reciprocity and equivalent non-discriminatory opportunities, avoiding at the same time loopholes and inconsistencies created by individually negotiated BATAs. (219)

(217) Here may be mentioned the granting of Fifth Freedom rights allowing foreign carriers to penetrate in a commercially valid way the intra-EEC market. See the report in ITA Magazine (No. 36) 1986 at p. 20 indicating that the U.S. has 37 gateways to Europe often combined with Fifth Freedom rights. It should, however, be noted that Fifth Freedom rights in Europe are most often hold by carriers of Developing States.

(218) It becomes clear in the Communication to the Council on "Development of civil aviation in the Community" (supra fn. 149) at p. 14, that the Commission wants to focus especially on the U.S. market offering the European carriers only few gateways and Fifth Freedom opportunities.

(219) See: Communication to the Council "Development of Civil Aviation in the Community, loc. cit. supra (fn. 149), at p. 13; the Commission's intentions are highlighted by the following paragraph of the preamble to the Decision Proposal:

> "Whereas a procedure must be established to ensure that the *replacement* of national agreements by Community agreements is carried out progressively;" (emphasize added).

The mentioned Decision Proposal (220), underlining the progressive process of EEC intervention, introduces a first step towards an EEC *exclusive negotiation procedure* with third countries. The proposal distinguishes between existing agreements and new agreements.

In its first title, the Decision Proposal submits the existing agreements to a transitional mixed EEC/Member States regime. Member States are obliged to communicate completely all bilateral aviation related agreements (including MoUs and tacit agreements) (221) to the Commission, which notifies those instruments to all Member States. Within a certain period after communication, consultations shall take place with the purpose of establishing whether a Community negotiation should be initiated in order to change the contents of the respective agreements or whether an expiring agreement to be renewed expressly or tacitly should be renegotiated by the Commission. (222) Provided the agreement in question is in full consistency with the Treaty, Member States may be authorized to extend the BATA relations with a third State for a period not exceeding one year. (223)

However, if the Commission establishes that provisions in the bilateral instrument constitute an obstacle to the implementation of the Common commercial aviation policy (224),

(220) See Proposal for a Council Decision on a consultation and authorization procedure for agreements concerning commercial aviation relations between Member States and third countries and on the negotiation of Community agreements, loc. cit. supra (fn. 149).

(221) See supra Chapter 1 (fn. 92) and (fn. 96).

(222) Compare art. 2 para. 1 and para. 2 of the Decision Proposal.

(223) In case the BATA contains already a clause providing for a Community reservation (clause allowing the EEC to intervene in the contractual relation) the period may be longer, see art. 3 para. 2 of the Decision Proposal.

(224) E.g. not containing a "Community carrier clause", see supra (fn. 199).

the Commission submits a detailed report to the Council together with a request for authorization to open negotiations with the third country in question. (225) By this means the Commission would be empowered to exercise effective control over the existing agreements, having the procedural possibility to align in a flexible way the contents of those agreements with the EEC policy. (226)

With regard to agreements which are to be newly negotiated between Member States and third countries the Commission proposes a particular procedure under Title II of the Decision Proposal. Pursuant to that procedure, Member States *may*, during a transitional period, be *authorized* by the EEC *by way of exception* to negotiate with certain third countries in cases where the Community negotiations prove to be *not yet* possible. (227) Prior consultation will establish guidelines the Member States have to observe in the inter-State negotiations. (228) In addition, the respective Member States are not entitled to conclude the BATA without explicit consent of the Commission and the other Member States. (229)

Newly negotiated BATAs can, thus, in certain cases remain individual agreements between two States but they will be consistent with Community pattern and, consequently, in line with EEC law.

(225) See art. 4 of the Decision Proposal.

(226) These proposals by the Commission reflect partly suggestions made by the doctrine, see: Guillaume, G., L'Europe du transport aérien. Les incidences de la réalisation du marché unique des transports aériens sur les compétences extérieures des Communautés Européennes, in RFDA 1987, p. 488 at p. 494; Doorten, A., L'aviation civile dans la Communauté aprés 1992, in Rev. du Marché Commun, 1989 p. 243 at p. 247.

(227) See art. 5 para. 1 and para. 3 of the Decision Proposal.

(228) See art. 6 of the Decision Proposal.

(229) See art. 7 of the Decision Proposal.

(c) Negotiations between EEC and EFTA Countries

On the line of the traditionally very intense relations between the six States associated in EFTA (European Free Trade Association), which are based on the fullest possible realization of free movement of goods, services, capital and persons (230), it is no surprise that both sides attempt to establish preferential relations equally in the aviation sector. (231) On the basis of a request by the EFTA States for an agreement between the six countries and the EEC, the Commission now issues a "Recommendation for a Council Decision authorizing the Commission to open Negotiations between the European Economic Community and EFTA Countries on scheduled Air Passenger Services" (232) in order to extent to the EFTA the intra-EEC aviation regime, including all necessary harmonization measures. On the contrary to other foreign countries, the EFTA States are aiming at an agreement with the Community along the lines of the 1987 package, enhancing, by this way, the intra-EEC air market to the Trade Association.

Since the purposes of both sides are quite distinct from the objectives of the general exterior aviation policy of the EEC, the Commission suggests to give priority to the development of relations with the EFTA States. (233) In its Recommendation it

(230) See: Schweitzer, M., Hummer, W., Europarecht, Frankfurt/Main, (2nd ed.) 1985, at p. 170 seq.

(231) Due to the joint airline SAS operated by Denmark (EEC member), and the two EFTA countries Sweden and Norway, a particular link between both countries and the EEC is already established. SAS is recognized as Community carrier under Council Directive 601/87, see Annex I to that Directive, loc. cit. supra (fn. 111).

(232) See Commission "Memorandum on the opening of negotiations between the European Community and EFTA countries on scheduled air passenger services" accompanied by a Recommendation for a Council Decision, yet unpublished, Brussels, Jan. 1990.

(233) This opinion has been shared by the Council meeting of Dec. 4 - 5, 1989, See: Council of the European Communities, General Secretariat, Press Release 10311/89 at p. 16. The Council meeting of June 18-19, 1990 could, however, not convene on a preferential

requests the Council to be authorized to open negotiations with a view of concluding an Air Transport Agreement on the basis of negotiation directives (234), leading to a *de facto* application of the EEC Air Law to 18 European States

(d) Comment

After the 1987 package, which had only a limited impact on the external EEC relations, the 1989 package, in the aftermath of the "Ahmed Saeed" judgment by the ECJ, brought a decisive change. As a first step towards comprehensive regulation of the extra-EEC aviation relations, the Commission proposed the application of the competition rules of the Treaty. In a second step, it presented, in early 1990, a strategy for a Common exterior aviation policy which would lead, after its completion, to a total structural reversal in the European system of government regulation. Its final aim is to substitute the States in large parts of their legislatorial functions and especially to "transfer" the exterior competence in aviation matters to the Community.

This ambitious proposal of the Commission is based on the Commission's view of Europe as one "air market" without boarders and distinct nationality no longer allowing the individual negotiation of BATAs by the Member States. The final purpose of the aviation strategy seems to be the welding of the 12 distinct air markets to one "quasi-sovereign" block of equal size and bargaining power as the United States.

However, the question will be whether the Commission's *vision* does not turn out as a fiction. It is a fact that under public international law no third State is obliged to recognize the transfer of powers to the EEC organs, giving them the competence to negotiate and to validly conclude an agreement.

treatment for all EFTA countries. It charged the Commission with negotiations only with Sweden and Norway. See infra.

(234) Those directives are joint in an annex to the Recommendation.

(235) This could lead to a status quo situation blocking the development of the EEC relations, especially with States which are not interested in the further strengthening of the EEC. Given the Commission's objective to realize equal opportunity and reciprocity, increasing the access to certain other markets abroad, the intended process in the exterior aviation relations will most probably not be brought to an end without major frictions and conflicts.

Until the new European system is in place, the transitional measures might lead to conflicts equally within the EEC. It is, e.g., not excluded that on one and the same route from/to the EEC, two different regimes are applicable. The EEC rules apply to the EEC carrier, a different BATA regime to the foreign carrier. Commercial disadvantages for the European airlines are likely and will lead to an increasing pressure on the Member States to renegotiate agreements in accordance with art. 234 EEC Treaty.

d. The Commission's Vision of an Integrated Air Market

On the bottom of all three recent legislative initiatives by the Commission, with regard to the European air sector, is the *vision of an Integrated European Air Market* forming a unity which is internationally unprecedented in intensity and extent. What the Commission calls a "Cabotage Area" would merge twelve individual air markets together to one air transport area. The creation of the Internal Market 1993 has, in the opinion of the

(235) See Groux,J., Manin, Ph., Die Europäischen Gemeinschaften in der Völkerrechtsordnung, Brüssel, Luxemburg (Amt für Veröffentlichungen der Europäischen Gemeinschaften), 1984, at p. 71; the authors conclude, nevertheless, that today in general third countries recognize the FEC as competent partner in negotiations especially in cases where the Community action is based on unambiguous decisions by the Member States.

Commission, "as a logical consequence for the outside world that the Community should be regarded as one entity". (236)

The formation of the Integrated European Air Market has three legal dimensions:

1. the regulation of air services within the region;
2. the regulation of air services to and from the region and the development of exterior relations;
3. the institutional framework of the EEC market.

The first issue dealing with the creation of the intra-EEC market is governed by the general provisions of the Treaty and the 1987 and 1989 "packages". (237) This will lead to a zone where *nationality* of the EEC carriers and the commercial nature of the flight operations (domestic or international flight, Fifth Freedom rights within the EEC) will be legally almost indifferent.

All "Community carriers' will, thus, be entitled to exercise rights and freedoms granted by the primary and secondary EEC law: they will be able to provide services or to establish themselves in all Member States. They will be allowed to cooperate or to merge under EEC supervision with other carriers. Their economic and route structure will be changed significantly. Their personnel can refer to the rules concerning the movement of workers (238), increasing the mobility of qualified employees. Based on the principle of non-discrimination and regulated by a harmonized EEC-wide legislation (239), one can, in fact, expect

(236) See: Communication "Community Relations with Third Countries in Aviation Matters", loc. cit. supra (fn. 149) at p. 12.

(237) If the latter is adopted as such; see: "EEC ministers edge nearer to air liberalization accord (Tim Dickson) in Financial Times of July 19, 1990, at p. 3, indicating that large parts of the 1989 proposals by the Commission are likely to be adopted by the Council but that a certain delay is most probable.

(238) Art. 48 EEC Treaty.

(239) Being aware of the extent of necessary flanking measures required for a smooth integration of the air industries the Commission discusses currently a number of further measures in the following fields mostly to be covered by Council Directives,

the Integrated Air Market to become a reality whereas national divisions are blurred.

Unlike the U.S. market after "deregulation" (240), this market will not be entirely freed from restrictions. As shown above, the first objective of the Community action is to relieve the air transport sector from the burden of national barriers and high segmentation by bringing the domestic legislations in line under a common EEC regime. National rules will then be replaced or harmonized, forming a legal system which can be in some respects more liberal than the before existing laws. At the same time, it is not excluded that the EEC regime imposes - unlike the U.S. situation - new limits on the carriers in order to maintain a healthy competitive market structure (e.g. measures of merger control or EEC competition law). (241) "Liberalization in the European Air Transport" (242) means, consequently, in the first place, the application in an equal and effective way of the rules of the EEC Treaty and not "deregulation" in the U.S. sense.

leading to a harmonized national legislation: - aviation personnel licensing; - airport slot allocation; - airworthiness requirements; - denied boarding compensation; - regulation of State aids to air carriers and airports; - ownership of airlines (extra- and intra-EEC); - aviation personnel working and social conditions; - infrastructure planning (prevention of congestion). The presentation of proposals for legislative measures in those fields must be expected within the next year. A more precise schedule for the further action could not be provided by the Commission in Brussels.

(240) See supra (fn. 92).

(241) In the U.S.A. the deregulation process led to a strong concentration movement. Today only eight "mega carriers" share 94% of the national market (see: "L'été de la vérité", in Nouvel Economiste No. 752 of June 29, 1990, p. 34 at p. 37. The EEC situation is legally different as the EEC organs and the national authorities dispose of effective instruments of merger control: see e.g. Council Regulation (EEC) No. 4064/89 of Dec. 21, 1989 on the control of concentrations between undertaking, in OJEC 1989 No. L395/1 of Dec. 30, 1989, which they are willing to apply.

(242) See supra (fn. 3) and accompanying text.

The second aspect of this "Integrated European Air Market" is the regulation of air services to and from the EEC. The Commission's vision of a "Cabotage Area" implies that this entity will be represented in its links with third countries by one single authority charged with the negotiation and development of all exterior aviation relations. The EEC will, thus, appear in a final stage as one "quasi-sovereign" unit with one "EEC nationality" of carriers and one "EEC sovereignty" over the airspace. Air-related rights and freedoms, gateways, access and designation will be approved by one EEC authority. (243) The concept of the "Cabotage Area" might touch the foundations of the international system built on the concepts of sovereignty and nationality.

The existence of more than 600 EEC-related BATAs to be replaced, the multitude of questions and the complexity of the legislative tasks reaching from infrastructural and local to international matters, make clear that the regulatory work within the Integrated Air Transport Market requires expertise and manpower. There is the question of negotiation and follow up of BATAs, and the problem of competence for designations of carriers on extra-EEC routes. One might ask whether there will be a Community Register and who will bear the responsibility in case of joint operated carriers or cross-boarder ownership. (244) Eventually, one has to think about the representation of the EEC in international specialized organizations (e.g. ICAO). (245) Given the fact that the EEC will become more and more the logical

(243) See: Wassenbergh, H.A., EEC cabotage after 1992 !?, in Air Law (Vol. XIII) 1988, p. 282 at p. 283.

(244) See infra Chapter 4.

(245) The EEC attempt to enter in formal relations with ICAO failed; see Louis, J.-V., in Mégret, J., Walbroek, M., Louis, L.-V., Vignes, D., Dewost, J.-L., Le Droit de la Communauté Européenne, Commentaire du Traité et des Textes pris pour son application, Bruxelles 1981, Vol. 12 at p. 95.

partner for third countries in aviation matters (246), institutional consequences, leading to some "European CAB" seem to be most probable. (247)

The Commission's *vision of* a "Cabotage Area" in Europe might, thus, lead not only to a regionally limited restructuring of one of several economic branches of the EEC. In our analysis it becomes evident that the integration of the European Air Industry could cause major modifications which might turn up-side-down the existing European legal and institutional structures and might come into conflict with the global international system of air regulation in place.

e. The Council's Reaction: Go Slow

When the Council of the European Transport Ministers met on June 18-19, 1990 (248) it had, inter alia, to decide on the proposals made by the Commission in its 1989/90 package on air transport liberalization (249) and adopted three Regulations and one Decision. These legal instruments are in some respects far from reaching the extent of the Commission's proposals.

(246) See the above-mentioned request by EFTA countries to enter in BATA relations with the EEC, see supra (fn. 230) and accompanying text.

(247) See equally Doorten, A., op. cit. supra (fn. 226) at p. 246.

(248) As underlined in the introduction, this thesis is based on documents and research until May 1990; it seems however to be necessary to present shortly more recent developments as they contribute to the evaluation of the EEC Commission's projects and the impact that those initiatives might have. The current text cannot be based on official documents as the legal instruments the Council decided on will not be published before Sept. 1990. We will, nevertheless, endeavor to give a concise description of the Council's 1990 package on the basis of unofficial information.

(249) See supra (fn. 149) and (fn. 208).

(1) Air Fare Regulation

Other than the Commission's proposal in the air fare field (250), which intended to pass rapidly to a nearly entirely liberalized fare formation and approval system on a "double disapproval" basis, the Council Regulation keeps, at least for a longer transitional phase, the "zonal-system" introduced in the 1987 package. (251) The Council retains the principle that fares modified within a margin around a certain reference fare are to be automatically approved. In comparison to the 1987 Directive 601/87, the margins for discount fares are larger and the filing procedure has been facilitated. The "flexible zone system will, thus, remain applicable to all intra-EEC tariffs, at least until 1993, where a necessary new decision by the Council might bring the double approval system wished by the Commission.

(2) Market Access Regulation

The Council realized partly the Commission's projects in the field of market access. (252) It decided to introduce a complete intra-European exchange of Third, Fourth, Fifth and Sixth Freedom rights for all Community Carriers. Only the exercise of Fifth Freedom is still limited. Fifth Freedom operations should not exceed 50 % of the yearly transported capacity of the carrier. Carriers with seat in Europe will, consequently, be relieved from the restrictive operational structures imposed on the intra-EEC traffic by individual inter-State BATAs. (253)

With regard to capacity, the Council showed to be reluctant to pass almost directly, as suggested by the Commission (254), to the very liberal ratio of 25 % : 75 %. Instead, it decided to liberalize the capacity sharing regime by 7.5 % steps annually

(250) See supra (fn. 150) and accompanying text.

(251) See supra (fn. 132) and accompanying text.

(252) See supra (fn. 136) and accompanying text.

(253) See supra Chapter 2.II.1.

(254) See supra (fn. 137) and accompanying text.

(255) bringing it progressively down to the intended 25 % : 75 % ratio.

Furthermore, it is very important that the new Council Regulation imposes on the Member States the mandatory obligation to licence (from June 1, 1992 on) air carriers desiring to establish themselves in another Member State. By this means the Council brings the right of establishment granted by art. 52. EEC Treaty to practical application. Carriers like AIR FRANCE (Britain) of BRITISH AIRWAYS (Deutschland) AG may become reality, entitled to operate like "national" carriers on national or international routes out of that State.

Due to resistance of some major European States the Council did not (yet) open the domestic markets for European cabotage; this item was left open for later phases of European Air Transport Liberalization.

(3) Competition Regulation

In the field of competition, the Council extended the 1987 Regulation 3975/87 and 3976/87 (256) without major modifications. The powers of the Commission to apply the competition rules and to grant exemption (individual or block) were not enhanced in the proposed way. (258) Instead, it was entitled to submit the - until now unregulated - air cargo tariff sector to its implementing competition legislation; an additional entitlement for block-exemptions in that field is contained in the new Regulation.

(4) Council Decision on Exterior Relations

Even if the Council has followed the Commission Proposals in most of the major items dealing with intra-EEC flight operations, it did not take up the Commission's exterior initiatives. The

(255) Spain, being in a particular situation due to massive charter competition, is partly exempted from this measure in order to ease its adaptation to the Integrated Market.

(256) See supra (fn. 111).

(258) See supra (fn. 174).

adopted Council Decision makes clear that the Council considers such an initiative as premature and rejects all attempts in that direction. Consequently, neither the Decision proposal authorizing the Commission to consult and to negotiate with third countries nor the Recommendation for a Council Decision on the opening of negotiations between the EEC and EFTA countries on scheduled air passenger services have been approved by the Council. (259)

Instead, it decided to limit such central exterior negotiations to Norway and Sweden, linked to Denmark (EEC member) by their common airline SAS. Denmark fears that SAS could face problems due to its particular legal situation. (260)

(5) Evaluation

The outcome of the Council meeting in June is the manifestation of the Council's general attitude against a precipitate European integration of the aviation industry. In the opinion of the Council, the proposals of the Commission are partly premature. The Council's "go slow" attitude, reflecting the Member States' reluctance to confer immediately comprehensive competences to the Commission, especially in the fields of domestic aviation and external aviation relations, does, nevertheless, not mean that the Commission's vision of an integrated European Air Market will not materialize in the future. The Council's decisions indicate that the European Air Market, with all its elements, being programmed in the EEC Treaty and its "general rules", will be realized in a more considerate and slow rhythm. Omittance is not acquittance.

(259) See supra (fn. 149) and (fn. 208) and accompanying text.

(260) The reluctance of the Ministers to include an exterior aviation competence of the EEC in the package might be due to the intended European negotiations between the EEC Member States and other European States (including EFTA) on a European Economic Space (EES) which might comprise the aviation sector.

In the following two Chapters we will analyze the repercussions of an Integrated European Air Market under two aspects: first we will deal with questions of competence of the EEC and the problem of extraterritorial application of EEC law (261); then we will turn to the compatibility of the EEC Commission's vision with the Chicago System. (262)

CHAPTER 3: EXTERIOR COMPETENCE AND EXTRATERRITORIAL APPLICATION OF EUROPEAN LAW

The discussion on the European Integrated Air Market raises two questions being situated in the span between public international law and domestic law. The action by the Community is legally limited to the inside, as well as to the outside, which narrows the EEC's regulatory freedom of action.

There is no doubt any more about the legal nature of the Community as a subject of public international law. (1) This international personality is, however, derived from the Member States and, consequently, depends in its extent and scope on the statute on which the organization is based. (2) The Member

(261) See infra Chapter 3.

(262) See infra Chapter 4.

(1) This is the almost unanimous opinion of doctrine and jurisprudence, see Groux, J., Manin, Ph. op.cit. supra Chapter 2 (fn. 235) at p. 17 seq.; Schweitzer, M., Hummer, W., op. cit. supra Chapter 2 (fn. 230) at p. 158; Bernhardt, R., Die Europäische Gemeinschaft als neuer Rechtsträger im Geflecht der traditionellen zwischenstaatlichen Beziehungen, in Europarecht 1983, p. 193, at p. 203; ECJ, case 6/64 'Costa v. ENEL', of July 16, 1964, ECR 1964 at p. 1269; ECJ case 22/70 'ERTA', of March 31, 1971, ECR 1971 at p. 271.

(2) See International Court of Justice "Reparations for injuries suffered in the service of the U.N.", advisory opinion, ICJ Reports 1949, at p. 174.

States have conferred legal personality to the EEC in art. 210 EEC Treaty. The general legal personality of the organization must, however, be separated from the question of whether and in what legal fields the EEC can act for and legally bind the Member States, and whether and to what extent it is entitled to conclude international treaties with third countries or represent the Member States in international organizations. This problem could be characterized as the problem of external competence.

On the other side, a legally relevant act by the EEC covered by the EEC's interior legal capacity might be incompatible with public international law. There is especially the question of the extraterritorial application of competition law which must be examined.

In the following we will first turn to the question of competence and then analyze whether internally granted competence and general public international law are compatible.

I. THE EXTERIOR COMPETENCE OF THE EEC IN AVIATION MATTERS

When the Commission, in its new proposals, suggests the application of the competition rules of the Treaty, when it claims the authority to negotiate and conclude BATAs at the place of the Member States and, eventually, when it has the intention to intervene in international specialized organizations or in the current GATT negotiations (3), it must be backed by some explicit or implicit exterior competence in order to act in a legal and valid way.

Neither the above-mentioned art. 210 EEC Treaty nor art. 228 EEC Treaty, regulating the procedure within the EEC for the conclusion of Treaties with third States, are drafted in a way which could, in a concrete case, confer a general competence to

(3) See Communication on "Community Relations with Third Countries in aviation matters, loc. cit. supra Chapter 2 (fn 149).

the EEC organs to act for the Member States in international organizations or treaty relations.

On the contrary, it is recognized that the EEC organs have no free choice of means for the fulfillment of the purposes of the Treaty. The wording of art. 228 and art. 4 EEC Treaty underlines that "the institutions shall act within the limits of the powers conferred upon by this Treaty" (art. 4) and only "where this Treaty provides for the conclusion of agreements" (art. 228). Besides art. 131 seq. and art. 238 (4), the Treaty contains only one norm conferring explicitly the capacity to the EEC to act in foreign relations. It is art. 113 in conj. with art. 114 EEC Treaty which deals with the *common commercial policy*. The other provisions of the Treaty provide competences just for inner- or intra-EEC matters and never refer to exterior relations. (5)

The older doctrine based on the theory of "compétence d'attribution" (6) concluded, therefore, that exterior action by the EEC in all other fields would only be possible on the basis of a decision of the Council under art. 235 EEC Treaty (7) or if the States, having attained a common position, negotiate and conclude an agreement with third States and on behalf of the

(4) Dealing with association of other States or association of overseas possessions.

(5) The EEC Treaty provides, consequently, for a division of the exterior competences of the Member States between the Member States and the EEC. This is a unique phenomenon in public international law, see Tomuschat, Chr., Liability for Mixed Agreements, in O'Keefe, D., Schermers, H.G., Mixed Agreements, Deventer 1983, p. 125 at p. 126. This leads to a situation where third States attempting to enter into relations with EEC Member States face partners which are not entirely competent in all questions a sovereign State can currently decide on.

(6) Meaning that only the means explicitly provided for by the Treaty are at the disposition of the EEC institutions.

(7) Art. 235 EEC Treaty provides for unanimous decisions by the Council in situations where action should prove necessary to attain one of the objectives of the Community and the Treaty contains not the necessary powers.

Community. (8) Both ways are not very satisfactory as they are based on the very uncertain and complex detour through concerted and unanimous action of all Member States.

The question is now in the concrete case of exterior aviation relations, on what ground the exterior initiatives by the EEC could be justified.

1. THE COMMISSION'S POSITION BASED ON ART. 113 EEC TREATY

Alongside with the proposals for future measures concerning extra-EEC aviation relations the Commission presents its legal opinion on the Community's exterior competence. (9) Pursuant to the Commission's Communication, art. 113 must be considered as the legal basis for Community action in the exterior aviation field.

At the first approach this reference to art. 113 seems to be surprising since this norm is part of the Chapter "Commercial Policy" and - according to its wording - contains only very specific treaty-making powers. (10)

The Commission justifies its position with the current GATT negotiations, the so-called "Uruguay-Round", dealing *inter alia* with trade in services. It argues that aviation is a form of

(8) See Vedder, Chr., in Grabitz, E. (ed.), Kommentar zum EWG-Vertrag, Munic 1987, art. 228; Pescatore, P., Les relations extérieures des Communautés Européennes, in RdC 1961 II, p. 3 at p. 95 seq.; Mégret, J., Le pouvoir de la Communauté Economique Européenne de conclure des accords internationaux, in Rev. du Marché Commun 1964, p. 529, at p. 531.

(9) See Communication on "Community Relations with Third Countries in Aviation Matters", loc. cit. supra Chapter 2 (fn. 149) at p. 6 seq.

(10) Art. 113 para. 1 reads: "After the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy, and measures to protect trade such as those to be taken in case of dumping or subsidies."

service which is covered by the notion of "trade in services" and, thus, will probably be submitted to the GATT rules, provided an agreement will be reached before December 1990.

It is true that the civil aviation sector is currently under discussion for inclusion in the GATT system. The timetable and indicative agenda of meetings adopted by the Group of Negotiation on Services (GNS) contains deliberations on the "identification of sectors requiring annotation and nature of annotation" occasionally covering aviation. (11) However, one has to note that the discussion on the scope of a possible framework for trade in services has not yet been determined. (12)

The Commission's argument opens two questions: first, whether, in case aviation is covered by a GATT agreement on trade in services, art. 113 EEC Treaty is a sufficient basis conferring competence equally in the aviation field; and second, whether, in case the agreement does not include civil aviation, the scope of art. 113 is still sufficiently broad to cover aviation relations with third States.

a. Aviation as Part of the GATT Trade in Services and Consequences for the Scope of Art. 113 EEC Treaty

If the GATT negotiations on trade in services include civil aviation this does not automatically mean - as the Commission argues (13) - that trade in services and civil aviation relations are covered by the notion of *'commercial policy'* of art. 113 EEC Treaty. According to the wording of art. 113, the 'commercial policy' refers to the conclusion of tariff and trade agreements.

(11) See ICAO Doc. C-WP/9029, March 1990 at p. 4.

(12) For the problem of integration of trade in services in the GATT system (in general) and of civil aviation (in particular), see Mifsud, P.V., New proposals for new directions, 1992 and the GATT approach to trade in air transport services, in Air Law, (Vol. XII) no. 4, 1988, p. 154, at p. 164.

(13) See Communication on Community Relations with Third Countries in aviation matters, loc. cit. supra (fn. 149).

(14) It is not clear what kind of economic activities are covered by these terms. (15) The doctrine in that field is divided. For some, trade in services is part of the common commercial policy, others limit the scope of art. 113 to trade in goods. An intermediate position is held by those who accept the application of art. 113 only to services which are closely related to international trade in goods. (15a) It is the dominant opinion in the doctrine which is in favor of the inclusion of trade in services in the scope of art. 113 for di'ferent reasons. (16) These authors define services as exchangeable but intangible goods. They see the essential criteria in the exchangeability of the services. (17) The value of the service remains in the foreign country similar to exchanged goods, whereas the producer returns or remains in the sphere of the EEC. (18) In addition, they argue that often

(14) French: accords tarifaires and commerciaux, German: Zoll- und Handelsabkommen.

(15) See Weissenberg, P., Die Kompetenz der Europäischen Wirtschaftsgemeinschaft zum Abschluss von Handels- und Kooperationsabkommen gem. Artikel 113 EWG-Vertrag, Berlin 1978, with an extensive interpretation of art. 113, at p. 54 seq.

(15a) See: Timmermans, Chr. W.A., Common Commercial Policy (Art. 113) and International Trade in Services, in Liber Amicorum P. Pescatore, F. Capotorti et al. (eds.) "Du Droit International au Droit de l'Intégration, Baden Baden 1987; Ehlermann, C.-D., The scope of art. 113 of the EEC Treaty, in Etudes de Droit des Communautés Européennes, Mélanges offerts a Pierre-Henri Teitgen, Paris 1984, at p. 675 seq. with more references.

(16) See inter alia: Vedder, Chr., Die auswärtige Gewalt der Neun, Göttingen, 1980 at p. 19 seq., Bleckmann, A., Europarecht, Munic (4th ed.) 1985 at p. 461, Pescatore, P., La Politique Commerciale, in Ganshof van der Meersch, W.J. (ed.) Les Nouvelles - Droit des Communautés Européennes, Brussels 1969 No. 1631 at No.2296.

(17) See Mégret, J. in: Mégret, J., Walbroek, M., Louis, J.-V., Vignes, D., Dewost,J.-L., Le Droit de la Communauté Economique Européenne, Brussels 1970 seq., at Art. 113 Ann. 2; Pescatore, P., op. cit. supra (fn. 16) at No. 2296.

(18) See Vedder, Chr., op.cit. supra (fn. 8) at Art. 113. Ann. 33.

services and exportation of goods are inseparable since goods cannot be sold when services are not included. (19) This opinion can refer to some elements of the jurisprudence of the Court. Since the early seventies, the Court has adopted a broad approach with regard to the 'commercial policy' notion in art. 113 EEC Treaty. In the case "Massey Ferguson" (20), the ECJ underlined that the effective realization of the custom union justifies a broad interpretation of art. 113. In its advisory opinion 1/75 (21) the Court states, the notion of 'commercial policy'

> "a le même contenu, qu'elle s'applique dans la sphère d'action internationale d'un Etat ou de la Communauté". (22)

Some authors want, therefore, to interpret the 'commercial policy' as a general competence for exterior economic relations. (23)

Only few authors argue against such a broad concept. In their opinion it cannot be compatible with the Treaty to deprive the Member States from all their means for the regulation of exterior commercial relations as art. 113, since the ECJ decision in "Donckerwolke" (24), confers exclusive competence to the EEC. (25) Given the clear position of the European jurisprudence this

(19) See Ehlermann, C.-D., op. cit. supra (fn. 15) at p. 160 seq.

(20) Case No. 8/73, "Massey Ferguson", of July 12, 1973, ECR 1973 at p. 857 seq.

(21) Advisory opinion of Nov. 11, 1975 in ECR 1975, 1355.

(22) The 'commercial policy' definition in European domestic laws normally implies trade in services, see Ernst, W., Beseler, H.F., in van der Groeben, von Boeckh, Thiesing, Ehlermann, Kommentar zum EWG-Vertrag, Baden Baden, (3rd. ed.) 1983 Art. 113 Ann. 19; and see the German "Aussenwirtschaftsgesetz" of April 28, 1961 (BGBl I p. 481).

(23) See Weissenberg, P., op. cit. supra (fn. 15) at p. 6 seq.; Bleckmann, A., op. cit. supra (fn. 16) at p. 461; Ernst, W., Beseler, H.F., op. cit supra (fn. 22), Art. 113 Ann. 21.

(24) Case 41/76, of Dec. 15, 1976, ECR 1976, 1921 seq.

(25) See esp. Timmermans, Chr. W.A., op. cit. supra (fn. 15) at p. 684 seq.

merely political argument cannot, however, convince and must be rejected. The debate in the doctrine and the ECJ line of interpretation seem to support the position of the Commission wanting to include trade in services in the scope of art. 113 EEC Treaty.

This intermediate result does not decide whether civil aviation, as such, is covered by the notion of 'commercial policy' in art. 113. The question is to define the scope of this provision. The scope of the 'commercial policy' seems - in the opinion of the Commission - to be predetermined by the GATT negotiations in the framework of the "Uruguay Round", which means that the ambit of the trade negotiations in GATT influences directly the scope of application of the Treaty and, consequently, the competences of the Community institutions. In fact, in the above-mentioned Communication the only argument of the Commission for the inclusion of exterior aviation relations in art. 113 was the state of the international negotiations in GATT, probably leading to a GATT regime for aviation.

Given the current and recognized principles of interpretation of the Treaty, there remains doubt regarding the Commission's reasoning: can the decision of an international (extra-EEC) conference determine or otherwise influence the interpretation of the Treaty ? Can this conference, by its decision, indirectly influence the extent of powers of the Community organs ? We have to note that, in the institutional shape of the Treaty, the ECJ has the monopoly of interpretation with regard to the Treaty (26) so that in case of uncertainties in the scope of one provision only the Court is called to interpret it.

Furthermore, the Court has always underlined the *autonomy* of the EEC institutions with regard to rules and terminology, namely in case of doubts about this or that provision and particularly about the powers of the organization, free from outside interferences, to determine the issue. (27) The EEC law is, in

(26) See art. 164 EEC Treaty.

the first place, autonomous law which must be interpreted in its own system on the basis of the wording and the teleology of the Treaty. Only in the context of the teleological interpretation (28) it is, occasionally, possible to refer to current evolutions such as the EEC participation in the GATT negotiations. (29) The Commission's pragmatical approach referring exclusively to exterior evolutions and disregarding the legal system of the EEC Treaty, as such, is certainly improper.

In a first step, consequently, we have to look at the Treaty itself and at the systematic position it confers to "transport" and aviation, independently from the discussion in foreign fora like the GATT qualifying air transport as a "service". In sum we have to note that the Commission cannot deduce competences from the mere fact that the GATT regime might cover air transportation.

b. Aviation Relations as Part of Art. 113 EEC Treaty ?

When dealing with the interpretation of provisions of the Treaty, the ECJ uses techniques which are to some extent different from those currently used in public international law.(30) Alongside with the traditional methods of grammatical and systematical interpretation, the Court took extensive recourse to teleological approaches. The contractual aim of

(27) See Manin, Ph., The European Communities and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, in CMLR (Vol. 24) 1987, p. 457, at p. 463.

(28) See for the "dynamic interpretation" method applied by the ECJ as the basic technique of interpretation, see Case 6/72 Europemballage/Continental Can v. Commission, in ECR 1973 p. 215 at p. 244.

(29) See for the co-operation of the EEC in GATT on the side of the Member States, Hilf, M., Petersmann, E.-U., Jacobs, F.G. (eds.) The European Community and GATT, Deventer, 1986.

(30) See Schweitzer, M., Hummer, W., op. cit. supra Chapter 2 (fn. 230) at p. 198.

"integration" became, thus, the guideline for the "dynamic" interpretation of the Treaty. (31)

In order to determine if and to what extent art. 113 and the 'commercial policy' clause cover international aviation relations we have to interpret this provision on the basis of the recognized methods.

(1) Grammatical Interpretation

As mentioned above the textual approach to this article does not give information about its exact scope. Art. 113 contains an enumeration of possible fields to be covered by the 'commercial policy'. This catalogue is, however, not exhaustive (32)

(2) Systematical Interpretation

The systematical interpretation intends to explore the meaning of a provision out of its situation and context in the system of a legal text. The European Court has based itself in numerous cases on this method. (33)

Pursuant to art. 3 EEC Treaty enumerating the means to be used for achieving the purposes of the EEC, the Community shall *inter alia* develop 3 different common policies: a common commercial policy, a common agricultural policy and a common transport policy. The first-mentioned policy is situated in Part III ("Policy of the Community") under Title II ("Economic Policy"). The latter policies are contained in Part II ("Foundations of the Community") forming Title II and Title IV. This systematical ground-pattern can be interpreted in two manners. Some argue that Part III must be viewed as a "general rule", applicable to all economic areas covered by the Treaty,

(31) See Ipsen, H.P., Europäisches Gemeinschaftsrecht, Tübingen 1972 at p. 199 seq.; Weissenberg, P., op. cit. supra (fn. 15) at p. 54 and at p. 58.

(32) See advisory opinion of the ECJ 1/78, 'Natural Caoutchouc Agreement', ECR 1979, 2871 at p. 2912.

(33) See e.g. 'Rey Soda v. Cassa Conguaglio Zucchero', ECR 1975, p. 1279 at p. 1302.

giving the Community all the means necessary for influencing the economic process, structure and order. (34) Title II of Part III would, thus, become the general basis for exterior economic relations covering all economic activities.

Others see the common commercial policy and the common transport policy on the same systematical level. They argue that, due to the particular importance the Treaty confers to agriculture, to transport and to the commercial relations in order to realize the Common Market, the drafters chose to develop in particular chapters on those three common policies. All three chapters, agriculture, transport and commerce stand on the same level and each forms a separate and independent "Common Policy". The Title "Transport", art. 74 seq., is, consequently, not submitted to the Title "Common Commercial Policy". (35) In addition, the transport provisions - unlike the agricultural rules (art. 38 para 2.) - do not refer to "the rules laid down for the establishment of the common market", which underlines the distinct character of the transport policy. One can equally refer to art 61 para. 1. which exempts the transport title from the rules governing the Freedom to provide services and highlights the particular character of the transport chapter. (36) Art. 61 para. 1 can, in fact, be understood as provision clarifying unambiguously the very distinct character of the transport title in the EEC framework.

The latter opinion - in our mind - seems to be the more convincing since the argument characterizing art. 110 seq as a general rule, governing all economic activities, cannot

(34) See van der Groeben, H., von Boeckh, H., Thiesing, J., Ehlermann, C.-D., Kommentar zum EWG-Vertrag (3rd. ed.) Baden Baden 1983, Vorb. a zu Art. 113 bis 116.

(35) See for this opinion which is dominant in the legal writing: Mègret, J., in Mègret, Walbroek, Vignes, Dewost, op. cit. (fn. 17) at p. 108 seq.; Vedder, Chr. op. cit. supra (fn. 16) at p. 23; Weissenberg, P., op. cit. supra (fn. 15) at p. 108 seq.

(36) See Vedder, Chr., in Grabitz, op. cit. supra (fn. 8) at Art. 113 Ann. 36.

debilitate the argument of the distinct character of the different "common policies". (37)

(3) Teleological (Dynamic) Approach

The teleological interpretation has to refer to the aims of the Treaty, especially to the Preamble and art. 2 and 3. With regard to the treaty-making powers of art. 113/114 EEC Treaty the following "aims" may be relevant:

- para. 6 of the Preamble which underlines the desire of the parties to abolish progressively the restrictions on international trade.

- art. 2 which mentions the task to promote a harmonious development of economic acuities, a continuous and balanced expansion.

- art. 3 lit. f which provides for the institution of a system ensuring that competition in the Common market is not distorted

- and eventually art. 3 lit. b highlighting the importance of a common commercial policy with third countries.

Pursuant to the described aims, the Treaty clearly has functions which are *not only* directed at the regulation of the internal market development. Recognizing that the "custom union" is, as such, part of the international system of commercial exchange, the Treaty obliges the Community to cooperate in the improvement of international commerce since a balanced expansion of the EEC market is only possible in a healthy international context. One of the instruments for achieving that aim is the 'common commercial policy' which shall promote the development of economic exchange with third countries and have a positive effect on the interior market of the EEC as such.

Thus, one could argue that any activity which could favor the realization of those purposes would fall under the 'commercial policy' and entitle the Community to act on the basis of art. 113. Provided the Commission can prove that Community

(37) This result is shared by the jurisprudence of the ECJ in the "ERTA" judgment, Case 22/70, ECR 1971, p. 263 at p. 274.

action in the field of international civil aviation can be beneficiary to the expansion of the European air industry and the opening of the international market, one could, in fact, consider art. 113, in its teleological interpretation, as sufficient legal basis for the Commission's external aviation policy initiative.

(4) Result

This consequence is, nevertheless, not mandatory. Given the contradictory results of the systematical and the teleological interpretations, a clear decision seems to be difficult.

However, on the basis of the ERTA judgment, (38) it is most probable that in the evaluation by the Court the 'commercial policy' provisions - despite all teleological considerations - would not cover, as a whole or partly, the air transport sector. Consequently, we have to note that - in our opinion - art. 113 is not a valid competence norm conferring to the EEC institutions the capacity to regulate exterior aviation relations. It is, nevertheless, not excluded that in the light of recent economic evolutions (GATT etc.) the ECJ could decide - in abrogation of its prior jurisprudence - in favor of the Commission's opinion. (39)

(38) Case 22/70, loc. cit supra (fn. 37). The Court did not chose art. 113 as legal basis for the involvement of the EEC in an international transport-related treaty.

(39) The question the Court would have to resolve would be similar to the question of the "Nouvelles Frontieres" case, see supra (Chapter 2): what is the extent of the general rules of the Treaty, do they include the 'common commercial policy' title, or just the freedoms granted by the Treaty, the rule of non-discrimination and the competition regime ?; see equally Close, G.L., Community Law and Civil Aviation, in Toward a Community Air Transport Policy - The Legal Dimensions, Slot, P.J., Dagtoglou, P.D., Deventer, Boston, 1989, p. 139, at p. 143.

2. IMPLICIT COMPETENCE OF THE EEC BASED ON ART. 84 EEC TREATY

The negation of explicit competences of the Community to act in the international extra-EEC relations does not automatically mean that there is no competence at all. In a number of cases, brought to the Court in the seventies (40), the Court held that in particular situations competence to conclude treaties may equally flow from other provisions and from measures adopted within the framework of those provisions by the Community institutions.(41) The exterior competence is, therefore, the annex to the interior competence.

Although in the "ERTA" judgment as well as in the "Kramer" cases (42), the Court referred to existing secondary EEC law in order to justify the implicit competence of the EEC to conclude international agreements, it made clear in the opinion 1/76 that this competence does not depend on legislative action (secondary law) already taken, but on the existing interior competence flowing from the Treaty as such. Thus, the Community is entitled to conclude international agreements when an interior competence is conferred by the Treaty *and* when the participation of the EEC in the agreement is necessary in order to achieve the aims of the Treaty. (43) This new approach enhancing the field of action of

(40) See Case 22/70 "ERTA" loc. cit. supra (fn. 37); Case 3, 4 and 6/1976 "Kramer", ECR 1976 p.1279 at p. 1309; advisory opinion 1/76 "Stillegungsfonds", ECR 1977, p. 741, 755.

(41) See: Lang J.T., The E.R.T.A. Judgment and the Court's Case-law on Competence and Conflict, in Yearbook of European Law (Vol. 6) Oxford 1987, p. 183, at p. 194.

(42) See supra (fn. 40).

(43) See advisory opinion 1/76, loc. cit. supra (fn. 40) at p. 741; and see Groux, J., Le Parallèlisme des Compétences internes et externes de la Communauté Européenne, Rev. Trim. de Droit Europ. 1978, p. 3, at p. 18.

the Community found almost undivided support in the legal doctrine. (44)

Whether, in the concrete case, the Community has the competence to act internationally has to be decided on the basis of the Treaty, taking into particular consideration the effective functioning of the EEC law, the aims of the Treaty and the precedence of Community law over national law. (45) In cases where it is necessary, on this basis, to conclude the international agreement, it is the Community which has *exclusive* (46) competence. The implicit competence of the Community is, thus, the reflex of the explicit interior competence. (47)

In the concrete case, we have, consequently, to look at the relevant competence conferring norms of the Treaty. Air transport is systematically part of the 'common transport policy'.(48) The common policies of the Treaty are characterized by a comprehensive legislative Community competence to regulate in detail all questions which could arise. The regulation of air

(44) See inter alia: Mégret, J., in Mégret, Louis, Walbroek, Vignes, Dewost, loc. cit. supra (fn. 17) Art. 110 - 116 Ann. 61; Brueckner in Mégret, Louis, Walbroek, Vignes, Dewost, op. cit. Art. 228 Ann. 3; Bleckmann, A., op. cit. supra (fn. 16) at para 9.I.c.; Vedder, Chr. op. cit. (fn. 16) at p. 116 seq. A part of the legal writers argue that without implicit competences art. 228 would be useless as art. 113/114 and art. 238 contain sufficient procedural rules, see esp. Vedder, Chr., op. cit. at p. 105.

(45) See Vedder, Chr. in Grabitz, op. cit. supra (fn. 8) Art. 228 Ann. 7.

(46) ECJ in case 22/70 "ERTA", ECR 1971 p. 263 at p. 276; and see Slot, P.J., in Slot, P.J., Dagtoglou, P.D., Toward a Community Air Transport Policy - The legal Dimension, Deventer, Boston, 1989, p. 5, at p. 25. Prof. Slot argues that the Community powers will be exclusive only if internally enacted measures cover the matter. As long as this field has not been covered, mixed agreements (States plus EEC) must be concluded.

(47) See Groux, J., op. cit. (fn. 43) at p. 20 seq.; Vedder, Chr., in Grabitz, op. cit (fn. 8) Art. 228 Ann. 7.

(48) See Close, G.L., op. cit. supra (fn. 39) at p. 143.

transport is clearly an interior EEC competence. (49) The Community has already taken extensive action in this field. (50) Since aviation is highly internationalized and interdependent, so that intra-EEC and extra-EEC traffic can only be separated in an artificial way, one could argue that the effective functioning of the EEC law requires (at least in some areas) Community action equally in the international aviation relations of Member States with third countries.

The Community is, consequently, pursuant to the criteria developed by the ECJ, entitled, on the basis of an *implicit* competence, to negotiate and conclude international air transport-related treaties and to cooperate otherwise with third States in the aviation field. (51)

3. CONCLUSION

We do not share the opinion of the Commission in regard to the legal basis of its extra-EEC air transport initiative. Its action cannot be founded on art. 113 EEC Treaty as air transport cannot be considered as part of the 'common commercial policy'. Nevertheless, this does not mean that the EEC is deprived from competences in that field. Pursuant to the jurisprudence of the ECJ, interior competences can "as a reflex" confer implicit exterior competences. This is clearly the case in the field of aviation. Thus, the EEC has exclusive competence in matters where interior implementing legislation has been adopted, and parallel

(49) Art. 84 para. 2 providing for decisions by the Council to what extent and by what procedure the Community exercises its competence does not mean that air transport is outside the EEC regulatory competence. This is underlined by the last sentence referring to the procedural provisions of the common transport policy.

(50) See supra Chapter 2.

(51) For the ability of the EEC to participate in international organizations see: Groux, J., op. cit. supra (fn. 43) at p. 21 seq.

competence with the Member States in fields where such a legislation has not yet been enacted.

This result leads to differences with regard to procedural questions. Under art. 113/114 EEC Treaty the Council concludes agreements on behalf of the Community by a *qualified majority*. Pursuant to art. 84 para. 2 (last sentence) juncto art. 75 para. 1 the qualified majority regime is equally applicable for decisions in the aviation field. However, there is an important restriction to be found in art. 75 para. 3 reading:

> "By way of derogation from the procedure provided for in para. 1, where the application of provisions concerning the principles of the regulatory system for transport would be liable to have a serious effect on the standard of living and on employment in certain areas and on the operation of transport facilities they shall be laid down by the Council acting *unanimously*."

This provision, in its very broad formula, is likely to hinder the future EEC legal action with regard to third States, because it confers to the individual Member States some "veto" power. There will be few aviation-related agreements which may not directly or indirectly have effect on the operation of transport facilities or on the employment.

It might have been this paragraph 3 of art. 75 which contributed to the Commission's choice of art. 113 as empowering provision for the external aviation relations initiative despite all open questions with regard to its applicability and interpretation. The future will decide whether the Member States accept this application of the Treaty or whether the Court will be called upon to clarify the scope of the 'common commercial policy'. For the time being, art. 84 para. 2 must be viewed as the valid competence norm.

II. THE EXTRATERRITORIAL APPLICATION OF COMPETITION LAW

In its 1989 package (52), the Commission proposes to enhance the scope of application of the competition rules from intra-EEC to extra-EEC international flights. (53) This step is not without importance under public international law.

1. THE EXTRATERRITORIAL APPLICATION OF COMPETITION LAW UNDER EEC LAW

Until recently, the scope of the Treaty's competition law was restricted to the territory of the Member States. In the last years, the ECJ's jurisprudence brought a modification in this regard: along the line from the case "Deyestuffs - Imperial Chemical Industries L.T.D. v. Commission" (54), where the Court clearly refused to adopt the position of the General-advocate in favor of the exterior application of art. 85 EEC Treaty, to "Beguelin Import Co. v. SAGL Import-Export" (56) and the case "Walgrave and Koch v. Union Cycliste Internationale" (57) the Court finally accepted the opinion that agreements between undertakings concluded outside the EEC but having an effect contrary to the EEC legal order inside the EEC may be submitted to the EEC competition regime.(58) In the recent "Wood Pulpe

(52) See supra Chapter 2 (fn. 149).

(53) See supra Chapter 2 (fn. 208) and accompanying text.

(54) Case 48/69 to be found in CMLR 1972 at p. 557; see equally Mann, F.A., The Deyestuffs case in the Court of Justice of the European Communities, in Int'l. and Comp. Law Q. (Vol. 22) 1973 at p. 35 seq.

(56) Case 22/71 in ECR 1971 at p. 949 seq.

(57) Case 36/74 in ECR 1974 at p. 1405 seq.

(58) Both cases concerned, however, legal disputes where at least one of the parties had its registered office in the EEC; the adoption of the "effects doctrine" must, consequently, be regarded as obiter dictum; see for more information: Christoforon, Th., Rockwell, D.B., European Economic Community

Case" (59) it confirmed the mentioned judgments and declared that

> "lorsque des producteurs se concertent sur le prix qu'ils consentiront a leurs clients établis dans la Communauté et mettent en oeuvre cette concertation en vendant effectivement á des prix coordonés, ils participent á une concertation qui a pour objet et pour effet de restreindre le jeu de la concurrence á l'intérieur du Marché Commun, au sens de l'art. 85 du Traité."

The Court then underlines that agreements restricting competition contain two elements, the formation of the "entente" and its implementation. In the opinion of the Court, it is not the place of formation but the place where the illegal "entente" takes effect which is decisive because otherwise it would be easy for the undertakings to evade the Treaty's prohibitions. (60) This is clearly the application of the so-called "effects doctrine" to economic conducts outside the Common Market. This legal theory, applied to international aviation relations (i.e. IATA activities, tariff and pooling agreements), might have major repercussions on the functioning of the international aviation industry. In its new proposals, the Commission refers evidently to this doctrine approved by the ECJ.

2. THE EXTRATERRITORIAL APPLICATION OF COMPETITION LAW UNDER INTERNATIONAL LAW

In the "Wood Pulp Case" (61) some of the parties contended that the application of the EEC law to undertakings outside the EEC violates international law. In fact, it can be doubtful whether one State, or here a body of international law, can apply

Law: The Territorial Scope of Application of EEC Antitrust Law, in Harvard Int'l. Law J. (Vol. 30) 1989 p. 195 at p. 198.

(59) Entreprises de Pate de Bois v. Commission, joint cases 89, 104, 114, 116, 117, 125, 126, 127, 128, 129, 185/84 of September 27, 1988, reported in Rev. Trim. de Droit Europ. (Vol 25/2) 1989.

(60) See judgment loc. cit. supra, ground No.16.

(61) See supra (fn. 59).

its national (supranational) law to territories or subjects outside its jurisdiction. The "effects doctrine" (62), being currently applied in the U.S.A., by German courts and now by the ECJ might namely raise questions with regard to the prohibition of illegal intervention in foreign State's affaires. (63)

In this regard we have to distinguish between jurisdiction to prescribe and jurisdiction to enforce. According to the jurisprudence of the Permanent Court of International Justice (PCIJ) in the "Lotus Case" (64), States are generally allowed to adopt norms which exceed in scope the national territory (65) and this even without being obliged to justify their competence with reference to the traditional principles of territorial or nationality link.

The only limitation to the exercise of State's or EEC"s jurisdiction would be a recognized "prohibitive rule". With regard to the jurisdiction to prescribe, such rules are not available in public international law. (66)

Thus, the Community is in full compatibility with international law when it prescribes rules of competition

(62) For its origins in the U.S. law, see Dèmaret, P., L'extraterritorialitè des lois et les relations transatlantiques: une question de droit ou de diplomatie ?, in Rev. Trim. Droit Europ. 1985, p. 1, at p. 3 seq.

(63) Principle based on customary international law, see International Court of Justice, "Nicaragua Case", in ICJ Reports 1986 at p. 108.

(64) PCIJ Series A No. 10.

(65) The judgment reads: "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their Courts to persons, property and acts outside their jurisdiction, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases every State remains free to adopt principles which it regards as best and most suitable", see judgment loc. cit. supra, at p. 19.

(66) See Dèmaret, P., op. cit. supra (fn. 62) at p. 27 with more references.

governing exterior conducts which can lead to competition distorting effects within the Interior Market. As long as no enforcement measures contrary to international law or other domestic legislations take place, the violation of international law cannot be contended.

3. CONFLICTS OF COMPETENCE

Due to the different legal competition systems, the collision of two or more regimes covering one and the same conduct is not excluded. There is no recognized regime under public international law governing such conflicts. (67) Provided the Commission's proposal with regard to the extra-EEC application of competition rules to international aviation-related agreements became reality, situations of conflict with other States where a conduct explicitly prohibited by EEC law is explicitly allowed or tolerated, are more than probable.

Being aware of possible conflicts of competence in the highly internationalized aviation industry, ICAO has elaborated a catalogue of recommendations addressed to the States in order to avoid disputes and to harmonize the competition regimes in the aviation sector. The circular No. 215 (68) urges the States *inter alia* to enter into consultations with concerned other States before adoption of competition legislation or before application of such rules to foreign carriers and to take into consideration the interests of other States as well as the principles of moderation and international comity.

These rules - which are not binding on the States - should influence the Commission in the exercise of its competences in

(67) See for the problem: Guldimann, W., Zur extraterritorialen Anwendung nationaler Wettbewerbsgesetze in der internationalen Zivilluftfahrt, in Zeitschrift für Luft- und Weltraumrecht 2/1989 (Vol. 38) p. 86, at p. 91 seq.

(68) ICAO Circular No. 215 - AT/85 based on Council Decision of Nov. 21, 1988.

the competition field. A moderate approach based on the suggested principles of consultation and cooperation would ease the transition from a highly uncompetitive to a market force oriented international aviation industry. (69)

CHAPTER 4: THE COMPATIBILITY OF THE EEC PROJECTS WITH THE CHICAGO SYSTEM

The International System of Air Regulation (1), based on its three pillars Chicago Convention, inter-airline cooperation and Bilateral Air Transport Agreements is a balanced compromise between different legal and economic approaches on a global level. When twelve more important States decide to integrate their national aviation legislations in order to create an Internal Market based on a Common Air Transport Policy, this might have consequences for the international system in place. When this integration process reaches an extent that it includes the "transfer" of sovereign rights of the States to a "supranational" interstate body, this might lead to incompatibilities with the international system based essentially on State sovereignty and nationality. (2) The realization of concepts like "cabotage area" or "Community carriers", coupled with the application of severe competition rules, could even bring the worldwide regulatory system out of balance.

It is the purpose of this Chapter to analyze the compatibility of the EEC law and legal projects of an Integrated European Air Market with the International System of Air

(69) See supra Chapter (fn. 2); in its proposal for the amendment to Regulation 3975/87 the Commission suggests a consultation procedure aiming at the application of EEC law in compatibility with international law.

(1) See supra Chapter 1.

(2) See supra Chapter 1. I. 1. an 2.

Transport Regulation. We will first focus on the question of whether the EEC "multilateralism" is a priori excluded by the Chicago System, then we will turn to the legal concepts of the Chicago Convention. Eventually we will analyze the implications of the EEC law on IATA and on the system of bilateral aviation relations in place.

I. MULTILATERALISM/SUPRANATIONALISM v. BILATERALISM ?

The 1944 Chicago Conference failed in its search for multilateral solutions for a number of questions of international civil aviation. (3) Instead, a system of bilateral inter-State relations developed, filling the regulatory gap that the Conference had left open. When the EEC plans, now, the realization of a Common Air Transport Policy which is clearly a multilateral approach covering most of the fields of national and international air regulation, we have to ask if such an approach is not systematically excluded by the international structures in place.

The question is whether one can categorize the international system in terms of *"multilateralism v. bilateralism"* (4), or even *"supranationalism v. bilateralism"*. It is true that a large part of the regulation of international air transport is done within the BATA relations between single States and it is equally true that all post-war attempts in the ICAO framework to create a multilateral global economic regime have failed; but these facts do not conclusively prove that the international system does a priori exclude multilateralism in the inter-State relations.

First, BATAs are just one element in the international regulatory system, embedded in a solid structure of multilateral

(3) See supra Chapter 1. I. and III.

(4) See esp. Cheng, B., op. cit. supra Chapter 1 (fn. 10) at p. 229 seq.

technical and economic regulation. Second, the results of the Chicago Conference (5) prove that pursuant to the will of (most of) the drafters the multilateral approach should dominate the air transport relations. They attempted to enact the global approach as far as States' consensus allowed, by drafting the International Air Services Transit Agreement and the International Air Transport Agreement alongside with a Standard Form for a Bilateral Agreement. Third, even if the multilateral cooperation on a global level failed, we can observe successful multilateral regional cooperation which led to harmonized economic guidelines in different areas of the world (6) without any third country arguing that these activities are incompatible with the system in place. Fourth, even the bilateral element of the Chicago regulatory framework is not a bilateral system in the true sense of the word. The cornerstone of BATAs is the tariff clause. A large part of BATAs refer in that respect directly or indirectly to the multilateral tariff coordination organism of IATA. Furthermore, the contents of BATAs is almost harmonized, so that one can view the system in place as a globally uniform bilateralism which comes close to the uniformity of multilateral agreements.

In conclusion, one can note that the International System of Air Transport Regulation is not opposed to multilateral solutions, States may choose for their international aviation relations either bilateral models or a multilateral formula. As the preamble of the Chicago Convention underlines, the international aviation system is open to all solutions which avoid friction and promote cooperation between States.

(5) See supra Chapter 1 (fn. 15 - 18).

(6) See e.g. the 1956 Paris Agreement of April 13, 1956, filed with ICAO, Doc. 7695; the ECAC 1967 International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services, of July 10, 1967, ICAO Doc. 8681; the Montreal ECAC - United States MoU of Sept. 25, 1989 on Procedure for the Establishment of Tariffs; yet not registered with ICAO.

The European integration is, however, more than a mere cooperation. Different from common international treaties the EEC Treaty is generally recognized as the "Constitution of the Community" (7), leading to the creation of an entity to be qualified as a "more integrated international organization" or "sui generis" or even as a "prefederated organization". (8) This strong link and the policy based on it might, despite the openness of the International System of Air Transport Regulation, lead to conflicts and incompatibilities.

II. COMPATIBILITY OF THE EEC INTERNAL AIR MARKET WITH THE CHICAGO CONVENTION

1. THE SOVEREIGNTY PRINCIPLE

The sovereignty principle laid down in art. 1 and art. 2 of the Chicago Convention is at the bottom of the international regulatory system (9), reaffirming the complete and exclusive sovereignty of *States* over the airspace above their territories. Based on this rule the Convention stipulates that the right to regulate flights in/from/to the territory is the *State's* legislative domaine (art. 5, 6, 7 and 9 Chicago Convention). It provides at the same time for a number of obligations of the contracting *States* e.g. to insure that flight operations over the territory are in conformity with the existing regulation.

(7) See Weber, L., op. cit. supra Chapter 2 (fn. 22) at p. 274 with more references.

(8) It would go too far in this context to decide on the legal nature of the EEC in international law. See for further information: Seidl-Hohenfeldern, I., Das Recht der Internationalen Organisationen, einschliesslich der supranationalen Gemeinschaften, (4th ed.) Cologne 1984, at p. 8; Ipsen, P., Gemeinschaftsrecht, op. cit. supra Chapter 3 (fn. 31) at p. 193.

(9) See supra Chapter 1. I. 1.

If the EEC Member States "transfer" competences flowing from their territorial sovereignty to a supranational organization which is, then, entitled to exercise, independently, on the basis of from the State separate powers and limiting at the same time the States' sovereignty, this might be incompatible with the legal structure underlying the Chicago Convention. (10)

Art. 1 attaches the sovereignty over the airspace expressly to States. Thus, one could conclude that, according to the Convention, no other subject of public international law should be able to exercise the rights and to bear the obligations stated by the Convention.

However, it is recognized that art. 1 is the mere repetition of a principle of customary international law. (11) Art. 1 intends, thus, to make a general reference to the rules governing States' sovereignty in order to give effect to the sovereignty principle equally in the air (12) and does not aim at the establishment of new rules which would modify or restrict the existing regime under general public international law.

In public international law it is generally recognized that States are entitled to partly (not entirely) transfer competences or sovereignty to other subjects of public international law. (13) By applying this rule to the air sector, the Chicago

(10) For the characteristics of supranational organizations and esp. the EEC, see Capotorti, F., Supranational Organizations, in Encyclopedia of Public International Law, Bindschedler, R.L., Buergenthal, Th., et al. (eds.) Vol. 5 Amsterdam, New York, Oxford, 1983, p. 262 at p. 264.

(11) See supra Chapter 1 I. 1. and inter alia Cheng, B., op. cit. supra Chapter 1 (fn. 10) at p. 120; Mateesco Matte, N., op. cit. Chapter 1 (fn. 13) at p. 132.

(12) The affirmation of the sovereignty over the airspace in the Paris Convention and in the Chicago Convention is essentially due to historical reasons in response to the "air libre" discussion, see Chapter I.1.

(13) See Capotorti, F., op. cit. supra (fn. 10) at p. 264 seq.; Thierry, H., Sur, S., Combacau, J., Vallé, Ch., Droit International Public, Paris 1984, at p. 231.

Convention cannot be interpreted as intending to exclusively reserve the air-related competences to States; we have to conclude that the exercise by the EEC of rights and obligations being currently referred to States, is not contrary to art. 1 Chicago Convention.

This result may be supported with reference to the preamble of the Chicago Convention as well as to the provisions of art. 77 seq. The Convention indents to promote international cooperation and suggests itself, in its Chapter XVI, joint air transport operating organizations which may imply certain transfers of national authority to an inter-State body.

According to art. 83 Chicago Convention, the contracting States may make arrangements not inconsistent with the Convention, which shall then be *registered* with the Council of ICAO. (14) The EEC Treaty, providing for a Common Air Transport Policy and, as such, for an integrated air law regime, is to be regarded as an "arrangement" in the sense of art. 83. (15) Thus, it must be suggested to the EEC Member States to register the Treaty and the legal acts regarding the air transport sector in order to comply with their obligations under the Convention. (16)

(14) In the context of the establishment of ECAC, the discussion of interpretation of art. 83 rose with regard to the inconsistency of an international organization providing for intergovernmental cooperation. The argument was advanced that such an organization on the inter-State level was incompatible with an alleged monopoly of ICAO in this field; see Minutes of the Executive Committee, ICAO Doc. A 10 - WP/150; see equally Mateesco Matte, N., op. cit. supra Chapter 1 (fn. 13) at p. 205. But in the absence of a positive rule providing for such a monopoly the presumption for the compatibility, contained in the wording of art. 83, renders regional cooperation compatible with the Convention, provided it does not hinder or functionally duplicate the work of ICAO; see Weber, L., Les éléments de la coopération dans le cadre de la Commission Européenne de l'Aviation Civile, in RFDA 1977, p. 388, at p. 408 seq.

(15) This formula is broader than "agreement" including all forms of legal cooperation.

(16) Unlike art. 102 of the Charter of the United Nations, Yearbook of the United Nations 1969, p. 953 seq., ICAO does not dispose of legal sanctions allowing to enforce the obligation to

2. THE EEC CONCEPT OF A "CABOTAGE AREA"

The European Commission currently refers to the concept of a "Community Cabotage Area" (17), wanting to describe a "common aviation area" or a "European Integrated Air Market". In conformity with the EEC Treaty, the Commission develops a legal regime which applies equally to domestic, international intra-EEC and extra-EEC flights in which the "Cabotage Area" is the centerpiece. (18)

According to the proposals of the Commission in its 1989/1990 package, flights of airlines from third countries within the EEC must be viewed as a "Community asset" (19) and the Community, for the outside world, as "one entity". (20) This means, in the opinion of the Commission

> " that all the traffic within and between the Member States is considered to be equivalent to cabotage and is in principle reserved fo Community carriers."

Only the EEC organs will be able to grant Fifth Freedom or "EEC cabotage rights". Thus, the EEC forms one block similar to a State's territory.

This concept raises a number of questions with regard to the Chicago Convention. There is, in particular, art. 7 sentence 1 and 2, regulating the domestic air traffic in a manner granting exclusivity to national carriers. This is linked with the

register. According to art. 102 para. 2 Charter a State cannot invoke a treaty which has not been registered before.

(17) See supra Chapter 2 (fn. 167), and see as examples : Communication (Commission) "Community Relations with Third Countries in Aviation Matters" loc. cit. Chapter 2 (fn. 149) at p. 11; and Annex II to that Communication.

(18) See supra Chapter 2. II. c. (1) (b).

(19) See Communication (fn. 17) at p. 11.

(20) Idem at p. 12.

principle of non-discrimination in case - exceptionally - a foreign carrier has been entitled to operate on domestic routes. (21) This provision must be analyzed under two aspects, first whether "European Cabotage" is cabotage in the sense of art. 7 Chicago Convention, and second, whether and what consequences are flowing from this provision to be taken into consideration by the European authorities.

a. "European cabotage" as cabotage under art. 7 Chicago Convention?

Like art. 1, art. 7 Chicago Convention refers explicitly to the contracting States as entities bearing the right to refuse permission to other States' airlines to exercise cabotage rights within their territory. The question is whether the airspace over the territory of 12 Member States of the EEC, brought under the authority of the Community, can form one "air sovereignty" over "one EEC territory" in the sense of art. 7.

First, under public international law the EEC does not (yet) form a sovereign entity disposing of its own territory. (22) It remains an organization which derives its powers and competences from the Member States which continue to exist as subjects of public international law. One cannot, consequently, regard the "EEC territory" as one State's territory in the sense of art. 7 Chicago Convention. (23)

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(21) See Chapter 1. I. b.

(22) In the European legal doctrine the legal nature of the EEC is debated. The opinions range from a status as "prefederated entity" to an "integrated international organization", see supra (fn. 8). However, as the Member States are still the "domini pacti" and not the Community itself, the so created integrated structure can certainly not (yet) be regarded as a confederation or a federated State in the classical sense; see inter alia: Schweitzer, M., Hummer, W., op. cit. Chapter 2 (fn. 230) at p. 197.

(23) See equally Wassenbergh, H.A., EEC Cabotage after 1992 !?, op. cit supr Chapter 2 (fn. 243) at p. 283.

Art. 7 could, however, be subject to interpretation. One could argue that in 1944 no forms of State cooperation similar to the EEC were known to the drafters of the Chicago Convention and that they did not want to preclude "integrated air markets" from the scope of art. 7. This argument can, nevertheless, neither meet the teleology of the Convention nor does it correspond with the draft history.

Art. 7, granting exclusive domestic control over the national flights, was apparently an exceptional concession to the prevailing nationalistic concerns of the States in the war period, wanting to protect national economic and security interests (24) in a context of an uncertain legal and economic future development of the international air transport system.(25) Exceptions are to be interpreted narrowly and cannot be transferred to other contexts by way of analogy. Thus, the application of the cabotage concept to State groups seems to be technically excluded. In addition, the further protection of big segments of the international market is in contradiction to the principle of promotion of international cooperation in the air sector, laid down in the preamble of the Convention. Therefore, art. 7 must be understood literally and its scope cannot be enhanced to integrated air transport markets.

As an intermediate result, we have to note that the "EEC Cabotage Area" is not a "territory" in the sense of art. 7 Chicago Convention. Flights within that area remain submitted to two different international regimes: intra-EEC international flights are flights in the sense of art. 6 Chicago Convention, intra-EEC flights within one Country are submitted to art. 7.

(24) See: Lewis, D. R., op. cit. Chapter 1 (fn. 42) at p. 1063, and see supra Chapter 1.

(25) See Haanappel, P.P.C., op. cit. supra Chapter 2 (fn. 46) at p. 138.

b. Cabotage in Member States

Domestic flights within one Member State are clearly submitted to art. 7 Chicago Convention. On that basis the States or even (after the "transfer" of a corresponding competence) the EEC authorities could grant to national or foreign carriers the right to operate on such routes. Pursuant to its Communication, the Commission considers the traffic within the EEC Member States as "in principle reserved for Community carriers". (26) This might be in contravention with the principles laid down in art. 7 sentence 2 Chicago Convention, stipulating that no other State has the right to grant *exclusivity* of cabotage to another State or airline. As underlined above (27), the interpretation of this sentence is far from being clear, due to the ambiguity attaching to the words "*specifically*" and "*on an exclusive basis*". (28)

One possible interpretation emphasizes the phrase "on an exclusive basis" and passes over the "specifically" element. This leads to a restrictive approach (29), meaning that on the basis of art. 7, and similar to a "most favored nation clause", cabotage rights can either be granted *to no other* State or *to all other* States desiring to operate on such domestic routes. (30)

The other possible interpretation wants to give full effect to the word "specifically" in art. 7 and reaches a more flexible

(26) See supra (fn. 20) and accompanying text.

(27) See supra Chapter 1 (fn. 40 - 46).

(28) Sentence 2 of art. 7 reads: "Each Contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State..."

(29) See Institut de Droit Aérien (ITA), Study "Cabotage in International Air Transport, Historical and Present Day Aspects", Paris, ITA Bulletin 1969 at p. 9; and see Sheenan, W.M., Air Cabotage and the Chicago Convention, Harvard Law Rev. (Vol. 63) 1950 p. 1160.

(30) See equally the U.S. position during the negotiations of the Conference advocating for the restrictive approach, Conference Proceedings , see supra Chapter 1 (fn. 9) at p. 1269.

approach. (31) The granting of cabotage rights, pursuant to this opinion, is possible even on an exclusive basis as long as it has not been stipulated "specifically" that these rights are "exclusive". It is evident that this interpretation weakens the non-discriminatory contents of this provision. (32) However, the practice seems to prefer this second approach as it corresponds more easily with the States' need for reciprocal exchange of rights. (33)

Both interpretations could refer to the draft history, both could invoke the purposes of the Convention. (34) Thus, it is impossible to give a legal answer to the question of interpretation of art. 7. Only a political or judicial decision might bring the necessary clarity. (35)

Meanwhile we can note that even according to the more liberal theory an "exclusive" grant of cabotage rights, which is officially declared as being "exclusive", would clearly be

(31) See ITA Study op. cit. supra (fn. 29), at p. 14 seq.

(32) See Hesse, N.E., op. cit. supra Chapter 1 (fn. 43) at p. 140.

(33) ICAO Assembly had to decide on two occasions on proposals to amend art. 7 Chicago Convention in the sense of the flexible interpretation. The proposals laid before the Assembly could not obtain the necessary majorities. (See art. 94 lit. a Chicago Convention and see Doc. A16 - WP/7 (1968) and Doc. A 18 - WP/ 26-27, A 18 - Min P/12 (1971)) A legal guideline on the basis of an ICAO Council definition could not yet be obtained.

(34) See e.g. ICAO Doc. 8771, A 16 EX (1968) at 44 (39:2, 39:4): one delegate stated that the Convention's purpose was to impose limitations upon the Sovereignty for a common good and consequently only the restrictive approach was acceptable. Another delegate argued that only the flexible theory was compatible with the spirit of art. 1 (sovereignty principle). The apparent contradiction between both defensible positions makes clear that the cabotage concept is a "foreign body" in the system of the Chicago Convention.

(35) Prof. Haanappel, P.P.C., op. cit. supra Chapter 2 (fn. 46) at p. 138 seq., suggests the abrogation of art. 7 sentence 2 or the less cumbersome solution of a Council Decision defining its legal scope; see equally de Groot, J.E. op. cit. supra Chapter 1 (fn. 43) at p. 158 seq.

incompatible with the Chicago Convention. The Commission's Communication states that cabotage would be "in principle reserved to Community carriers". This formula indicates that EEC carriers will have a *preferential* status but no *exclusivity*. It has been repeatedly affirmed by the Commission that the creation of the "Cabotage Area" is essentially motivated by the necessity to improve the bargaining power of the EEC Member States towards the U.S.A. (36) The concept of a "Cabotage Area" is consequently not a means for excluding others from the EEC sky but a lever for opening, on a reciprocal basis, other markets. (37)

The SAS example, where Denmark, Norway and Sweden granted to each other "exclusive" cabotage rights in order to make their common carrier operative, teaches us that the flexible interpretation can be translated into the legal practice without objection by the contracting States of the Chicago Convention.(38) The EEC proposal with regard to domestic flights within Member States might, thus, be considered as compatible with art. 7 Chicago Convention in its flexible interpretation *unless* the contrary interpretation has been confirmed in a legally binding way. (39)

(36) See Communication "Community Relations with Third Countries in Aviation Matters, loc. cit. supra Chapter 2 (fn. 149) at p. 12.

(37) See for the consequences of such a policy: Folliot, M.G., La nécessaire adaptation du système juridique de la Convention de Chicago, in RFDA 1987 (No. 2) p. 125, at p. 129.

(38) See ICAO Doc. A 16-Min P/1-9 p. 89 seq. The Scandinavian agreement contains a safety clause in the event third States demand cabotage rights with reference to art. 7. No State contested this construction as being incompatible with the Convention.

(39) The abrogation or modification of an article of the Convention requires pursuant to art. 94 a two-thirds vote of the Assembly (with 162 States) and must be ratified by the number of contracting States specified by the Assembly.

c. International flights within the EEC

Flights within the "Cabotage Area" which are not domestic flights in the sense of the Convention remain in the ambit of art. 6 and are, consequently, not allowed when no particular permission or authorization of the respective State or, in case of "transfer" of the necessary competences to the EEC, of the Community institution in charge of air transport has been given. The EEC can, on that basis, realize its aims with regard to the creation of an "Interior Air Market" without being confronted with the same limitations as in the domestic air transport sector.

d. Conclusion

The Commission's concept of a "Cabotage Area" is not, as such, incompatible with art. 7 of the Chicago Convention and its prohibition of discrimination. However, the EEC does not form a legal entity based on one "air sovereignty". Flights within the EEC remain what they are under international air law unless the EEC takes the form of a confederation or a federated State (40) : domestic flights within one Member State will be submitted to art. 7 and its restrictions, international flights within/to/from the EEC to art. 6.

Art. 7, on the contrary to the Commission's view, cannot provide the applicable legal regime for the whole intra-EEC market, since only a small part of the operations are cabotage in the true sense of the this provision. The terminology used by the Commission in order to describe the intended European Integrated Air Market is, consequently, misleading and should be abrogated. Instead, "Internal Aviation Area", or the like, should be used.

This discussion concerning the European developments once again makes clear that art. 7 needs clarification in order to

(40) See equally Hesse, N.E. op. cit. supra Chapter 1 (fn. 43) at p. 135.

allow the determination of the legal obligations and rights of the States under the Convention. This is the more urgent, the more cabotage becomes an economically valid "good" of international economic exchange, which will be the case in the European Community. (41)

3. THE EEC CONCEPT OF 'COMMUNITY AIR CARRIERS'

Another central concept of the European Integrated Air Market is the "Community air carrier", being of major importance equally in the intra-EEC and the extra-EEC relations. On the basis of art. 7 para. 1 EEC Treaty, discrimination between Member States or their nationals on grounds of nationality is prohibited. (42) In order to give full effect to this principle, the carriers with seat in the EEC must be entitled to operate within all Member States under the same conditions as national carriers. (43) This will be valid for domestic traffic after a third phase of integration, for operations within the EEC between two Member States (44) and for extra-EEC flights (45) on the basis of the "Community carrier clause". Even the creation of multinationally owned carriers would be entirely in conformity

(41) See Folliot, M.G., op. cit. supra (fn. 37) at p. 129.

(42) See supra Chapter 2 (fn. 160) and accompanying text.

(43) As seen above the Council did not yet want to respond to this requirement imposed on the Member States by the Treaty. There can, nevertheless, be no doubt about the obligation under art. 7 para. 1 EEC Treaty to open equally the domestic markets to carriers registered in other Member States.

(44) See supra Chapter 2 (fn. 161) and corresponding text.

(45) See supra Chapter 2 (fn. 198) and corresponding text.

with the EEC law. (46) Thus, nationality criteria will no longer be a distinctive criteria of carriers in the EEC.

As shown above (47), "nationality" is, however, one of the fundamental legal principles of the international air law system to which numerous obligations, international responsibility and authority over the aircraft are attached. A regional system which does away - to large a extent - with the distinction of air carriers on national grounds might not be compatible with the international system in place.

a. Art. 17 Chicago Convention

Art. 17 Chicago Convention states shortly that:

> "Aircraft have the nationality of the State in which they are registered"

The nationality to which the above-mentioned rights and obligations are attached is defined by the formal requirement of registration. Thus, it is the place of registration which is decisive for the national status of the *aircraft*. For art. 17 it is not the nationality of the owners of the plane which is of importance. The nationality of the *airline*, currently expressed by the formula of "substantial ownership and effective control" (48) is indifferent as long as the aircraft has been nationally or internationally registered so that a State or recognized

(46) The EEC Treaty actually favorizes the creation of enterprises of multinational (EEC) ownership. Art. 58 juncto art. 52 EEC Treaty provides for a regime of equal treatment for all companies of EEC origin in all other Member States; art. 221 stipulates more specifically that EEC companies are entitled, like nationals, to participate in the capital of other Member State's undertakings.

(47) See supra Chapter 1. I. 2.

(48) See supra Chapter 1 (fn. 52).

operating organization (49) bears full responsibility under public international law for the operation of the plane. (50) Consequently, Art. 17 Chicago Convention is not opposed to the "Community air carrier" concept.

b. The International Air Services Transit Agreement

A separate and distinct problem is the issue of the exercise of traffic rights by "Community air carriers" under the International Air Services Transit Agreement. (51) Para. 1 sect. 5 of this almost globally adhered instrument, exchanging the First and Second Freedoms on a multilaterally basis, reads:

> "Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport *enterprise* of another State in any case where it is not satisfied that *substantial ownership and effective control* are vested in *nationals of the contracting State* ..." (52)

This provision, on the contrary to art. 17 Chicago Convention, requires national ownership of the airline. However, a "Community carrier" may, pursuant to the EEC law in place or in the planning stage, be owned by any legal subject of the EEC Member States irrespective nationality. It might even operate on extra-EEC routes out of one Member State and be totally owned by citizen of other Member States. "Substantial ownership clauses" and the EEC law are, consequently, incompatible.

All Member States are contracting States of the Transit Agreement. Due to Community law, their carriers will, in certain

(49) See art. 77 seq. Chicago Convention and infra Chapter 4. II. 3. c.

(50) See in detail: Milde, M., *op. cit.* supra Chapter 1 (fn. 48) at p. 140 seq.

(51) For the source see: Chapter 1 (fn. 17); the same problem is valid for the International Air Transport Agreement (see Chapter 1 (fn. 18)). As it has been ratified by only 19 States, two of them are European (Greece and Netherlands), it is of less importance in our context.

(52) Emphasizes added.

cases, no longer correspond with the requirements under the Transit Agreement. Thus, they might be subjected to the legal consequences under art. 1 sect. 5 Transit Agreement and be deprived from privileges of overflight and landing for non-traffic (technical) purposes, as laid down in art. 1 sect. 1 of the Transit Agreement.

This might, indeed, have major repercussions on the extra-EEC air transport relations since the right of overflight will become more and more relevant, especially in a phase where long-haul operations become increasingly important for the air industry. This problem could be resolved in three different ways.

The formula of sect. 5, confirming the sovereignty principle of art. 1 Chicago Convention, underlines the *discretionary* power of the contracting States with regard to the withdrawal of the privileges. It is in no way a compulsory obligation to revoke the rights of overflight or technical stop. The fact that all Member States of the EEC are parties to the Air Transit Agreement and that the ownership and effective control, therefore, remains vested in a limited number of contracting States should influence the decision of third countries in favor of accepting the close cooperation within the EEC in the framework of para. 1 sect. 5 Transit Agreement. (53)

A second solution could consist in the modification of the existing bilateral agreements or in the inclusion in newly negotiated BATAs of a formula, similar to the "Community carrier clause" (54), being not only limited to the designation of European carriers for the exercise of Fourth, Fifth and Sixth Freedom rights but equally exchanging the first two Freedoms without specific reference to national control and substantial ownership. In the framework of the intended renegotiation or

(53) See for a similar argument with regard to joint air transport operating organizations, where exactly the same problem could arise, Milde, M., op. cit. supra Chapter 1 (fn. 48) at p. 151.

(54) See supra Chapter 2 (fn. 199).

adaptation of BATAs (55) precautions in that regard should be taken.

A third thinkable solution could consist in the adherence of the EEC to the International Air Services Agreement. This agreement is open to Member States of the ICAO only, on mere notification of acceptance. (56) The EEC is, however, neither a member of ICAO (57) nor does it have the quality of a State. Pursuant to the international law of treaties (58), the modification of an existing multinational treaty requires that the parties of the original agreement adhere equally to the modified agreement as the modified one is considered to be a new agreement. A mere textual rectification of the original text is not possible.

First, it is doubtful whether the EEC Member States would be able to insert such a clause permitting membership of international organizations in the Transit Agreement, and secondly, whether that new agreement is adhered to by the same number of States around the world. (58)

In conclusion, one may note that there is the theoretical possibility that the concept of "Community air carriers" may lead to conflicts with regard to the International Air Services Transit Agreement. Since the Agreement, as such, could be modified only with major difficulties, the EEC should try to prevent possible conflicts in its future BATA policy.

(55) See supra Chapter 2 (fn. 198).

(56) See art. IV of the International Air Services Transit Agreement.

(57) For the question of status of the EEC in ICAO see infra Chapter 4. II. 4.

(58) See as a reference art. 40 of the Vienna Convention on the Law of Treaties, United Nations Conference on the Law of Treaties, Off. Rec. Doc. of the Conference U.N. Doc. A/Conf. 39/11/Add 2, New York 1971 p. 281 seq.

(58) For the problems the EEC currently faces with the adherence in international organizations, see Groux, J., Manin, Ph., op. cit. supra Chapter 2 (fn. 235) at p. 75 seq.

c. "Community Air Carriers" and "Community Registration"

The notion "Community carrier" makes believe that European air carriers derive their legal status from the Community as such and not from one particular Member State of the EEC. Under the traditional international air law the "genuine link" is established by registration. Thus the use of the term "Community carrier" implies registration by the EEC instead of a national one.

Up to now, no official projects by the Commission are known to propose, in a later phase of integration, a common register for all or a part of the European aircraft. However, there are a number of arguments which could incite the Commission to take this step. First, the two packages presented above (59) show a clear tendency towards "denationalization" of the Member States' regulation of air services in favor of Community powers. Secondly, in a European Integrated Market and after the fall of the economic borders the obligation to register aircraft of the different established branches of European carriers in different registers of the Member States may be regarded as a expensive anachronism in an entirely integrated market structure (60), hindering flexible interchange or adaptation to market requirements. Thirdly, with the creation of a "*societas europea*", a European joint-stock company governed by European law, a new form of multinational company will become possible. This company will be independent from national laws and be

(59) See supra Chapter 2 (fn. 111 seq. and fn. 149 seq.) and the corresponding text.

(60) Schwenk, W., op. cit. supra Chapter 1 (fn. 49) at p. 8 seq. illustrates the problem in the field of interchange of aircraft and interchange of crews which would be eased by a Common registration of European aircraft. The suggested double registration is, however, not compatible with art. 18 Chicago Convention.

registered in a Community register held by the EEC. (61) This form of European legal person would be particularly well adapted to air carriers and air carrier holding companies in an integrated air market. However, an adequate registration procedure for the aircraft held by this carrier would be lacking. Finally, a Community register would be the logical accomplishment of the "Community carrier" and "Cabotage Area" concepts which intend to delete all differences with regard to the treatment of carriers by national authorities in the intra-EEC market and to replace the national link by a "Community link" in the extra-EEC sector.

Consequently, it is not excluded that the proposal of a Community register will be issued by the EEC Commission in the near future. Based on this hypothesis we have to examine whether and in what form such a Community registration would be compatible with the provisions laid down in the Chicago Convention.

(1) Art. 77 of the Chicago Convention

The Chicago Convention provides for two forms of inter-State cooperation under deviation from the rule of national registration (art. 17): it allows States to constitute "joint air transport operating organizations" and "international operating agencies" in Chapter XVI of the Convention. (62)

Art. 77 establishes that such joint organizations or operating agencies are not prohibited by the Convention, that those organizations are submitted to all provisions of the Convention and finally, that the Council shall determine in what manner the provisions of the Convention relating to nationality

(61) See for more information: Gavalda, Chr., Parléani, G., Droit Communautaire des Affaires, Paris 1988, at p. 166 seq.

(62) The idea behind these provisions was to allow two or more States to operate services between them not by rival companies but by a joint organization, see Proceedings of the International Civil Aviation Conference, op. cit. supra Chapter 1 (fn. 9), Vol. I Doc. N. 50 p. 570 at p. 581 seq. and see Milde, M., op. cit. supra Chapter 1 (fn. 48) at p. 135.

of aircraft shall apply to aircraft operated by international operating agencies. According to art. 79, States can participate in such arrangements either through their government or through airline companies.

The implementation of Chapter XVI is problematic in two respects. On the one hand the terms "joint air transport operating organization" and "international operating agency" are not legally defined in the Convention. On the other hand the Convention leaves open to Council Decision (63) in what way the nationality of the aircraft shall be regulated. After long-lasting and often confusing debates and attempts within ICAO to solve the problems imposed by the wording of art. 77 (64) and multiple proposals by legal writers (65), the ICAO Council set an end to the speculations with its "Council Resolution on Nationality and Registration of Aircraft Operated by International Operating Agencies" (65a), adopted by unanimous vote. In this Resolution it provides guidelines for the interpretation of the two terms, describing possible forms of international cooperation and lays down some criteria for the application of the nationality principle to such organizations.

It was clear, at that time, that one had to distinguish fundamentally between the two concepts of "joint operating

(63) Until recently it was even open what legal nature such a "decision" might have. Today the binding erga omnes force is recognized, see: Resolution adopted by the Council on Nationality and Registration of Aircraft Operated by International Operating Agencies of Dec. 14, 1967, ICAO Doc. 8722 - C/976 of Feb. 20, 1968 at p. 3.

(64) See for the evolution of the debate: Milde, M., op. cit. supra Chapter 1 (fn. 48) at p. 138 - 147; and Fitzgerald, F.G., op. cit. supra Chapter 1 (fn. 48) at p. 196 seq.

(65) See inter alia: Cheng, B., Nationality and Aircraft Operated by Joint or International Agencies, in Yearbook of Air and Space Law 1966 p. 5 at p. 20; Mankiewicz, R.H., Interpretation and Application of art. 77 of the Chicago Convention - Nationality and Registration of Aircraft Operated by International Agencies, in J. of Air Law and Com., 1968 p. 68 seq.

(65a) See supra (fn. 63).

organizations" and "international operating agencies". The first-mentioned was considered to be still so strongly linked with States forming the organization that only a national registration of the used aircraft was to be taken into consideration. (66) With regard to the latter, the Resolution establishes two possible regimes of registration (67), "joint registration" and "international registration:

> "- the expression "joint registration" indicates that system of registration of aircraft according to which the States constituting an international operating agency would establish a register other than the national register for the joint registration of aircraft to be operated by the agency, and
>
> - the expression "international registration" denotes the cases where the aircraft to be operated by an international operating agency would be registered not on a national basis but with an international organization having legal personality, wether or not such international organization is composed of the same States as have constituted the international operating agency.

Both definitions make clear that they are conceived for agencies established by contracting States which shall *operate the aircraft themselves*, e.g. like ARAB AIR CARGO (68) or the potential use of aircraft by International Governmental Organizations such as the United Nations. This would in no way be the intention of the EEC. As, in the framework of art. 77, the formation of an "international operating agency" is the only way to come to an "international registration", the establishment of an international Community register for the registration of aircraft operated by "Community carriers" is not compatible with

(66) See the last paragraph of the mentioned Resolution; the last sentence of art. 77 must, thus, be understood literally, meaning that only in "international operating agencies" the problem of non-national registration can rise.

(67) See Appendix 1 to the Resolution, loc. cit. supra (fn. 63), at p. 5.

(68) For the Council determination in re ARAB AIR CARGO, see Milde, M., op. cit supra Chapter 1 (fn. 48) at p. 147 seq.

the possible forms of international cooperation provided for by the Chicago Convention. In sum, we have to note that the Chicago Convention is open to internationally organized airlines but not to supranational registration.

(2) Evolution de lege ferenda

The different statements in the legal discussion within ICAO clearly show the reluctance of the organization concerning attempts to weaken the nationality principle. (69) The Basic Criteria for the determination by the Council according to art. 77 Chicago Convention laid down in the Council Resolution of 1967 indicate that any system of international registration must give to States, members of ICAO, sufficient guarantees that the provisions of the Chicago Convention are complied with. (70) The question is open whether and under what conditions the Council would allow the EEC, or other supranational organizations in general, to bear rights and obligations of the States flowing from the registration of aircraft.

One opinion denies such a possibility, referring to the obligations to issue or validate certificates and licences (art. 30 to 33 Chicago Convention) which are explicitly imposed on sovereign States. These obligations, being closely linked to the registration, could be performed by international organizations only after amendment (71) to the Chicago Convention. (72)

(69) See e.g. Appendix 2 (Basic Criteria) to the Resolution quoted above (fn. 63) at p. 6; and Appendix 3 lit. f which reads: " ...the responsibilities of the State of registration with respect to the various provisions of the Chicago Convention shall be the joint and several responsibility of all the States which constitute the international operating agency."
See equally Fitzgerald, F.G., op. cit. Chapter 1 (fn. 48) at p. 211.

(70) See Milde, M., op. cit. supra Chapter 1 (fn. 48) at p. 150.

(71) The amendment to the Chicago Convention requires a two-thirds majority of the Assembly. The organization has 162 Member States.

(72) See Milde, M., op. cit supra Chapter 1 (fn. 48) at p. 151.

Another author (73) argues that. although the amendment to the Convention might be the best solution, an ICAO Council determination under art. 77 last sentence could suffice for the establishment of a European "Common register". In fact, given the teleology of art. 17 and 77 with regard to guarantees registration and "nationality" of the aircraft give to other contracting States, legal constructions are conceivable within the EEC which could satisfy these same needs.

By way of EEC legislation, binding on the Member States, the EEC Member States could be bound jointly and severally to assume the obligations which the Chicago Convention charges on the register State of aircraft. (74) This common register of all twelve States, making them responsible under public international law would enhance the number of potential liable States rather than depreciate the value of the guarantees granted by the Chicago Convention, on which the ICAO members rely. However, it would, be necessary, on the side of the ICAO Council, to modify its definition concerning "international operating agencies" in art. 77 Chicago Convention. (75) By that way both objectives, that of maintaining a high safety level in international aviation on the one side, and that of integrating the European civil aviation on the other side, could be successfully achieved. This remains, however, a prospect of the future.

(3) Conclusion

The EEC "Community carrier" concept is easily compatible with the Chicago Convention as long as the EEC does not intend to introduce a Common European aircraft register. This would, in fact, lead to conflicts with art. 77 and art. 17 of the Chicago

(73) Haanappel, P.P.C., op. cit. Chapter 2 (fn. 46) at p. 143 seq.

(74) See ICAO Council Resolution on the Nationality and Registration of Aircraft Operated by International Operating Agencies, loc. cit. supra (fn. 63) Appendix 2 part 1 B.

(75) As mentioned supra this definition is essentially shaped for "agencies" operating the aircraft for their own use and purposes.

Convention. The "Community carrier" concept could raise problems with regard to the International Air Services Transit Agreement.

4. A EUROPEAN "CAA" ?

One Belgian author asks the question: "Don't we need a European CAB acting along the lines of a Federal Aviation Act ?" (76) In fact, some elements of the above presented conception of a "European Integrated Air Market" urge us to believe that in the institutional framework of the EEC certain adaptations will be necessary in order to adequately respond to the needs and requirements of the International System of Air Regulation.

There is, first of all, the question of BATA negotiation. According to the intentions of the Commission, the bilateral system of agreements between Member States and third countries should be replaced - in the long run - by exclusive relations between the EEC and those countries on the basis of newly negotiated BATAs. (77) Who will negotiate the more than 100 agreements which require preparation, conclusion and follow up measures? Who will be charged with the notification and acceptation of notifications concerning the designation of carriers being allowed to operate on routes between the EEC and third countries? What will be the institution that distributes the rights obtained in agreements with third States in a non-discriminatory and impartial way to the different "Community carriers", applying for rights on extra-EEC routes? And eventually, who will approve fares and traffic conditions proposed on the basis of such Community BATAs, control the compliance with authorizations or approved fares?

(76) Naveau, J., Le droit de la CEE va-t'il influencer le Droit Aérien International ?, in AASL (Vol. XIII) 1988, p. 161, at 171; translation by the author.

(77) See supra Chapter 2 (fn. 214) and corresponding text.

In case of establishment of a European "Common register" (78) a second factor may contribute to the need for a European authority specialized in aviation matters. The Chicago Convention links the registration and nationality with multiple obligations, especially in the safety field. (79) The register State has the obligation to issue licences for the installation and use of radio equipment with regulations provided for by the overflown States. (80) The registering State is under the obligation to issue or render valid certificates of airworthiness for every aircraft engaged in international navigation (81) and to provide the operating crew of a registered aircraft with or render valid certificates of competency and licences. (82) In addition, there is the very far-reaching obligation under art. 12 Chicago Convention to

> "insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre there in force."

In case the EEC will take the step towards a "Community Registration" and ICAO Council will issues a Decision in this respect, all or a part of those regulatory functions would fall within the ambit of EEC competences and justify the establishment of a specialized EEC board, a "*European Civil Aeronautics Authority*" (CAA).

However, the question is whether the Chicago Convention allows the establishment of an inter-State authority exercising rights and bearing obligations flowing from the Convention. All above-mentioned provisions refer explicitly to States as the

(78) See supra Chapter 4. II. 3. c.

(79) See supra Chapter 1 (fn. 54 and 55) and corresponding text.

(80) See art. 30 para. 1 Chicago Convention.

(81) See art. 31 Chicago Convention.

(82) See art. 32 Chicago Convention.

subjects of public international law being charged with the insurance of international safety standards. International Governmental Organizations are neither mentioned nor taken into consideration. (83)

Nevertheless, there is an interesting precedent in international aviation law, proving that the Chicago Convention is open to pragmatic solutions in that regard. With treaty of Dec. 13, 1960 seven European States have established the European Organization for the Safety of Air Navigation (EUROCONTROL). (84) This "supranational" organization (85) has been charged with the *exclusive* competence to fulfill air traffic control (ATC) tasks in the upper airspace (above 25,000 ft.). Based on its independent competences, it is entitled to bill "route charges" for all air navigation services rendered. (86)

According to art. 28 of the Chicago Convention, the establishment and functioning of air navigation services is a duty of the contracting States. The "transfer" of those obligations to intergovernmental or other international organizations is not mentioned. The EUROCONTROL organization and its establishment as independent "supranational" organization has, nevertheless, never been challenged by the States' community. No contracting State of the Chicago Convention has

(83) See supra Chapter 4 II. 3. c. with regard to art. 77. The discussion proved that the contracting states felt the necessity for guarantees that safety and navigation standards are complied with. See esp. Milde, M., op. cit supra Chapter 1 a(fn. 48) at p. 151.

(84) International Convention on Cooperation for the Safety of Air Navigation (EUROCONTROL), filed with ICAO Doc. 7870 EuM/IV at p. 426 seq.

(85) See Mateesco Matte, N., op. cit. supra chapter 1 (fn. 13) at p. 264.

(86) See: Financing of Route Air Navigation Facilities and Services by Means of Route Charges. A Common Policy Implemented by Eurocontrol and Eleven European States, ITA Bulletin (No. 34) 1974 at p. 801 seq.

objected against this transfer of ATC functions to EUROCONTROL. (87) On the contrary, declarations may be found which read:

> "It may be hoped that the steps which led to 'EUROCONTROL' will pave the way to similar achievements in other areas." (88)

Under this angle it might not be excluded that ICAO and the contracting States of the Chicago Convention would accept the creation of a "European Air Authority" being equipped with far-reaching competences and sufficient guarantees for the compliance of European carriers with the provisions of the Convention.

5. EEC's POSITION WITHIN ICAO

In the legal evolution within the EEC we can observe an undeniable progressive "transfer" of competences from the Member States to the Community. The EEC institutions become, in this way, legislator in the aviation sector, sharing a huge number of legal functions with the EEC States.

As underlined before, civil aviation is far from being an economic activity which can be regulated on an isolated national or regional level since it requires vitally an international legally harmonized and standardized framework which is to be provided by ICAO. (89) This consideration leads us to the question of an EEC participation in the work of the International Civil Aviation Organization, allowing the EEC to contribute in future

> "that international aviation may be developed in a safe and orderly manner and that international air transport services

(87) See Weber, L., op. cit. supra Chapter 2 (fn. 22) at p. 278.

(88) See: Annual Report of the Council to the Assembly for 1960, ICAO Doc. 8140 A 14 P/1 at p. 19, reported in Weber, L., op. cit. supra (fn. 22) at p. 278.

(89) See supra Chapter 1.I.

> may be established on the basis of equality of opportunity and operated soundly and economically" (90)

This contribution might become more urgent the more the EEC competences in the aviation field take an exclusive shape replacing the Member States in their national and international regulatory functions and obligations. This is already the case in a number of important issues such as competition and intra-EEC traffic and will, at the end of the progressing integration process, concern almost all legal matters.

The Member States, represented in international fora, will, then, be in an ambivalent situation characterized by the lack of interior competence on the one side and exterior full power on the other side, whereas the EEC, as such, has neither voice nor power in those international conferences or organizations.

After a short look at the question of whether the Community Institutions are empowered by EEC law to act within international organizations we will focus on the possible forms of cooperation of the EEC with ICAO.

a. EEC Law and EEC's Participation in International Organizations

Statutes founding international organizations are a form of multilateral treaty. Formal participation of the EEC in such an organization comes up to adherence of the Community to an international agreement. The EEC can only adhere to an organization under the condition that it is backed by a corresponding interior competence, flowing from the EEC Treaty.(91) Art. 229 para. 1 and para. 2 alone, charging the Commission with the maintenance of appropriate relations with the United Nations, its specialized agencies, GATT and other

(90) See: Preamble to the Chicago Convention.

(91) See Vedder. Chr., op. cit. supra Chapter 3 (fn. 16); Kovar, R., La participation des Communautés Européennes aux conventions internationales, in AFDI 1975, p. 903 at p. 912.

international organizations does not, as such, confer competence to actively participate in the work of such organizations. (92)

In cases where the EEC aims at a legal status going beyond mere observation, it is the general opinion in the doctrine that particular treaty-making powers are required. (93) The extent of the necessary competences depends essentially on the purposes and competences of the respective organization the EEC wants to join. In case the Community desires to adhere to an organization without further participation of the Member States, it needs complete competence, covering entirely the purposes and tasks of that international body and all obligations which are linked with the adherence to it (e.g. contribution to the budget etc.).

Supposed, the EEC's treaty-making powers only partly cover the objectives and action of the international organization, the Community has to join it at the side of the Member States in form of a "mixed agreement" or "mixed participation". (94) In accordance with the interior legal order of the EEC, characterized by sharing of functions and competences, the EEC participation in international organizations becomes, consequently, a functionally limited membership where the EEC remains restricted in its action (e.g. to vote or to accept obligations) by its competences flowing from the Treaty. (95)

(92) See Kovar, R., op. cit. supra (fn. 91) at p. 912.

(93) See Vedder, Chr., op. cit. supra Chapter 3 (fn. 16) at p. 153 seq.; Schloh, B., Die Stellung der Europäischen Gemeinschaften und ihrer Organe in internationalen Organisationen, in: Aussenbeziehungen der Europäischen Gemeinschaften (Kölner Schriften zum Europarecht, KSE, Vol. 25) Cologne, 1975 p. 83 at p. 88.

(94) See Kovar, R., op. cit. supra (fn. 91) at p. 915.; Schermers, H.G., A Typology of Mixed Agreements, in O'Keefe, Schermers (eds.) Mixed Agreements, Deventer, p. 23 at p. 28; Vedder, Chr., op. cit. supra Chapter 3 (fn. 16) at p. 158.

(95) In its advisory opinion No. 1/78 "Natural Rubber" (of Oct. 4, 1979, in ECR 1979 p. 2871 seq.) concerning the participation of the FEC with or without the Member States in the conclusion of an international commodity agreement on natural rubber including the formation of an international regulatory organization the Court held that in case of negotiations within international

With regard to ICAO the question is whether, under EEC law, the Community is entitled to participate in this international organization, and whether this cooperation would be exclusive or shared with the Member States. ICAO's objectives are laid down in art. 44 of the Chicago Convention (96); they comprise regulatory activities in the safety, technical and economic fields.

The EEC Air Transport law, resulting directly from the Treaty or from secondary EEC law in place, provides for a comprehensive air transport policy which covers potentially all competences attributed to ICAO. (97) However, as long as the EEC does not implement regulations in all fields (e.g. safety or navigation), the EEC does not have exclusive competence in the aviation sector but has to share its regulatory functions with the Member States. (98) Furthermore, as long as the Member States contribute directly to the budget of ICAO under art. 61 of the Chicago Convention, the Member States and the EEC, in accordance with ECJ advisory opinion 1/78 (99), are both together entitled to participate in the work of that organization.

From the point of view of Community law, the EEC and the Member States have both the competence to adhere to ICAO on the

organizations or conferences on matters falling entirely into the ambit of the EEC competences the EEC alone is responsible unless the Member States, and not the EEC budget, have to respond to the financial obligations flowing from the action of the organization; see Ann. 8 advisory opinion at p. 2874.

(96) Art. 44 provides that the objectives of the organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport including the prevention of economic waste caused by unreasonable competition and the avoidance of discrimination between States. ICAO's main activity lies in the promotion of safety of flight operations, see supra Chapter 1. I.

(97) For the extent of the exterior and treaty-making powers of the EEC see supra Chapter 3 (fn. 42) and accompanying text.

(98) See supra Chapter 3 (fn. 46) and accompanying text.

(99) See supra (fn. 95).

basis of shared functions. Consequently, Community law does in no way hinder the membership of the EEC in that organization. (100)

b. ICAO and the participation of international organizations

The interior competence of the EEC to adhere to another organization is only one side of the necessary legal analysis. The statute of the international organization the EEC intends to join must allow such a participation. Different forms of cooperation between ICAO and EEC are to be taken into consideration. The EEC may adhere as a full member, representing the EEC Member States in all rights and functions (vote, participation, services, budget). (101) It may adhere as a member alongside with the EEC Member States (102), it may have

(100) Groux, J., Manin, Ph., op. cit supra Chapter (fn. 235) at p. 44 underline that the EEC Treaty encourages actually the membership of the EEC in international organizations. In their opinion art. 228 para. 1 presumes active membership in international fora since the Commission cannot negotiate treaties within its competences when it is not admitted to conferences or important organizations preparing those legal instruments.

(101) Since the EEC's attempt to adhere alone and exclusively to the "Natural Rubber Agreement" and to the corresponding commodity organization, similar initiatives have not been undertaken. The rules laid down in the ECJ advisory opinion 1/78 apply. The EEC is reluctant with regard to the request for admission to existing organizations; however, new organizations are immediately requested to allow EEC membership together with the EEC Member States' membership. The EE forms currently one delegation composed of eEC Member States and EC Commission. The Commission or the State holding the EEC presidency speak normally for all Member States and the EEC. See e.g. International Energy Agency, founded in 1975 by OECD States; NAFO, the 1979 organization for the exploitation of fishing grounds in the North Atlantic; or a number of commodity agreements (coffee, tin, olive oil, and natural rubber.

(102) This might be the case in the General Agreement on Tariffs and Trade (GATT) where the increasing participation of the EEC organs led to a "de facto" membership (Zieger, G., Die Stellung der Gemeinschaften und ihrer Organe in internationalen Organisationen, in: Aussenbeziehungen der Europäischen Gemeinschaften, op. cit. supra (fn. 93) p. 103 at p. 139) or to a "quasi full membership" (Grabitz, E., Die Stellung der Gemeinschaften und ihrer Organe in internationalen Organisationen, in: Aussenbeziehungen der Europäischen Gemeinschaften, op. cit., p. 47 at p. 65) entirely accepted by

the official status of an observer combined with an agreement on close cooperation (103) or be a simple observer without preferred relations. (104)

In general, international governmental organizations are only open to membership for sovereign States. The instruments founding international bodies note explicitly that only States may adhere. The extension of membership clauses in those multilateral treaties to adherence of States *and* international organizations requires, pursuant to public international law (105), the textual revision of the treaty in question and its reratification. (106) This is equally true with regard to the Chicago Convention, establishing ICAO. According to art. 92 of the Chicago Convention, only "members of the United Nations and

the other contracting States (see Schloh, B., op. cit. supra (fn 93) at p. 90. The EEC delegation to GATT is essentially a EC Commission delegation assisted by the advice of experts of the EEC Member States.
One should equally remind art. 305 para. 1 lit. f of the 1982 United Nations Convention on the Law of the Sea, where parallel membership of international organisations and their member states is possible, but only if and to the extent that there has been a transfer of competence to the organization.

(103) This form of inter-organization cooperation is apparently the preferred way of the Commission to enter into close relations with existing organizations, see inter alia: Exchange of Letters between EEC and World Health Organization (WHO) (OJEC 1982, L 300); Agreement on Cooperation between Council for ARAB Economic Unity and the EEC (OJEC 1982, L 300); United Nations Environment Program (UNEP) (OJEC 1983, C 248); for more information see "The European Community, international organizations and multilateral agreements" Office for Official Publications of the European Communities, (3rd ed.) Brussels 1985 with a complete list of all agreements.

(104) See e.g. art. 12 of the Mandate for the European Commission for Europe (ECE) on which the EEC basis its observer status.

(105) See esp. art. 39 seq. of the Vienna Convention on the Law of Treaties (reflecting customary international law) and supra Chapter 4 (fn. 58).

(106) See equally art. 94 of the Chicago Convention.

States associated with them ..." (107) shall adhere to the Convention. International Organizations are neither mentioned nor taken into consideration.

Formal adherence of the EEC would, consequently, require an amendment to the Convention which, pursuant to art. 94 (a), must be approved by a two-thirds vote of the Assembly and would come into force only *in respect of States which have ratified such amendment*. The Chicago Convention has 162 Member States (1990). The huge number of required ratifications could, in fact, lead to a disunification of law within the organization because of the principle "pacta tertiis nec nocent nec prosunt". (108)

There is, however, the practice within ICAO which is somewhat different from art. 94 (a): in the context of the modification of the constitutional structure of the organization, the increasing number of contracting States, members of ICAO, required adaptation of the ICAO Council. The number of Council Members was increased from twenty-one to thirty-three in several progressive steps by way of amendment of art. 50 (a) of the Convention. (109) None of the amendments to that article is in force for all contracting States; this could, indeed, lead to the situation that, for some States, the Council is still composed of twenty-one, for others of twenty-seven and for a third group of thirty-three members. (110) This problem has been solved in a pragmatic fashion at the 14th session of the Assembly in 1962 when the Plenary accepted - without vote and without objection - the view of the Executive Committee that the

(107) "United Nations" in a convention drafted before the adoption of the Charter of the United Nations (of June 26, 1945) must be understood in a broader way as all allied and neutral States.

(108) See equally art. 34 of the Vienna Convention on the Law of Treaties.

(109) See ICAO Doc. 8170, Doc. 8970, Doc. 8971 on the amendment of art. 50 (a) of the Chicago Convention.

(110) See Milde,M., Chicago Convention - 45 years later, op. cit. supra Chapter 1 (fn. 23) at p. 5.

enlargement of the Council is valid in respect to all contracting States. (111) This pragmatic approach has been repeated since 1962 and allows the conclusion - in the eyes of one author - that amendments to the Convention dealing with institutional problems come into force with *erga omnes* effect in respect to all States, having ratified or not the respective amending instrument. (112)

The potential adherence of the EEC to ICAO is essentially an institutional question. The following evaluation is consequently not mere fiction: The adherence of the EEC or of other international organizations, being at first glance excluded by art. 94 of the Chicago Convention, might be acceptable to the contracting States. Consequently, it is not excluded that this problem can be dealt with in a similar manner as the enlargement of the Council. The question of membership of the EEC becomes, thus, a political and no longer a legal question. (113)

In sum, we have to note that the EEC membership, alone or together with the EEC Member States, is not entirely excluded; the problem could be resolved in a pragmatic manner.

The Chicago Convention does not know any particular "observer" status. According to information of the Legal Bureau of ICAO, the organization does not practice formal relations with "observers" benefiting from particular treatment or other rights. In accordance with its pragmatical approach it currently invites, on an *informal* basis, associations, non-governmental and governmental organizations to attend meetings or conferences where it might be of interest. There is no intention to change this practice in the future. It will, thus, be impossible for the EEC to realize its declared intention to enter in similar official and close relations to ICAO as have been established to

(111) See ICAO Doc. 8269 A 14 - P/21 para 31.

(112) See Milde, M., op. cit. supra (fn. 110) at p. 6.

(113) It might, however, be necessary to determine legally budgetary questions and particularities concerning vote and participation.

WHO (114) on the basis of an official observer status combined with preferential cooperation.

Eventually, it might be possible to work within the ICAO framework on an unofficial basis. According to the principles laid down in Title III of the Single European Act (115) "Treaty Provisions on European Cooperation in the Sphere of Foreign Policy", the EEC Member States "shall endeavor jointly to formulate and implement a European Foreign Policy". (116) Based on consultations and information, joint action shall be prepared in EEC-wide meetings in order to avoid that individual positions of the States impair the effectiveness of the EEC foreign policy "as a cohesive force in international relations or within international organizations." This so-called "European Political Cooperation" (EPC) is compulsory for Member States only as to the consultation and information procedure. The practice shows that in a number of questions a common position could be reached. In this case, it is the delegation of the respective EEC Member State in charge of the presidency of the EEC Council which speaks in international fora for all 12 Member States. As to matters where no such consensus is possible, the individual States are free to disagree. An extensive practice of this concertation procedure might lead, in the future, to a "de facto" EEC participation in ICAO, speaking with one voice in all organs.(117)

(114) See supra (fn. 103), see especially Groux, J., Manin, Ph., op. cit. supra Chapter 2 (fn. 235) at p. 54 for the position of the EEC.

(115) See supra Chapter 1 (fn. 26).

(116) See art. 30 para. 1 of the Single European Act.

(117) Pursuant to the ICAO Legal Bureau first attempts in that direction could be observed in recent meetings of the Executive Committee.

In conclusion, one may note that the participation of the EEC on the basis of an official observer status within ICAO is excluded. Despite the fact that the Chicago Convention does not provide for membership of international organizations in ICAO, the successful amendment to the Convention is not entirely excluded. The pragmatic approach of the ICAO Assembly to institutional questions might ease the adherence of the EEC. In the meantime, the extensive practice of a common foreign policy of the Community in the ICAO framework could indirectly lead to a "de facto" membership of the EEC.

III. EUROPEAN AIR TRANSPORT LAW AND ITS IMPACT ON IATA

IATA, the world-wide association of the international air-carriers, was, and still is, particularly exposed to the European legal developments. A number of its activities, especially in the field of tariff-making, services and its agency programme being, no longer in compatibility with European competition law, have to be adapted to new requirements.

IATA is continuously adjusting its legal structure and practices (118), largely due to regulatory pressure in the United States, Australia, Canada and recently in Europe.

The European-wide competition regime applicable to the intra-EEC air transportation sector since 1988 and to be enhanced - pursuant to the Commission's projects (119) - to all flights within, to and from Europe may, in fact, concern a major share of the global flight operations. In the following we will especially look at IATA's tariff, services, and agency activities and the legal adjustment partly caused by the EEC action.

(118) See Weber, M., Effect of the EEC Air Transport Policy on International Cooperation, in European Transport Law (Vol. XXIV) 1989 at p. 448 seq.

(119) See supra Chapter 2 (fn. 113) but see equally the reluctant position of the Council supra Chapter 2 (fn. 256 - 258) and accompanying text.

1. THE EEC COMPETITION LAW AND THE IATA TARIFF-MAKING MACHINERY

The binding setting of tariffs between air carriers in form of agreements leading to a concerted practice is clearly incompatible with art. 85 of the EEC Treaty sanctioning all such activities which prevent, distort or restrict competition within the Common Market. Agreements fixing purchase or selling prices or other trading conditions are prohibited and void. The same conduct may equally be prohibited under art. 86 of the EEC Treaty as "abuse of a dominant position". (120) However, it remains possible to grant individual or block-exemptions to such agreements or concerted practices. (121) It is in the discretion of the Commission to adopt Regulations in that respect. Under the 1987/88 package block-exemptions may be granted *inter alia* to tariff proposals. According to Directive 601/87 air fares can be submitted for approval

> "following consultations with other carriers, provided that such consultations comply with the requirements of regulations issued pursuant to Council Regulation (EEC) 3976/87 of 14 Dec. 1987 on the application of art. 85 (3)." (122)

The corresponding implementing Regulation 2671/88 (123) allows tariff consultations (not agreements) under *inter alia* the following conditions: the participation in the consultation must be voluntary and open to all carriers, the tariff proposals which may result from the consultation shall not be binding, they must not contain capacity restricting provisions and have to apply

(120) Since ECJ judgment in re "Ahmed Saeed" it is clear that art. 85 and art. 86 can concur, see supra Chapter 2 (fn. 71) and accompanying text.

(121) See supra Chapter 2 (fn. 113 seq.) and accompanying text for Council Regulations 3975/87 and 3975/87.

(122) See supra Chapter 2 (fn. 121) and accompanying text.

(123) See supra Chapter 2 (fn. 124) and (fn. 133) and corresponding text.

uniformly without discrimination on grounds of nationality. (124)

This Regulation, meant to expire on Jan. 31, 1991, had a number of consequences for IATA. In general, IATA's institutional structure and operational mechanisms in the tariff sector were no longer compatible with EEC law.

Although IATA had taken some steps towards liberalization in the late eighties, changing the compulsory adherence to the tariff-making machinery to a voluntary regime, the resolutions on tariffs within Traffic Conferences remained binding on the *participating* carriers. In the aftermath of the 1987/88 EEC legislation IATA had to submit its conference structure to a second reform.

The tariff coordination procedure, applicable to the so-called "Within Europe Area", has been entirely restructured. Subject to governmental approval, tariff coordination in Europe will function in the following manner (125): in conformity with the requirements of non-discrimination (126), the conference will be open to all carriers, IATA members or not, operating a route in the "Within Europe" Conference area, or having applied to operate such a route. The Conference will no longer result in a formal or informal *agreement* to which participating carriers would be bound. Pursuant to IATA Resolution 001u Carriers are entitled to make *individual* filings to the national authorities, being no longer compelled to convene on a joint proposal together with other carriers operating that route. The Conference is consequently only meant to prepare joint or individual unbinding proposals to governments. In accordance with the requirements of Commission Regulation 2671/88, the EEC institutions will be provided with full information and will be entitled to attend the conferences as observer.

(124) See art. 4 of Regulation 2671/88 loc. cit.

(125) See Weber, L., op. cit. supra (fn. 118) at p. 449.

(126) See art. 4 para. 1 lit. d of Regulation 2671/88.

These structural changes within the Traffic Conference have considerably diminished the importance of the tariff coordination within Europe since non-binding consultations leave, at least theoretically, the possibility for fare competition in response to market forces.

As mentioned above, art. 8 para. 3 of Regulation 2671/88 provides for expiration of that instrument on Jan. 31, 1991. New Commission Regulations are under discussion today. A first unofficial draft Regulation intended to replace Regulation 2671/88 is supposed to tighten the existing block-exemption regime in the following manner: according to that proposal tariff coordination shall be strictly limited to "interlinable tariffs". (127)

Interlining, which allows the passenger to use, on the basis of one ticket, the services of two or more carriers, requires coordination of a number of elements including inter-carrier clearing (128), accounting arrangements, tariff coordination, standardized documents and harmonized industry practices.

The Commission recognizes this system as beneficial for the consumer interests and intends to exempt tariff arrangements within interlining agreements - and only such agreements - from the competition rules of the EEC Treaty

This strict regulation proposal has, however, a second and very important element. It defines air fares as "interlinable" in an extremely broad manner. Pursuant to the proposal, fares become *automatically interlinable* as soon as two carriers operating on a route (e.g. Paris - Nice - Rome) enter into consultations - even

(127) For the interlining system and its importance see supra Chapter 1 (fn. 74 seq.) and corresponding text. IATA has underlined in a submission to the Committee of Transport and Tourism of the European Parliament that the EEC air transport liberalization should at least safeguard the interlining system which requires to some extent tariff consultation and a common financial settlement institution; see IATA submission to the Committee of Transport and Tourism of the European Parliament, Brussels, Nov. 29, 1989.

(128) For the functions of the Clearing House see supra Chapter 1 (fn. 77).

without reaching agreement - on fares to be applied on that route. This means that the mere fare consultation obliges the carriers concerned to open those routes for interlining with all other Community carriers flying the same (Paris - Nice - Rome) or partly the same (Paris - Nice; Nice - Rome) route. Even against the will of the two consulting carriers the route becomes mandatorily an interlinable one. This improves the situation of small carriers which can, now, match their flights with those of major carriers, and are entitled to sell tickets for the whole distance in the name of the major carrier, etc.

The effect of this project should not be underestimated. As the draft underlines, the fact that mere *consultation* between carriers on tariffs is sufficient to open the route in question for interlining with all other carriers, it is predictable that, if the Regulation materializes in this form, even unbinding consultations between carriers will be reduced to a strict minimum and only where interlining or competition is desired. Thus, "Interlining" becomes a means to indirectly prevent, if not completely eliminate, tariff concertation between carriers within the EEC.

In conclusion, one can note that the EEC law in place and the legal proposals by the Commissions prevent IATA from maintaining its system of air fare coordination. The 1987/88 package has imposed important changes with regard to the institutional side of the tariff-making procedure. The second phase will go farther and - in an indirect way - reduce tariff consultations between carriers to a minimum.

At this place one may recall the Commission's project in the 1989/90 package (129), intending to apply the EEC competition regime equally to extra-EEC routes. On the background of the judgments in re "Ahmed Saeed" (130) and in re "Wood Pulp" (131),

(129) See supra, loc. cit. Chapter 2 (fn. 149) and (fn. 190 seq.) and accompanying text.

(130) See supra Chapter 2 (fn. 71).

one has to expect that the competition law, applicable to intra-EEC air transport, will soon be *"exported"* to routes to and from the EEC Member States and, thus, concern a large part of the global air transport operations. Air fare agreements and even unbinding air fare consultations are, consequently, likely to be diminished or even eliminated equally in the international aviation relations outside the Community. (131)

In conclusion, we have to note that IATA, being born essentially out of the need for tariff regulation and coordination in the post-war era, in order to avoid "free and uneconomic competition" (132), today has to face a situation where one of its major functions becomes a part of legal history.

2. THE EEC LAW AND CONSEQUENCES FOR IATA's SERVICES CONFERENCES

The EEC competition policy is likely to concern more than mere tariff-related functions of IATA. It is not excluded that IATA's"services" sector will be submitted to intervention by the EEC Commission.

In the aftermath of the first restructuring of IATA in 1978, the Traffic Conferences were split in non-compulsory tariff conferences and compulsory "procedures conferences". (133) Especially the "Passenger Services Conference" might be of

(131) See supra Chapter 3. II.

(131) See equally the U.S. attitude towards joint air fare determination, supra Chapter 1 (fn. 81 seq.), having almost the same effect on IATA as the extra-EEC application of competition law.

(132) See supra Chapter 1. I. and esp. (fn. 58).

(133) See "Provisions for the Conduct of the IATA Traffic Conferences, IATA Doc. (Manual), March 1988. All active IATA member airlines must participate in the so-called trade-association activities to be coordinated in four different "procedures conferences" (Passenger Services, Passenger Agency, Cargo Services, Cargo Agency), see art. IV of the Provisions for the Conduct of the IATA Traffic Conferences.

interest for the Commission. According to art. IV 3 (i) of the "Provisions for the Conduct of the IATA Traffic Conferences", it shall take action on matters relating to passenger services and baggage handling, documentation, procedures, rules and regulation, reservation, ticketing, schedules and automation standards. It equally includes the organization of interlining cooperation.

The EEC Commission is currently investigating whether those (compulsory) carrier activities are compatible with the EEC Treaty. Namely certain aspects of ticketing and accounting coordination, as well as schedule harmonization, may attract the Commission's attention. Recent legislative steps prove the Commission's particular interest for Computer Reservation Systems. (134) It is, however, not entirely clear on what legal ground the Commission can base its investigation activities. (135) Being not excluded that legal steps will be taken in the

(134) See Regulation 2672/87, loc. cit. supra Chapter 2 (fn. 149).

(135) On the background of Regulation 141/62 (see supra Chapter 2 (fn. 54)) excluding air transport from the scope of Regulation 17/62 it is doubtful wether the Commission is entitled to investigate in IATA's service activities. The Commission's practice shows a tendency towards extensive application of Regulation 17/62 based on a narrow concept of the notion of "air transport"; see Argyris, N., op. cit. supra Chapter 2 (fn. 55). In two recent cases it held, e.g., that the functioning of CRS systems and baggage ground handling were not part of "transport" but general services to be covered by Regulation 17/62; see Fifteenth Report on Competition Policy, Brussels, 1986, point 74, and Seventeenth Report on Competition Policy, Brussels 1988, point 86. It is, nevertheless, doubtful wether the distinction between tariff- and flight-related services on the one side (to be governed by Regulation 3975/87 and Regulation 3976/87 or, if not part of the implementation necessary for the application of competition law: unregulated) and "auxiliary services" on the other side (to be governed by Regulation 17/62) is justifiable. Art. 1 of Regulation 3975/87, defining its scope of application, states in general terms that "air transport services" shall be covered by the detailed ruling laid down in that Regulation. It does not give any indication concerning the definition of that term. But it does equally not exclude from its scope "auxiliary services" which are related to the functioning of air transport. The question wether Regulation 17/62 or Regulation 3976/87 (or even no EEC competition law at all) applies is of particular

near future focussing on all or a part of these still compulsory IATA activities, it is likely that IATA has to adapt its services activities similar to the regime applicable in the tariff sector. (136)

3. THE EEC LAW AND CONSEQUENCES FOR IATA's AGENCIES PROGRAMME

Another important IATA function is the organization and control of a global distribution system (137), including some 30,000 agents around the world. (138) As presented above, this system reserved, until recently, the sale of almost 90 % of the entire scheduled passenger ticket volume to a relatively small number of authorized agents. Its functioning was challenged for the first time by the U.S. authorities which concluded in 1984 that continued anti-trust immunity was not in the public interest for the further functioning of an airline distribution system. (139)

The application of the terms of European competition and anti-trust law shows that the restricted participation in a distribution system of selected agents only (140) can limit or

importance since the procedures prescribed and the exemption regime differ considerably. In our opinion it will be up to the ECJ to decide wether one of the mentioned Regulations implementing art. 85 and 86 of the EEC Treaty is applicable or wether a particular new regime concerning "auxiliary services" has to be adopted.

(136) See Weber, L., op. cit. supra (fn. 118) at p. 449, underlining the importance of a cautious approach towards dismantling the services conferences having essential standardization functions for the global interlining system.

(137) See supra Chapter 1. II. 2. c.

(138) See IATA Profile, "IATA's Agency Programmes", IATA publication, Montreal, Geneva, undated, at p. 1.

(139) See idem. at p. 2.

(140) IATA defends the necessity of an international system of accredited agents responding to financial, professional and security criteria with the argument that malpractice or

eliminate competition within the EEC in a prohibited fashion since it excludes others from participation and creates a certain vertical dependency of the intermediaries. (141)

Such distribution systems are, however, not in all cases incompatible with EEC law. Under certain conditions they have been accepted by the ECJ. (142) According to the jurisprudence, reasons like the sufficient financial situation of the intermediary, educational requirements (143) or equipment requirements necessary for the adequate sale of the product can be justification enough to allow the selection of certain agents as intermediaries in the distribution chain. (144) This selection must, however, be based on *objective* criteria, allowing every potential agent who fulfills the requirements to accede to the distribution network *without quantitative restrictions.* (145)

The sale of airline tickets requiring certain qualifications and know how, as well as a particular infrastructure on the side of the agent, might be a good example for distribution of a "product" which, in order to be sold "in good conditions", requires a system of selected intermediaries. As long as the

defalcation by intermediaries may have immediate and particularly harmful effects on the airlines (ticket = cheque).

(141) See in particular case 26/76 "Metro v. Commission and SABA" (I) of Oct. 25, 1977, in ECR 1977, p. 1875 seq.; constant jurisprudence confirmed inter alia by case 86/82 "Hasselblad v. Commission" of Feb. 21, 1984, in ECR 1984, p. 883 seq.

(142) Products of "high quality or technicality" such as cars, electronics and communication equipment, see inter alia "Metro v. SABA" (II) of Oct. 22, 1986, in ECR 1986 p. 3021 seq.; or where the sale is only possible "in good conditions" in the framework of a system of agreed agents, see "Junghans", of Dec. 21, 1976 in OJEC, L 30 of Feb. 2, 1977, are currently exempted from application of art. 85 and 86 of the EEC Treaty.

(143) See ECJ judgment in re "Metro v. Commission and SABA" (I) loc cit supra (fn. 141).

(144) See Gavalda, Chr., Parleani, G., Droit Communautaire des Affaires, Paris, 1988, at p. 499.

(145) See ECJ judgment in re "Metro v. SABA" (II) loc. cit supra. (fn. 142).

system is open to all potential agents of equal qualification and equipment, it is, in principle, compatible with EEC law. IATA agency programmes, which, today, are based on objective criteria, are consequently not a priori incompatible with EEC law.

On the background of the jurisprudence of the European Court of Justice, IATA has recently adapted its "Agency Programmes". (146) Along the lines of the modifications made in 1984 with regard to the U.S. agency structure (147), IATA decided to reorganize the European Agency Network. Travel agents form or will form (148) independent *national* agency coordinating associations or corporations issuing accreditation criteria adapted to national economic and legal requirements. The declared intention is to avoid incompatibilities with national or regional legislations, unavoidable in an inflexible global system, by means of decentralization being more easily adaptable to legal evolutions.

In conclusion, one can note that IATA's agencies programme based on objective and not quantity restricting criteria, allowing access to the distribution network for every travel agent fulfilling the set conditions, is compatible with EEC law. The regionalization of IATA's distribution system will help to create a more competitive climate adapted to legal requirements being acceptable for the EEC Commission and the national competent authorities.

(146) See Weber, L., op. cit. supra (fn. 118) at p. 450.

(147) Including the foundation of a nation-wide "Passenger Network Services Corporation" (IATAN), a non-profit corporation, replacing the International Agency Programmes in the United States.

(148) According to IATA information the new system is already in place in Belgium, the Netherlands and Federal Republic of Germany, and in process of establishment in all other member states of the EEC.

4. CONCLUSION

The EEC activities with regard to IATA's traditional objectives and tasks have increased the already existing pressure on the air carriers' association. This fact has contributed to accelerating the process of restructuring and reorientation already in course. IATA was compelled by European competition law to further liberalize the tariff-making mechanisms which now are likely to entirely disappear in the near future.

In the services sector, a tendency may be observed towards liberalizing all compulsory airline coordination activities, having an impact on intra-EEC competition. In all probability, the services sector will be subject to further scrutiny by the EEC institutions pressing for more transparency in the accounting, ticketing and, in general, the interlining sector. The threat of EEC action in the agency sector has already caused major reorganization of the distribution system.

Ongoing EEC air transport liberalization must, thus, be considered a catalyst for the reform of IATA's structure and functions. The current Director General of IATA, Dr. G.O. Eser, recognizes that increased competition among IATA members is inevitable. (149) In order to justify the further existence of the organization as global air carrier association, IATA is on the way to changing its functions. We can observe a clear shift from air industry coordination activities to new self-sustaining services. (150) We can note *inter alia* the following projects: the establishment of a global centrally operated fares data base called "Airline Industry Management Systems" (AIMS) (151), the

(149) Shifrin, C.A., Competitive airline market spurs IATA to develop new services, in: Aviation Week and Technology, Nov. 16, 1987 at p. 45.

(150) See Shifrin, C.A., op. cit. supra (fn. 149) at p. 45.

(151) See Ott, J., IATA strives to centralize airline tariff information, in: Aviation Week and Space Technology, Aug. 22, 1988 at p. 112.

installation of a more transparent and bank-rate based currency system facilitating carriers' accounting procedures (152), and the development of a universally harmonized computer language, allowing access between different CRS and other computer based systems. (153) At the same time, IATA strengthens its traditional trade association functions comprising investigation in problems, threatening the airline industry, and defence of airline interests in national and international fora. (154)

In sum, we have to recognize that IATA is submitted to "mutation" from a quasi-public regulatory body to an influential trade association of airlines. However, this process is far from being finished, today.

IV. EUROPEAN AIR TRANSPORT LAW AND ITS IMPACT ON BILATERAL AVIATION RELATIONS

The Community's action in the aviation sector may equally affect the bilateral aviation relations between States, being the "third pillar" in th international regulatory system of air transport. It is difficult, if not impossible, to predict evolutions in the inter-State relations governed by public international law and policy considerations. The EEC law in place and the concrete projects presented by the Commission indicate, however, some tendencies. In addition, the probable progressive disappearance of the IATA tariff machinery, referred to in the

(152) Partly in place since July 1989. See equally IATA Profile, New Air Fare Currency System, IATA publication, undated, Geneva, Montreal, p. 2 seq., and Weber, L., op. cit. supra (fn. 118) at p. 449.

(153) See Shifrin, C.A., op. cit. supra (fn. 149) at p. 46.

(154) One may note in this respect the new "worldwide Action Group" and public campaign aiming at alert of governments and the public of the threat caused by airport congestion, see report in IATA Review, 2/90, p. 3 seq.: "Congestion - IATA seeks public support".

large majority of BATAs (155), will contribute to changing the structure and contents of the bilateral aviation relations.

As far as it is predictable, the aviation policy of the EEC will be marked by two concepts which could have a major direct or indirect impact on the future BATAs of the Community and the Member States. There is the "cabotage area" concept, intending, to weld the twelve States together in order to form (at least de facto) one block in the international aviation relations (156), and the "Community air carrier" concept which does away with national designation clauses. Both concepts together will progressively lead to the replacement of the individual States on one side of the agreements by a more diffuse entity, the EEC. This might have the following consequences: first, the involvement of the EEC at the place of single States leads, at least theoretically, to an immense growth of bargaining power. (157) Instead of States with populations between 80,000 and 63 million inhabitants (158), the EEC would now negotiate for approx. 320 Million citizen, grant access to a huge number of highly developed airports, etc. Second, the "Community air carrier" clause would open almost all extra-EEC routes on the basis of multiple designation to all EEC carriers and increase traffic and competition on those city-pairs. Both factors could lead to a considerable improvement of the situation of EEC carriers in the international negotiation of aviation rights.

Provided the EEC sticks closely to the Commission's objective to realize the principle of 'equal opportunity' (159) in the international aviation relations, this could mean that for

(155) See supra Chapter 1 (fn. 108).

(156) See supra Chapter 2 (fn. 214) and Chapter 4 (fn. 17 seq.) and accompanying text.

(157) See supra Chapter 1 (fn. 98) and accompanying text.

(158) Luxemburg and the Federal Republic of Germany as the less and most populated Member States of the EEC.

(159) See supra Chapter 2 (fn. 219).

a number of States access to the EEC as a "cabotage area" will be restricted, the number of gateways and Fifth Freedom privileges might be reduced if those countries do not offer equivalent conditions for Community carriers. For other states, especially Developing countries, the EEC involvement might bring advantages, as only one agreement (instead of twelve) must be negotiated, which could ease the operation, in an economically valid manner, of routes to/from the EEC in connection with intra-EEC Fifth Freedom routes.

A major change will occur in the field of tariff-making and tariff competition. Similar to the U.S.A., the EEC and the Member States will be compelled by the EEC Treaty (160) to impose in their exterior relations a tariff-making regime which is compatible with its provisions. This means that besides the principle of non-discrimination (161) *inter alia* competition law is fully applicable.

As a consequence, BATAs will no longer contain revenue pooling agreements, clauses with regard to tariff consultations and binding agreements, inside or outside the IATA tariff conferences, and other provisions which would clearly be in contravention of the competition law. Strictly speaking, this means that in several hundred agreements the reference to IATA coordination has to be deleted and replaced by other systems of tariff determination.

In sum, one has to note that, in the long run, the contents of BATAs negotiated by the EEC or its Member States will be subject to change. This evolution will, however, require a long transitional period. First, we have to recall that no State can be obliged, under public international law, to accept the EEC as a competent partner in aviation matters which would be speaking and negotiating for the Member States. (162) Thus, it is not

(160) As direct consequence of the ECJ judgment in re "Ahmed Saeed" see supra Chapter 2 (fn. 71).

(161) Art. 7 para. 1 of the EEC Treaty.

(162) See supra Chapter 2 (fn. 235) and accompanying text.

excluded that certain countries would prefer maintaining bilateral inter-State relations with individual Member States. Second, a number of BATAs, concluded recently, are far from expiration and require formal termination and renegotiation. This will, consequently, be a process which can last for years. Third and last, we have seen above that the steps to be undertaken by the EEC will require institutional measures within the Community. (163) Initiatives in that direction have not yet been taken and, given the reluctant attitude of the Council, are far from being realized tomorrow.

Nevertheless, the EEC integration which is already on the way, will, in a long time perspective, completely change the ground pattern of bilateral air transport relations. This might not remain without consequences in other parts of the world and might lead - in response - to equivalent block-building or other forms of very close inter-State cooperation, e.g. in the Far East or in Arab regions. Thus, the EEC's move towards (regional) multilateral regulation could lead to a progressive multilateralization of aviation relations on a global level. A late triumph of multilateralism over bilateralism in the International System of Air Transport Regulation is, consequently, not excluded.

(163) See supra Chapter 2 (fn. 245 seq.) and accompanying text.

CONCLUSION

The International System of Air Transport Regulation has been functioning for more than 40 years based on its three pillars: ICAO provided technical and safety regulations, IATA the framework for tariff and fare coordination, and bilateral agreements (BATAs), eventually, established a world-wide network of economic regulation.

Until now the system proved to work reliably and to be sufficiently flexible for responding to States' and carriers' needs and requirements. It could withstand, without major modifications, the U.S. attempts aiming at economic "deregulation" of the international air transport in the late seventies. The liberalization of the European air market, on the way today, may be considered as a second challenge for the International System of Air Transport Regulation which might have, this time, more far-reaching consequences.

In the last years we have witnessed a growing interest by European institutions in the aviation sector. In fact, civil aviation had been one of the last economic activities in Europe outside common legislation. With the aim to completely integrate the European air market before 1993 the EEC institutions, guided and encouraged by the jurisprudence of the European Court of Justice, implemented, in the first phase, regulations submitting intra-EEC flight operations to the Treaty's competition law. They did not take, in a decided manner, steps towards liberalizing capacity and market access. The Commission's proposals for the second phase are now on the negotiation table and have already - partly - been adopted by the Council. They aim at creating, in full conformity with the EEC Treaty, an "Integrated European Air Market" where Community air carriers can nearly freely benefit from multilaterally exchanged commercial aviation rights and from all Freedoms granted by the EEC Treaty (establishment, movement of workers, etc.).

The European Air Market has, however, more than an interior side. In accordance with the recent jurisprudence of the European

Court the Commission's projects for a European air transport policy concern equally exterior aviation relations of the Member States with non-EEC third States. The EEC Commission intends to apply the Treaty's competition regime to routes to and from the EEC. In addition it has the declared intention to substitute itself to the Member States in the bilateral aviation relations and in a large part of the legislatory functions. The process of air transport liberalization in Europe has, thus, an interior and an exterior aspect.

The modification of the legislative context within the EEC will have a number of positive consequences within Europe. These advantages are, however, coupled with considerable dangers for the air industry which should not remain unmentioned.
The intra-EEC aviation market will show the following characteristics:

1. access and capacity will be almost entirely liberalized, permitting "Community air carriers" to operate all intra-European international routes without further designation or acceptance.

2. tariff competition will be encouraged by a system of flexible zonal approval and later by a system of double disapproval.

3. cabotage (transport within one Member State) being today still reserved for national carriers will (almost inevitably because of art. 7 para. 1 EEC Treaty) be opened to all "Community air carriers".

4. the Treaty's competition rules will be applicable to all agreements or concerted practices among air carriers. Arrangements which are likely to distort competition will be prohibited and void. Only few agreements or unbinding consultations will be exempted from the competition regime, and only as long as necessary for the sound functioning of air transport in Europe. This might namely be the case for interlining and airport slot allocation consultations, but no longer for general tariff and services agreements or consultations.

5. harmonization of legal provisions applicable in the 12 Member States, with regard to operation, safety, working conditions etc. will ease the functioning of the European Air Industry. Standardization is likely to bring operational costs down, which could improve the carriers' position in global competition and benefit the consumer within the EEC.

6. The U.S. deregulation example shows that liberalization of the air industry is likely to increase the traffic volume and the competition between carriers. This could lead to an important improvement of European services and schedule structures.

7. the increase in traffic volume can, however, have an ambiguous effect. Air services vitally require infrastructure on the ground (airports, slots etc.) and in the air (ATC facilities). European central airports are, to an important extent, already at their maximum capacity. The European ATC systems are not harmonized and do not allow efficient control all over Europe in case the traffic volume increases. The growth of the air industry must, consequently, be accompanied by adequate infrastructural measures in order to avoid supplementary risks and loss of revenue due to unbearable airport congestion.

8. competition between air carriers is likely to change the structure of the industry. In the long run, private European-wide operating, and not "national" carriers will compete in an EEC context and will no longer be protected by national laws or government action. This might lead to a strong concentration movement among carriers, similar to the United States after deregulation. An EEC policy in that regard has to be decided on in the near future taking into consideration the following arguments: on the one hand it is desirable to allow concentration and airline mergers; bigger airlines could, then, more easily face international competition by "mega"carriers of U.S. origin or by Asian airlines. But on the other hand it might be beneficiary for the consumers' interests to maintain a system of scattered air carriers of all sizes competing within the EEC.

The European air industry is part of the global system of air transport. The modification of the regional European regulatory framework does not remain without repercussions on the global system. The EEC must not loose sight of legal obligations binding on the Member States. It has to take into consideration that the International System of Air Transport Regulation is a carefully pondered compromise between conflicting interests. The analysis of the compatibility of EEC law in place or in project allows the following conclusions:

1. EEC law is, in its today's shape, compatible with the Chicago Convention. The EEC cannot, nevertheless, be regarded as one "cabotage area" in the sense of art. 7 of the Convention reserving in principle all intra-EEC flights to "Community carriers".

2. the "Community carrier" concept, advanced by the Commission, complies with the requirements of the Chicago Convention with regard to aircraft nationality as long as the EEC law maintains the principle of national registration. "Supranational" registration is not possible under existing international air law.

3. the Chicago Convention does not show flexibility with regard to close international cooperation in the aviation field. The forms of cooperation allowed under art. 77 of the Convention may hinder further integration of the EEC as they are not adapted to supranational structures including transfer of sovereignty to international bodies.

4. it is up to ICAO and to the EEC to find ways within the international legal system allowing close inter-State cooperation without endangering safety of international air transport. Amendments to the Chicago Convention concerning art. 7 (cabotage, cabotage area), art. 77 (international cooperation) and art. 92 (adherence to the Convention) may be taken into consideration.

5. IATA activities such as the tariff-making machinery, the services coordination and the agencies programmes are doubtful under the angle of EEC competition law.

6. IATA's tariff coordination system has been modified recently. In case the Commission's projects materialize, further adaptation of the tariff-making system will be necessary. Tariff consultation for the "Within Europe Area" will almost probably disappear.

7. the services conferences of IATA are under current investigation by the EEC Commission. It is likely that the EEC will request the modification of their compulsory character and more transparency with regard to interlining, ticketing and accounting procedures.

8. the IATA agencies programmes have already been modified in a way compatible with EEC law.

9. due, among other elements, to pressure exercised by the EEC, IATA is changing its face. Its institutional structure and functions show that the organization is shifting from a quasi-public air carrier coordinating organization to a trade association in the classical sense of the term.

10. Bilateral Air Transport Agreements are particularly exposed to the European air transport policy. The Commission requests the Council to be authorized to negotiate and conclude BATAs with third States. This means that Member States' powers in that respect might be shifted to the EEC in the near future.

11. the EEC would, thus, appear as one (de facto) entity in the international aviation relations. This would increase the bargaining position of the Member States in international aviation relations. But it could equally create anxiety on the side of third States facing a protectionist "fortress Europe".

12. The application of competition law in the extra-EEC relations, encouraged by the ECJ jurisprudence and proposed by the Commission in its 1989 proposals, might become reality in the third phase of liberalization. It is likely that a large part of existing BATAs would be concerned by this measure. In this way the EEC would, similar to the U.S.A. in the late 1970s and early 1980s, "export" its interior liberalization.

To summarize, we can note that the EEC law, which has been implemented until now or which is likely to materialize in the phase until 1993, is likely to have a major impact on the International system of Air Transport Regulation, transforming, to a large extent, two of its three "pillars".

Given the repercussions the European liberalization will have, equally inside and outside the EEC market, some considerations should lead future legal action to be undertaken by the EEC institutions: first, the airline industry in Europe, being closely interlinked with the global market, where it has to compete with non-European airlines, cannot be dealt with in the same manner as ground-stationed industries. Their competitive conduct and even their size cannot be determined by "only-European" criteria but must be adapted to the international and global situation. The European air market, as part of the international air transport market, must remain open to international air carriers of third States in order to prevent disintegration of the world-wide system of air transportation; international interlining systems and other forms of cooperation must be maintained.

Second, the process of European integration must take into consideration the existing International System of Air Transport Regulation which is based on a global consensus. A regional system of the size of the EEC could, in fact, destroy the balance carefully maintained in the last 45 years. Criteria and rules which are good for the EEC are not automatically good for the rest of the world; this is true especially for Developing Countries and their carriers.

The modifications necessary under EEC law should, consequently, be implemented in a very cautious manner. A long transitional period should allow European and foreign carriers, legislators and international bodies, like ICAO and IATA, to carefully adapt their action and statutes to new requirements and desirable evolutions, maintaining the International System of Air Regulation based on international consensus.

"The wish to acquire more is admittedly a very natural and common thing; and when men succeed in this they are always praised rather than condemned. But when they lack ability to do so and yet want to acquire more at all costs, they deserve condemnation for their mistakes."

(Niccolò Machiavelli, The Prince, at p. 42.)

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