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Consolidation and Rationalization in the Transatlantic Air Transport Market - Prospects and Challenges for Competition and Consumer Welfare

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CONSOLIDATION AND RATIONALIZATION IN THE TRANSATLANTIC AIR TRANSPORT MARKET— PROSPECTS AND CHALLENGES FOR COMPETITION AND CONSUMER WELFARE

DR. ANTIGONI LYKOTRAFITI*

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ABSTRACT

This article examines the regulation of the air transport sector from the perspective of competition law, focusing specifically on European Union (EU)-U.S. air transport relations. Emphasis is placed on the ongoing negotiations between Europe and the United States for the creation of a transatlantic open aviation area, where U.S. and European airlines will operate freely without restrictions on traffic rights, subject solely to common rules agreed upon by the parties. In 2007, the first-ever EU-U.S. Air Transport Agreement (ATA) was reached, followed in 2010 by a second-stage agreement. All efforts are now concentrated on the conclusion of the final agreement. Given that the transatlantic air transport market accounts for almost sixty percent of world traffic, the conclusion of the final agreement will signal the creation of the biggest liberalized airspace in the world. The prospects and challenges thereof are expected to be major and are examined from the perspective of the consumers, the airline industry, and the law itself. The first part of the article is a flight into the past, tracing the regulation of air transport from the birth of civil aviation up until today. The second part is a flight into the future, aspiring to foresee how smooth or turbulent the transition to the new regime is going to be. Given that the successful application of the final agreement is dependent

upon effective regulatory cooperation aimed ultimately at regulatory convergence, the analysis looks into the prospects and challenges associated with regulatory convergence at both sector-specific and general competition law levels.

I. INTRODUCTION

CONCEPTUALIZING AN OPEN aviation area between the United States and the EU is as demanding an exercise as comprehending the unknown. If one considers that the sector of air transport has been regulated ever since its inception on the basis of bilateral agreements between sovereign states,¹ the idea of an open aviation area where air carriers from a multitude of states operate freely on the basis of common rules is certainly innovative. Although it is true that the creation of a single market in Europe and, in particular, a single air transport market in the 1990s paved the way in this direction, the expansion of this model towards the other side of the Atlantic is undoubtedly a revolutionary idea.

The conclusion in 2007 of the first-ever EU-U.S. ATA opened up a new chapter in EU-U.S. aviation relations, but also in aviation regulation in general. From a fragmented framework, whereby each member state of the EU individually negotiated a bilateral Air Services Agreement (ASA) with the United States, a transition occurred to a uniform system of a multilateral nature, whereby a single ASA negotiated directly between the EU and the United States phased out all bilaterals. Obviously, the materialization of what a few years ago was still unthinkable was, and continues to be, met with significant difficulties. This is why the parties agreed from the outset to a staged approach whereby a couple of preliminary agreements would smooth the way to a final agreement. Since the preliminary agreements reached in 2007 and 2010 are producing their effects, all efforts are now concentrated on the conclusion of the final agreement.

This article aims to clarify the reasons why the old system of bilateral ASAs is no longer sustainable and to look into the newly emerging system from the perspective of competition law. To achieve this, the analysis is divided into two parts. The first part is a flight into the past, tracing the regulation of air transport from the birth of civil aviation to today. The second part is a flight into the future, aspiring to foresee how the industry will

¹ Paul Stephen Dempsey, *The Evolution of Air Transport Agreements*, 33 *ANNALS AIR & SPACE L.* 127, 132 (2008).

be transformed should a final EU-U.S. ATA come into force. Both parts are indispensable for the analysis and have equal importance, as planning the future presupposes a clear understanding of the past.

II. HISTORICAL FLASHBACK—THE REGULATION OF THE AIR TRANSPORT SECTOR FROM THE BIRTH OF INTERNATIONAL CIVIL AVIATION TO TODAY

A. THE BIRTH OF INTERNATIONAL CIVIL AVIATION: FROM THE PARIS CONVENTION OF 1919 TO THE CHICAGO CONVENTION OF 1944

The regulation of civil aviation has been determined to a great extent by the realization of its military potential, as experienced in World War I and World War II. The bombardments of World War I expedited efforts to regulate international aviation. The Paris Convention of 1919² constituted the first codification of public international air law. Article 1 thereof provided that each state would enjoy “complete and exclusive sovereignty over the airspace above its territory.”³ The incorporation of the *cuius est solum* principle into the first article of the Paris Convention was a reflection of the strong security considerations prevailing in the aftermath of a devastating World War.⁴ More importantly, the legitimization and encouragement of national regulation of air transport matters, a corollary of the principle of national sovereignty, provides a first indication of the regulatory course the aviation industry would follow in the years to come.

If the extension of the battlefields in the air experienced in World War I rendered clear the military potential of aviation, the years following the war highlighted its civilian dimension. Large numbers of military aircraft “were available for conversion to civilian use,” opening up new prospects for expeditious transport and communications.⁵ Advances in technology rendered

² Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173.

³ *Id.* art. 1.

⁴ Dempsey, *supra* note 1, at 131.

⁵ *Id.* at 129 n.5.

possible the first intercontinental operations, inducing the creation of air carriers on both sides of the Atlantic.⁶

The outbreak of World War II obliged the aviation forces of that era to concentrate on the production of military aircraft, while using their commercial fleet for military purposes.⁷ In stark contrast to the European civil aviation industry, which by the end of the war had almost been destroyed, its U.S. counterpart went through tremendous growth during the war years.⁸ With a fleet of 20,000 aircraft accounting for seventy-two per cent of world air commerce,⁹ the United States was the unrivaled aviation power of the day. Against this backdrop, the need for a comprehensive regulatory framework for post-war international civil aviation led to the International Civil Aviation Conference (Conference), held in Chicago from November 1 to December 7, 1944 (when the hostilities had not yet ceased).¹⁰

Despite the need for a multilateral exchange of traffic rights, which would have facilitated commercial air transport operations, strong national security and defense considerations prevailing during the war dictated a prudent approach towards the regulation of international civil aviation. The Chicago Convention executed at the conclusion of the Conference did not depart in this respect from the principle of exclusive national sovereignty embedded in the Paris Convention.¹¹ In a similar fashion, it proclaimed that "every State has complete and exclusive sovereignty over the airspace above its territory."¹² Thus, although Article 5 of the Convention allows for a limited multilateral exchange of traffic rights for nonscheduled international flights, no similar provision is made as far as scheduled flights are concerned.¹³ Instead, Article 6 reads "[n]o scheduled international air service may be operated over or into the territory of

⁶ In Europe, national governments and, in particular, the colonial powers of the day concentrated their resources on the creation of national flag carriers, entrusted, *inter alia*, with the mission of linking their overseas acquisitions to their respective homelands. *Id.* at 134. The United States, on the contrary, experienced a proliferation of private airlines, in their majority dependent, nevertheless, upon government subsidies for their survival. *See id.*

⁷ *Id.* at 135.

⁸ *Id.* at 135–36.

⁹ *Id.* at 137.

¹⁰ *Id.* at 135–36.

¹¹ Convention on International Civil Aviation art. 1, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

¹² *Id.*

¹³ *Id.* art. 5.

a contracting State, except with the special permission or authorization of that State, and in accordance with the terms of such permission or authorization."¹⁴ In addition, while the freedom to provide cabotage services¹⁵ was not prohibited, save for on an exclusive basis,¹⁶ the right to refuse such freedom was vested with the contracting states.¹⁷

Article 1 of the Convention, in conjunction with Article 6, in essence prevented any multilateral exchange of traffic rights on the basis of universally accepted terms and conditions. Instead, they paved the way for bilateral solutions on the basis of government-to-government negotiations. The reason for the failure of the Conference to address the growing needs of international civil aviation by means of multilateral regulation is obviously related to the balance of power between the two leading aviation forces of that time (the United States on the one hand and the United Kingdom on the other). The United States, enjoying an unrivaled superiority in aircraft capacity and technological expertise gained during the war,¹⁸ was interested in safeguarding access to foreign states through the privilege of friendly passage. It therefore advocated a system of commercial freedom of airlines.¹⁹ The United Kingdom, on the other hand, whose aviation industry had been severely harmed during the war, yet which was still a colonial power controlling strategic points around the globe, fearful of unrestrained competition from the United States, was anxious to preserve its historical rights while rebuilding its economy and aviation industry.²⁰ It therefore aimed at a protectionist system along the lines of an International Regulatory Air Authority.²¹

The policy disagreement between the United States and the United Kingdom resulted in the Chicago Convention regulating

¹⁴ *Id.* art. 6.

¹⁵ Cabotage refers to the freedom to provide domestic services, i.e., services originating in and destined for the same country. *See id.* art. 7.

¹⁶ Article 7, second sentence, reads: "Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis, . . . and not to obtain any such exclusive privilege from any other State." *Id.*

¹⁷ Article 7, first sentence, reads: "Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory." *Id.*

¹⁸ Dempsey, *supra* note 1, at 136.

¹⁹ *Id.* at 136-38.

²⁰ *Id.* at 136-37, 142.

²¹ *Id.* at 142.

only technical and operational aspects of civil aviation rather than economic and commercial aspects, the latter being left to sovereign states to decide on the basis of bilateral negotiations.²² The freedoms of the sky defined up until that moment related to:

- the right of a nation's airlines to fly over the territory of another country in order to reach a third (first freedom);
- the right of a nation's airlines to make technical stops for fuel and maintenance, but not to load or unload passengers or cargo, in another nation while in transit to a third nation (second freedom);
- the right to carry commercial traffic (i.e., cargo and passengers) from the operator's state of origin to a third nation (third freedom);
- the right to carry commercial traffic from a third nation to the operator's state of origin (fourth freedom); and,
- the right to carry commercial traffic between two foreign nations as an extension of a service originating in or destined for the operator's home state (fifth freedom or "beyond right").²³

The first two technical freedoms were exchanged multilaterally by means of the International Air Services Transit Agreement (IASTA),²⁴ which also came out of the Chicago Conference and has been ratified by over 100 states. The International Air Transport Agreement, also produced at the Conference, provided for a multilateral exchange of international air services of all five freedoms of the air.²⁵ Yet, its ratification by a mere eleven states, and certainly not by the United States,²⁶ despite the latter's campaign for liberalism and openness, did little to change the compromise solution promoted at the Confer-

²² See Chicago Convention, *supra* note 11, arts. 77–79; Dempsey, *supra* note 1, at 144–45.

²³ 1944 International Air Services Transit Agreement art. I, § 1, Dec. 7, 1944, 59 Stat. 1963 [hereinafter IASTA]; Int'l Civil Aviation Org. [ICAO], *Manual on the Regulation of International Air Transport*, at 4.1–8, ICAO Doc. 9626 (1st ed. 1996) [hereinafter *IAT Manual*].

²⁴ IASTA, *supra* note 23.

²⁵ 1944 International Air Transport Agreement art. I, § 1, Dec. 7, 1944, 59 Stat. 1701 (entered into force Feb. 8, 1945) [hereinafter *Transport Agreement*].

²⁶ *International Air Transport Agreement Signed at Chicago on 7 December 1944*, ICAO, http://www2.icao.int/en/leb/List%20of%20Parties/Transport_EN.pdf (last visited Oct. 27, 2011).

ence—that of bilateral regulation of international air transport matters.²⁷

Although the very limited multilateral exchange of overflight rights and rights to technical stops left very little room for the formation of a uniform system of air transport rules applied indiscriminately to all industry participants, the growth dynamic of civil aviation, already evident during the war years, necessitated the creation of a global forum for civil aviation. This role was reserved for the International Civil Aviation Organization (ICAO), established by Article 43 of the Chicago Convention, whose aims and objectives would be “to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport.”²⁸ The carefully crafted wording of the relevant Convention provision delineating ICAO’s objectives is a reflection of the will of the signatories not to delegate any regulatory power in the economic field. This resulted in ICAO being established mainly as a technical standard-setting body, although it cannot be excluded that current developments in the field of economic regulation might induce more active ICAO participation and involvement in the near future.²⁹

B. EARLY DEVELOPMENT PHASES OF INTERNATIONAL CIVIL
AVIATION: FROM BERMUDA I TO FIRST GENERATION
OPEN SKIES AGREEMENTS

1. *Bermuda I*

Upon the conclusion of the Chicago Conference, the United States engaged in bilateral negotiations with a number of coun-

²⁷ The freedoms of the sky that have since developed include: the right to carry commercial traffic between two foreign nations via the operator’s state of registry (i.e., the right of a carrier to fly from a foreign country to its home country, pick up passengers and then carry them on to another foreign country) (sixth freedom); the right to carry commercial traffic outside the operator’s territory (i.e., the right to carry traffic between two foreign nations independent of any service originating in or destined for the carrier’s home nation) (seventh freedom); the right to carry traffic from one point in the territory of a foreign country to another point in the same country on a flight which originates in the airline’s home country (eighth freedom or consecutive cabotage); the right to carry traffic from one point in the territory of a foreign country to another point in the same country (ninth freedom or pure cabotage). *IAT Manual*, *supra* note 23, at 4.1-9 to 4.1-10.

²⁸ Chicago Convention, *supra* note 11, arts. 43–44.

²⁹ See Ruwantissa Abeyratne, *The Role of the International Civil Aviation Organization (ICAO) in the Twenty First Century*, 34 *ANNALS AIR & SPACE L.* 529, 535 (2009).

tries in an effort to safeguard critical traffic rights for its carriers.³⁰ These early bilaterals were modeled on the so-called Form of Standard Agreement for Provisional Air Routes, a model bilateral agreement produced at the Chicago Conference. Nevertheless, the negotiations with the United Kingdom held in Bermuda from January 15 to February 11, 1946,³¹ culminated in a different bilateral agreement from the ones the United States had concluded up to that point. Bermuda I,³² also characterized as the “Magna Carta of international aviation,”³³ defined the identity of civil aviation for decades, constituting the prototype for future bilateral agreements.³⁴

A product of compromise between American liberalism and British protectionism, the agreement dealt with the issues typically addressed by a bilateral agreement (i.e., market entry (designation of airlines and routes) and traffic rights, capacity and frequency of service, and rate-setting) in a moderately restrictive way.³⁵ Thus, while the designation of carriers was left with individual governments, the routes to be operated were to be negotiated bilaterally. Moreover, although the determination of capacity and frequency levels fell in the first instance within the discretion of the airlines, such determination had to respect traffic demand, subject to ex post facto review by individual governments.³⁶ Lastly, while the setting of fares was delegated to the International Air Transport Association (IATA), its authority was curtailed by the so-called double-approval requirement.³⁷ Yet, the most salient feature of the agreement was still another one. For the first time in a bilateral ASA, the parties reserved the right to not allow the exercise of traffic rights by carriers in cases where they were “not satisfied that substantial ownership

³⁰ Dempsey, *supra* note 1, at 145. Interestingly, the first bilateral agreement in the history of civil aviation was concluded in 1913 between Germany and France, which agreed to allow, under conditions, each other's aircraft into their airspace until a multilateral air convention was adopted. *Id.* at 132.

³¹ *Id.* at 145.

³² Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between Their Respective Territories, U.S.-U.K., Feb. 11, 1946, 60 Stat. 1499 [hereinafter *Bermuda I*].

³³ Harriet Oswalt Hill, Comment, *Bermuda II: The British Revolution of 1976*, 44 J. AIR L. & COM. 111, 112 (1978).

³⁴ Dempsey, *supra* note 1, at 146.

³⁵ *See id.* at 145–46.

³⁶ *Id.* at 146.

³⁷ *See id.* at 145–46.

and effective control of such carriers are vested in nationals of either Contracting [State].”³⁸

2. *Ownership and Control Clauses (O&C)*

The genesis of the ownership and control requirement must be sought in the IASTA and the Transport Agreement, which both provide that “[e]ach 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 a contracting State.”³⁹ It should be noted that the said agreements are multilateral in nature,⁴⁰ which means in practice that the term “contracting state” refers to a multitude of states—in fact, to all parties to the agreement. In contrast, the reference to “either Contracting [State]” in Bermuda I was aimed at the United States and the United Kingdom exclusively, Bermuda I being a bilateral agreement.⁴¹ What is common in both cases is the discretion of the parties to block the designation of an airline (“[e]ach Contracting [State] reserves the right”) rather than any kind of obligation to do so.⁴²

What is meant by the term “substantial ownership and effective control” is an interesting issue, especially as no definition is provided by either IASTA or the Transport Agreement.⁴³ Generally, “substantial ownership” of an airline is understood as majority ownership, meaning ownership of more than fifty percent of an airline’s voting shares.⁴⁴ For instance, the so-called 1992 Licensing Regulation, which formed part of the third European Community (EC or Community) air liberalization package, provided that “the undertaking shall be owned and continue to be owned directly or through majority ownership by Member States

³⁸ Bermuda I, *supra* note 32, art. 6.

³⁹ IASTA, *supra* note 23, art. I, § 5; Transport Agreement, *supra* note 25, art. I, § 6.

⁴⁰ See IASTA, *supra* note 23, art. III; Transport Agreement, *supra* note 25, art. VIII.

⁴¹ Bermuda I, *supra* note 32, art. 6.

⁴² *Id.*; see also IASTA, *supra* note 23, art. I, § 5; Transport Agreement, *supra* note 25, art. I, § 6.

⁴³ See IASTA, *supra* note 23, art. I, § 5; Transport Agreement, *supra* note 25, art. I, § 6.

⁴⁴ Commission Decision 95/404, of 19 July 1995 on a Procedure Relating to the Application of Council Regulation (EEC) No 2407/92 (Swissair/Sabena), art. 10, 1995 O.J. (L 239) 19, 24 (EC).

and/or nationals or Member States.”⁴⁵ This regulation has now been recast and consolidated in EC Regulation No. 1008/2008, which simply provides that “Member States and/or nationals of Member States [shall] own more than fifty percent of the undertaking.”⁴⁶

The U.S. perception of the term “substantial ownership” has fluctuated since its first expression in the Air Commerce Act of 1926⁴⁷ between different percentages of ownership of voting interest, ranging from fifty-one percent to seventy-five percent. Thus, the initial fifty-one percent threshold set by the 1926 Air Commerce Act⁴⁸ was later amended by the Civil Aeronautics Act of 1938, which required an American ownership of seventy-five percent of an airline’s equity.⁴⁹ The Federal Aviation Act of 1958, which was in essence the first piece of legislation promulgated by Congress following the Chicago Convention, maintained the seventy-five percent cap.⁵⁰ Although the latter threshold is still valid, the U.S. Department of Transportation (DOT) has shown a willingness to ease this restriction either on the basis of reciprocity or where American interests are not jeopardized by a higher percentage of foreign ownership.⁵¹ This is so when an increase in foreign equity stake does not exceed forty-nine percent and, most importantly, does not entail an increase in voting equity power, the latter being fixed at twenty-five percent.⁵²

⁴⁵ Council Regulation 2407/92, of 23 July 1992 on Licensing of Air Carriers, art. 4(2), 1992 O.J. (L 240) 1 (EC); *see also* Commission Decision 95/404, *supra* note 44 (“The Commission takes the view that the majority ownership requirement is complied with if at least 50% plus one share of the capital of the air carrier concerned is owned by Member States and/or national Member States.”). Further, the Commission “refers to a concept of ownership of an undertaking which is essentially based on the notion of equity capital.” Commission Decision 95/404, *supra* note 44.

⁴⁶ Regulation 1008/2008, of the European Parliament and of the Council of 24 September 2008 on Common Rules for the Operation of Air Services in the Community (Recast), art. 4(f), 2008 O.J. (L 293) 3, 6.

⁴⁷ Air Commerce Act of 1926, ch. 344, § 9(a), 44 Stat. 568 (repealed 1958).

⁴⁸ *Id.*

⁴⁹ Civil Aeronautics Act, Pub. L. No. 75-706, § 1107(i)(6), 52 Stat. 973, 1028 (1938) (repealed 1958).

⁵⁰ Federal Aviation Act of 1958, Pub. L. No. 85-726, § 101(13), 72 Stat. 731, 737-38 (repealed 1958).

⁵¹ *In re* Acquisition of Nw. Airlines, Inc. by Wings Holdings, Inc., No. 46371, 1991 WL 247884, at *6 (Dep’t of Transp. Jan. 23, 1991).

⁵² On the distinction between voting interest and nonvoting interest, *see id.* at *5, concerning a case about the acquisition of Northwest Airlines Inc. by Wings Holdings, Inc.

Although determining whether an air carrier fulfills the ownership requirement might prove problematic, especially in cases of privatized, publicly traded companies, the criterion that seems to matter most in the assessment of the authorities is that of “effective control.”⁵³ Who actually controls the company (i.e., in whose hands its management lies) is an issue to be decided ad hoc, along the lines, nevertheless, of certain predefined parameters.⁵⁴ EC Regulation No. 1008/2008 defines “effective control” as follows:

[a] relationship constituted by rights, contracts or any other means which . . . confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by: (a) the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.⁵⁵

Similarly, pursuant to U.S. law, the notion of “control” relates to “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.”⁵⁶ This requirement has been further fleshed out by the U.S. Code (U.S.C.), which requires that the “president and at least two-thirds of the board of directors and other managing officers” of a U.S. air carrier be U.S. citizens, “which is under the actual control of citizens of the United States, and in which at least [seventy-five percent] of the voting interest be owned” by U.S. citizens.⁵⁷

It should be noted, nevertheless, that despite the regulatory provisions in force, the fulfillment of the ownership and control conditions remains a function of the quality of the bilateral aviation relationship, as well as of vested aeropolitical interests.⁵⁸

⁵³ See, e.g., Luftverkehrsnachweissicherungsgesetz, [Aviation Compliance Documentation Act], June 5, 1997, BUNDESGESETZBLATT 1997 TEIL I SEITE 1322, §§ 1, 4 (1997) (setting the requirement that shares in German listed airlines be registered shares with restricted transferability, as opposed to anonymous bearer shares).

⁵⁴ Regulation 1008/2008, *supra* note 46.

⁵⁵ *Id.* at 5.

⁵⁶ 17 C.F.R. § 240.12b-2 (2005).

⁵⁷ 49 U.S.C. § 40102(a)(2), (15) (2006).

⁵⁸ This is explicitly stated in the 2007 EU-U.S. ATA: “the DOT considers the totality of circumstances affecting the US airline, and Department precedents have permitted consideration of the nature of the aviation relationship between

For instance, in 1995, the DOT allowed KLM Royal Dutch Airlines to increase its total equity in its subsidiary Wings Holdings, Inc. beyond the initially agreed twenty-five percent and up to forty-nine percent, although Wings had earlier merged with NWA Inc., the parent company of Northwest Airlines.⁵⁹ By contrast, British Airways' attempt a year later to take over U.S. Air was doomed to fail; despite the DOT's willingness to allow an equity participation in U.S. Air higher than the statutory thresholds, the reluctance of the U.K. authorities to liberalize its bilateral air services agreement with the United States, set as a prerequisite for the clearance of the transaction, resulted in a modest investment and final disinvestment some years later.⁶⁰

The rationale behind the establishment and inclusion of ownership and control clauses in bilateral agreements is not difficult to ascertain. The Chicago Convention was negotiated and concluded at a moment when the balance of power between the states of the world was extremely fragile. It suffices to recall that the Axis nations (Germany, Italy, and Japan) had not been invited to the Conference, while the U.S.S.R. declined to attend due to the presence of Spain and Portugal.⁶¹ Against this backdrop, the ownership and control criteria aimed, in the first instance, at "permit[ing] States to refuse to authorize air services by air carriers owned or controlled by certain other States."⁶² In the second instance, the said clauses served:

[T]o establish a link between the air carrier using international commercial rights and the State to which these rights pertain, thereby preventing a situation of potentially non-reciprocated benefits when an air carrier from one State uses another State's rights; to implement a balance of benefits policy in terms of the air carriers of the State involved; to ensure, in certain circumstances, that national air carriers do not use the rights of a foreign State to serve their own State.⁶³

The establishment of a link between the operating air carrier and the designating state through the nationality clauses right

the United States and the homeland(s) of any foreign investors." Air Transport Agreement, May 25, 2007, 2007 O.J. (L 134) 4, 30.

⁵⁹ *In re Acquisition of Nw. Airlines, Inc. by Wings Holdings, Inc.*, No. 46371, 1991 WL 247884, at *5-6 (Dep't of Transp. Jan. 23, 1991).

⁶⁰ See Kirsten Böhmman, *The Ownership and Control Requirements in U.S. and European Union Air Law and U.S. Maritime Law—Policy; Consideration; Comparison*, 66 J. AIR L. & COM. 689, 703 (2001).

⁶¹ Dempsey, *supra* note 1, at 136.

⁶² See *IAT Manual*, *supra* note 23, at 4.4-1.

⁶³ *Id.*

from the outset of civil aviation precluded the appearance of flags of convenience. In stark contrast with international maritime transport, where the ideal of freedom of the seas has led to forum shopping practices, in air transport, airlines fly the flag of their state of registration.⁶⁴ The latter nexus serves a multitude of purposes. First, it renders the country of registration solely responsible for safety and security matters. Moreover, it leaves no space for free-riding practices, whereby third-country airlines benefit indirectly by traffic rights and other privileges negotiated bilaterally by foreign states. Lastly, the exclusive right of states to designate the carriers eligible to operate on certain routes aims at safeguarding a balance of benefits vis-à-vis air carriers, allowing equal participation in air transport activity.

3. *Bermuda II, the U.S. Airline Deregulation Act, and First Generation Open Skies Agreements*

The trade of air rights along the lines of the Bermuda I agreement resulted in the conclusion of thousands of bilateral agreements worldwide. The exchange of traffic rights on a quid pro quo basis, fair and equitable as it is, incentivized the states of the world to engage in bilateral negotiations and conclude ASAs with a multitude of aviation states.⁶⁵ At the same time, the tight rules on designation of routes and airlines, designed to safeguard equality of operating opportunity for the air carriers of both nations, prompted national governments to become involved in air transportation activities through the establishment of their national flag carriers.⁶⁶ Apart from the United States, where private airlines appeared right from the outset, in the rest of the world, and especially in Europe, the tight regulation of the sector nurtured the creation of national airlines, perceived as symbols of national pride and prestige.⁶⁷ Enjoying virtual dominance in their homelands, national champions did not hesitate to operate international networks, even in the absence of sufficient volumes of passengers to render these services profitable.

⁶⁴ See Böhmann, *supra* note 60, at 726–27.

⁶⁵ Pursuant to Articles 81, 82, and 83 of the Chicago Convention, all aeronautical agreements concluded by contracting parties and their airlines shall be registered with the ICAO. See *Welcome to DAGMAR: ICAO's Database of Aeronautical Agreements and Arrangements*, ICAO, <http://www.icao.int/applications/dagmar/main.cfm> (last visited Sept. 30, 2011).

⁶⁶ See Dempsey, *supra* note 1, at 131.

⁶⁷ *Id.* at 131, 134.

Three decades following the signing of Bermuda I, though a dense web of bilateral agreements had emerged, the differing approaches towards the regulation of the industry espoused by the United Kingdom and the United States remained unchanged. In 1976, the United Kingdom renounced Bermuda I and negotiated its more restrictive successor, Bermuda II.⁶⁸ Bermuda II restricted U.S. carriers' fifth freedom rights, providing for a mere exchange of third and fourth freedom rights as the primary objective of international air transport services.⁶⁹ It further aimed at restricting capacity, closing Heathrow Airport to competition by allowing access to a maximum of two carriers from each of the United Kingdom and the United States, and this only for air services destined for specific U.S. airports.⁷⁰ Most interestingly, while under Bermuda I the United States was entitled to designate both U.S. and U.K. airlines and, *mutatis mutandis*, the United Kingdom was entitled to designate both U.K. and U.S. airlines, the amended nationality clause under Bermuda II made the system "unilateral," in that substantial ownership and effective control of the airline shall be vested "in the Contracting Party designating the airline or in its nationals."⁷¹

The tightening of the rules affected by Bermuda II did not in reality reflect the evolution of civil aviation in the course of time and its readiness to undergo structural and operational changes. In the United States, given the unprofitability of U.S. airlines, the need for a switch from operative performance to competitive performance⁷² induced Congress to pass the so-called Airline Deregulation Act of 1978.⁷³ The Act phased out federal regulation of rates, routes, and services for domestic airlines,

⁶⁸ Agreement Concerning Air Services, U.S.-U.K., July 23, 1977, 28 U.S.T. 5367 [hereinafter Bermuda II].

⁶⁹ *Id.* art. 2(1)-(4).

⁷⁰ *Id.* art. 3. From 1978 until 1991, a mere three air carriers were operating out of Heathrow: Pan Am, TWA, and British Airways. A modification of Bermuda II in 1991 resulted in Pan Am and TWA being succeeded by United Airlines and American Airlines, as well as the U.K. designating a second airline, Virgin Atlantic. U.S. GEN. ACCOUNTING OFFICE, GAO/T-RCED-97-103, INTERNATIONAL AVIATION: COMPETITION ISSUES IN THE U.S.-U.K. MARKET 5-6 (1997). The Bermuda II arrangement in essence enabled British Airways to dominate the U.S.-U.K. air passenger segment of the market, capturing the vast part of the traffic. See *id.* at 4.

⁷¹ Bermuda II, *supra* note 68, art. 3(b)(a); P.P.C. Haanappel, *Airline Ownership and Control, and Some Related Matters*, 26 AIR & SPACE L. 90, 93 (2001).

⁷² See Ruwantissa Abeyratne, *Competition in Air Transport—The Need for a Shift in Focus*, 33 TRANSP. L.J. 29, 39 (2005-2006).

⁷³ Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

opening up the industry to market forces.⁷⁴ Nevertheless, despite its sweeping character, regulatory restrictions on foreign investment in U.S. airlines remained unchanged. As a result, the consolidation and rationalization effect of deregulation in the form of unprecedented mergers and acquisitions was restricted in the U.S. domestic market. Therefore, the status quo regarding the regulation of international civil aviation stayed intact.

The deregulation of the U.S. air transport market was coupled with the conclusion of liberal bilateral agreements with a number of nations. Belgium and the Netherlands were the first European countries to enter into first generation open skies agreements with the United States, dispensing with restrictions on designation of carriers, capacity, and rates, in exchange for access to the U.S. domestic market.⁷⁵ Despite internal criticism on the promptness with which the United States opened up its aviation market to foreign airlines without obtaining commensurate benefits for U.S. airlines abroad,⁷⁶ the beneficial effects of the Airline Deregulation Act on competition and consumer welfare, expressed in the form of new market entrants and lower prices, could not go unnoticed on the other side of the Atlantic.

C. AIR TRANSPORT REGULATION AND LIBERALIZATION IN EUROPE

Arguably, the deregulation of the U.S. air transport market caught Europe unprepared in the sense that, since the entering into force of the Treaty Establishing the European Economic Community (EC Treaty) in 1958, no competition regulation had ever been adopted concerning air transport. As a result, not only was there no single European air transport market at that time, but it was not even clear whether the competition provisions of the EC Treaty were applicable in the field of air transport. If the application of the EC Treaty rules to air transport are traced right from the outset, it should first be underlined that a common policy in the sphere of transport (CTP or Common Transport Policy) had been set right from the signing of the EC Treaty as one of the means by which the objectives of the

⁷⁴ *Id.*

⁷⁵ Dempsey, *supra* note 1, at 152, 155–56.

⁷⁶ *See id.* at 157.

Community, as delineated in Article 2, would be achieved.⁷⁷ Illustrative of the "special aspects" ascribed to transport, the treaty included a separate title regulating transport services.⁷⁸ In practice, this meant, as explicitly stated in Article 61(1) of the EC Treaty, that transport was excluded from the treaty provisions on the freedom to provide services.⁷⁹

In particular, as far as air transport is concerned, a further derogation from the transport rules was introduced, leaving this mode of transport outside the scope of Title IV of the EC Treaty. Article 84(2) granted the European Council (Council) the discretion to decide "whether, to what extent and by what procedure appropriate provisions might be adopted for . . . air transport."⁸⁰ Thus, the regulation of the sector was contingent upon positive action by the Council. This special settlement created some controversy over whether air transport was merely excluded from the CTP in the absence of any Council action or from the EC Treaty as a whole.⁸¹

In 1962, the first regulation implementing Articles 85 and 86 of the EC Treaty was introduced.⁸² A few months later, however, transport was exempted from its scope of application.⁸³ On January 1, 1970, the EC Treaty became fully applicable following a transitional period of twelve years.⁸⁴ Yet no light was shed on the controversy in question. The first time the European Court of Justice (Court) had the chance to rule on the issue was in the *French Seamen's* case of 1974.⁸⁵ After pointing out that the obligation of the Community under Article 2 to establish a common market referred to the whole of the economic activities of the Community, the Court clarified that air transport remained, on the same basis as other modes of transport, subject to the general rules of the EC Treaty.⁸⁶ In view of the inactivity of the

⁷⁷ Treaty Establishing the European Economic Community art. 3(e), Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter EC Treaty]. In the consolidated version, the treaty refers to air transport's "distinctive features." Consolidated Version of the Treaty Establishing the European Community art. 71, Dec. 24, 2002, 2002 O.J. (C 325) 40. In the following discussion, reference to articles of the EC Treaty correlate to the 1958 treaty.

⁷⁸ EC Treaty, *supra* note 77, tit. IV (as in effect 1958).

⁷⁹ *See id.* art. 61(1).

⁸⁰ *Id.* art. 84(2).

⁸¹ *See* Case 167/73, *Comm'n v. French Republic*, 1974 E.C.R. 360, 371.

⁸² Council Regulation 17/62, 1959-62 O.J. SPEC. ED. 87, 87 (EC).

⁸³ Council Regulation 141/62, 1959-62 O.J. SPEC. ED. 291, 291 (EC).

⁸⁴ EC Treaty, *supra* note 77, art. 8(1) (as in effect 1958).

⁸⁵ *See French Republic*, 1974 E.C.R. 360.

⁸⁶ *Id.* at 369, 371.

Council, which had not at that time promulgated any implementing legislation, the Court's ruling in essence highlighted the Commission of the European Communities' (Commission) legal and political duty to safeguard the application of the general rules of the treaty to the sector of air transport.⁸⁷ The Commission's reaction to this judgment, as well as to the deregulation of the U.S. aviation market, led to the adoption in 1979 of a very cautious first memorandum, listing future priorities for the development of the European air transport market,⁸⁸ followed by a proposal, in 1981, for an implementing regulation under Article 83 on third country air transport, which was met, nevertheless, with opposition from the Council.⁸⁹

Things started to change radically in 1983 when the Parliament brought an action before the Court against the Council for failure to act in the field of transport pursuant to Article 175.⁹⁰ A year later, the Tribunal de Police de Paris sought a preliminary ruling from the Court on whether certain provisions of the French civil aviation code were compatible with the competition rules of the EC Treaty.⁹¹ Some days later the Commission published a second, more thorough civil aviation memorandum, together with a set of proposals, which paved the way for the liberalization of the air transport market.⁹²

In 1985, the Parliament's transport case was decided.⁹³ In its landmark ruling, the Court concluded that the Council failed to act with regard to the freedom to provide services in the field of international transport and the laying down of conditions under which non-resident carriers could operate transport services in a member state.⁹⁴ Soon after the Court's judgment, the Commission presented its White Paper on Completing the Single European Market, setting out a program of legislative measures

⁸⁷ Abeyratne, *supra* note 72, at 73.

⁸⁸ *Contribution of the European Communities to the Development of Air Transport Services—Memorandum of the Commission*, at 24, COM (1979) 311 final (July 6, 1976).

⁸⁹ Hubert Drabbe, Directorate-Gen., Competition of the European Comm'n, Remarks at the 10th Annual Conference of the European Air Law Association: Extension of EU Air Transport Competition Rules to Air Transport to and from the EU (Nov. 6, 1998), available at http://ec.europa.eu/competition/speeches/text/sp1998_058_en.html.

⁹⁰ Case 13/83, *Parliament v. Council*, 1985 E.C.R. 1556, 1557.

⁹¹ Case 209-213/84, *Ministère Public v. Asjes*, 1986 E.C.R. 1457, 1459.

⁹² See *Commission Proposal for Progress Towards the Development of a Community Air Transport Policy*, at 13, COM (1984) 72 final (Mar. 15, 1984).

⁹³ See generally *Parliament*, 1985 E.C.R. 1556.

⁹⁴ *Id.* at 1600.

whose main objective for air transport would be the establishment of a more liberalized regime with respect to entry, tariff, and capacity control.⁹⁵ The year 1992 was set as the cut-off point by which a single European aviation market should have been created.⁹⁶

This avalanche of developments was without precedent for a field that for almost twenty-five years had not been subject to any competition regulation. In 1985, the Advocate General delivered his opinion in the *Ministère Public v. Asjes* case (commonly known as *Nouvelles Frontières*), confirming the direct applicability of the competition rules of the EC Treaty in the absence of any enacted secondary legislation.⁹⁷ Largely as a result of this opinion, a second case was laid before the Court in January 1986; the German Federal Court of Justice sought a preliminary ruling on whether Article 86 was, on the same basis as Article 85, applicable in the field of air transport.⁹⁸ *Asjes* was finally decided in April 1986; the Court ruled that while in principle Article 85 applies to air transport, such application is dependent upon: (1) prior legislative action by the Council, pursuant to Article 87; or (2) an appropriate Commission decision along the lines of Article 89; or (3) action taken by member states' authorities pursuant to Article 88.⁹⁹

A decisive moment for the history of European integration, with an immediate impact on aviation, was the enactment in 1987 of the Single European Act (SEA).¹⁰⁰ The transition from unanimity to majority voting streamlined the liberalization of the market, overcoming the insurmountable obstacle of the member states' right of veto.¹⁰¹ Despite the Court's prudent judgment in *Asjes* and its reluctance to accept the direct applicability of Article 85, after the enactment of the SEA, it was in the power of the Commission to force the issue. The liberalization of the air transport market took the form of three packages of measures, adopted by the Council in 1987, 1990, and 1992.¹⁰² In contrast to the United States, where the policy chosen was

⁹⁵ *Commission White Paper on Completing the Internal Market*, at 4, COM (1985) 310 final (June 14, 1985).

⁹⁶ *Id.*

⁹⁷ Case 209-213/84, *Ministère Public v. Asjes*, 1986 E.C.R. 1425.

⁹⁸ Case 66/86, *Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, 1986 E.C.R. 808.

⁹⁹ *Asjes*, 1986 E.C.R. at 1470.

¹⁰⁰ Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1.

¹⁰¹ *See, e.g., id.* arts. 6, 9, 16.

¹⁰² *See sources cited infra* notes 103, 105-106.

that of complete deregulation occurring with the adoption of a single piece of legislation (the Airline Deregulation Act) in Europe, the model advanced was that of controlled liberalization, occurring gradually over a period of almost ten years.

The first package of air liberalization measures adopted in 1987, although limited in scope, laid down the foundations for the regulation of the sector on a more competitive basis.¹⁰³ In the meantime, the Court, in view of the new legislation adopted, re-opened the procedure in the *Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* case (commonly known as *Ahmed Saeed*) and, following three hearings, ruled in April 1989 that Article 86 is directly applicable in national courts even in the absence of implementing legislation.¹⁰⁴ In 1990, the second package of measures entered into force,¹⁰⁵ paving the way for the final set of measures, effective as of January 1993,¹⁰⁶ following a period of global economic recession and high fuel prices, attributable mainly to the Gulf War in the early 1990s. In line with the ambitious goal of a single European market, the third, fully-liberalized regulatory package provided uniform standards for intra-EC market access to EC carriers.¹⁰⁷ Consisting of three regulations on market access, air fares, and licensing of air carri-

¹⁰³ Council Regulation 3975/87, of 14 December 1987 on Laying Down the Procedure for the Application of the Rules on Competition to Undertakings in the Air Transport Sector, 1987 O.J. (L 374) 1 (EC); Council Regulation 3976/87, of 14 December 1987 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices in the Air Transport Sector, 1987 O.J. (L 374) 9 (EC); Council Directive 87/601, of 14 December 1987 on Fares for Scheduled Air Services Between Member States, 1987 O.J. (L 374) 12 (EC); Council Decision 87/602, of 14 December 1987 on the Sharing of Passenger Capacity Between Air Carriers on Scheduled Air Services Between Member States and on Access for Air Carriers to Scheduled Air-Service Routes Between Member States, 1987 O.J. (L 374) 19 (EC).

¹⁰⁴ Case 66/86, *Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, 1986 E.C.R. 838, 848.

¹⁰⁵ Council Regulation 2342/90, of 24 July 1990 on Fares for Scheduled Air Services, 1990 O.J. (L 217) 1 (EC); Council Regulation 2343/90, of 24 July 1990 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, 1990 O.J. (L 217) 8 (EC); Council Regulation 2344/90, of 24 July 1990 Amending Regulation (EEC) No 3976/87 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerned Practices in the Air Transport Sector, 1990 O.J. (L 217) 15 (EC).

¹⁰⁶ Council Regulation 2407/92, *supra* note 45; Council Regulation 2408/92, of 23 July 1992 on Access for Community Air Carriers to Intra-Community Air Routes, 1992 O.J. (L 240) 8 (EC); Council Regulation 2409/92, of 23 July 1992 on Fares and Rates for Air Services, 1992 O.J. (L 240) 15 (EC).

¹⁰⁷ Council Regulation 2408/92, *supra* note 106, art. 3(1).

ers, the packages opened up to competition all international routes within the EC.¹⁰⁸ However, domestic flights remained the prerogative of national airlines for four more years, until 1997, when full cabotage rights were extended to all EU carriers.¹⁰⁹

D. THE U.S. ANSWER TO EC LIBERALIZATION

The emergence of a common market in Europe and, in particular, a single air transport market could not but generate action on the other side of the Atlantic. The United States, having traditionally been *à l'avant-garde* of the regulation of international civil aviation, realized that the transition from a system of national ownership and control to a system of community ownership and control had the potential to change the balance of power between U.S. airlines and European airlines. The notion of "Community Carrier," a corollary of the freedom of establishment, brought about extensive market access opportunities for European airlines, which could now serve any route within the EU. The U.S. reaction to EU liberalization was the launch of its "open skies" policy.¹¹⁰

As early as mid-1992, before the third air liberalization package entered into force, the United States announced its willingness to offer open skies air services agreements to EU countries.¹¹¹ These second generation open skies bilaterals were meant to significantly liberalize international air transport services by dispensing with the typical restrictions of traditional bilaterals.¹¹² In particular, the new agreements would provide for:

- (1) [o]pen entry on all routes[;] . . . (2) [u]nrestricted capacity and frequency on all routes[;] . . . (3) [u]nrestricted route and traffic rights[;] . . . (4) [d]ouble-disapproval pricing in Third and Fourth freedom markets[;] . . . (5) [l]iberal charter arrangements[;] . . . (6) [l]iberal cargo regime[;] . . . (7) [c]onversion and remittance arrangement[s;] . . . (8) [o]pen code-sharing opportunities[;] . . . (9) self-handling provisions[;] . . . (10)

¹⁰⁸ The third package of measures has now been recast and consolidated into a single regulation. Regulation 1008/2008, *supra* note 46, at 3.

¹⁰⁹ Council Regulation 2408/92, *supra* note 106, art. 3(2).

¹¹⁰ For a discussion of the U.S. Open Skies policy, see Pablo Mendes de Leon, *Before and After the Tenth Anniversary of the Open Skies Agreement Netherlands-US of 1992*, 28 AIR & SPACE L. 280 (2002).

¹¹¹ Dempsey, *supra* note 1, at 162.

¹¹² *Id.*

[p]rocompetitive provisions on commercial opportunities, user charges, fair competition, and intermodal rights[; and] . . . (11) [e]xplicit commitment for non-discriminatory operation of and access to computer reservation systems.¹¹³

Nevertheless, despite the significant opening of the industry to competition, the delicate issues of ownership and control, ninth freedom rights, and cabotage were not addressed, and were potentially subject to further bilateral negotiations.¹¹⁴

Interestingly, since its inception, the U.S. open skies policy has been associated with the facilitation of airline alliances. U.S. authorities made clear from the outset that upon the conclusion of an open skies agreement, antitrust immunity would be conferred on the parties' airlines either participating in an alliance or intending to forge an alliance.¹¹⁵ The granting of such immunity by the DOT in essence enables airlines to engage in business practices that under traditional antitrust law are per se illegal (e.g., price-fixing and revenue pooling).¹¹⁶ The reason for the readiness of the United States to legalize even blatant infringements of its antitrust legislation may be found in its desire to pioneer the liberalization of international air transport in such a way that the ownership and control regime remained unchanged.

The first member state to respond positively to the United States' calls was, naturally, the Netherlands.¹¹⁷ Building on the original ATA of 1957 and its amended version, the so-called Protocol of 1978, the parties concluded a Memorandum of Consultations (MoC) in 1992 further liberalizing their bilateral air transport relations.¹¹⁸ In November 1992, a couple of months following the adoption of the MoC, KLM Royal Dutch Airlines and Northwest Airlines, which had already engaged in an alliance arrangement, sought DOT clearance of their "cooperation and integration" agreement.¹¹⁹ In January 1993, the DOT inau-

¹¹³ See *In re* Defining "Open Skies," No. 48130, 1992 WL 204010, at *2-5 (DOT Aug. 5, 1992).

¹¹⁴ Adam L. Schless, Comment, *Open Skies: Loosening the Protectionist Grip on International Civil Aviation*, 8 EMORY INT'L L. REV. 435, 452 (1994).

¹¹⁵ Dempsey, *supra* note 1, at 164.

¹¹⁶ *Id.* at 166.

¹¹⁷ Pablo Mendes de Leon, *supra* note 110, at 280.

¹¹⁸ *Id.* at 280, 282-89.

¹¹⁹ Dempsey, *supra* note 1, at 164.

gured its practice of immunizing alliance agreements in anticipation of a proliferation of similar requests.¹²⁰

E. THE EC REACTION TO THE LAUNCH OF THE U.S. OPEN SKIES POLICY

Soon after the aforementioned MoC, the Commission issued a communication urging member states to refrain from entering into new air transport arrangements with the United States.¹²¹ The Commission's efforts to safeguard a mandate from the Council to initiate negotiations with third countries on behalf of the Community and its member states date back to 1979, when its first civil aviation memorandum was adopted.¹²² The 1984 memorandum reiterated the need for a common approach towards international air transport,¹²³ something that was strongly supported a decade later by the *Comité des Sages*, a committee of experts set up by the Commission to analyze the situation of EC civil aviation and make recommendations for future policy initiatives.¹²⁴ In view of the completion of the air liberalization process in Europe, the committee underlined that bilaterals "ignore the new realities" and should be replaced by a multilateral regime directed by the EU—and in particular by the European Commission—rather than the member states.¹²⁵

Despite the Commission's repeated requests to the contrary, six member states—Denmark, Sweden, Finland, Belgium, Luxembourg, and Austria—signed open skies agreements with the United States in May 1995, followed a year later by Germany.¹²⁶ In view of the Council's unwillingness to empower the Commission to negotiate *en bloc* with the United States and given the growing success of the U.S. open skies policy, the Commission initiated infringement proceedings against the aforementioned member states and the United Kingdom, which, while not entering into an open skies agreement, proceeded with an amend-

¹²⁰ Joint Application of Nw. Airlines, Inc. and KLM Royal Dutch Airlines for Approval and Antitrust Immunity, No. 48342, at 12 (DOT Jan. 11, 1993).

¹²¹ *Communication from the Commission to the Council Regarding Air Transport Relations with Third Countries*, at 21, COM (1992) 434 final (Oct. 21, 1992).

¹²² *Contribution of the European Communities to the Development of Air Transport Services—Memorandum of the Commission*, *supra* note 88, at 15.

¹²³ *Commission Proposal for Progress Towards the Development of a Community Air Transport Policy*, *supra* note 92.

¹²⁴ *Comité des Sages, Expanding Horizons: Civil Aviation in Europe, an Action Programme for the Future*, at 5 (Jan. 1994), available at <http://aei.pitt.edu/8690/>.

¹²⁵ *Id.* at 33–34.

¹²⁶ Dempsey, *supra* note 1, at 168–69.

ment of its Bermuda II agreement with the United States.¹²⁷ It was only after the latter action that the Council agreed, in mid-1996, to give the Commission a limited mandate to initiate preliminary talks on a multilateral air transport agreement.¹²⁸

However, the Council's concessions—a product of last minute compromises—soon proved to be a Pyrrhic victory for the Commission. The mandate's limited scope, covering only the so-called “soft-rights” (i.e., computer reservations systems, slot allocation, maintenance, O&C, code-sharing, leasing, competition issues, environmental issues, dispute resolution, and transitional measures), was considered insufficient by the United States as a basis for negotiations.¹²⁹ The latter made clear that a partial agreement was unacceptable and that as long as the hard issues of market access, capacity, airline designation, and pricing had not been included in the agenda, no further progress could be made.¹³⁰ In the face of the Council's consistent refusal to consent to a comprehensive mandate and given the initiation of open skies negotiations between the United States and four new member states (the Netherlands, France, Italy, and Portugal), the Commission reactivated its infringement proceedings under former Article 226 of the EC Treaty.¹³¹ In 2001, following the member states' refusal to comply with the Commission's reasoned opinion, the latter took its legal action to the next level, referring its cases to the Court.¹³²

Having been called on by the Commission to decide:

- whether the Community had exclusive competence to negotiate and conclude open skies agreements with the U.S. and, if so, to what extent, and
- whether the nationality clauses typically included in bilateral air services agreements violate the freedom of establishment enshrined in Article 43,¹³³

the Court handed down its individual judgments for all eight cases in November 2002.¹³⁴ The starting point of the Commis-

¹²⁷ *Id.* at 181–82, 186–87.

¹²⁸ *Id.* at 182.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 183 & n.256.

¹³² See, e.g., Case C-467/98, *Comm'n v. Kingdom of Den.*, 2002 E.C.R. I-09519.

¹³³ For an analysis of the open skies judgments, see Liz Heffernan & Conor McAuliffe, *External Relations in the Air Transport Sector: The Court of Justice and the Open Skies Agreements*, 28 EUR. L. REV. 601 (2003).

¹³⁴ Case C-466/98, *Comm'n v. U.K.*, 2002 E.C.R. I-09427; Case C-467/98, *Kingdom of Den.*, 2002 E.C.R. I-09519; Case C-468/98, *Comm'n v. Kingdom of Swed.*,

sion's rationale against the open skies agreements was their potential to undermine the outcome of the liberalization process (i.e., the establishment of a single European air transport market). In the Commission's perception, the creation of such a common market implied the conferral on the Community of the power to conclude air services agreements with third countries on behalf of the member states.¹³⁵ Such exclusive external power was indispensable for the interests of the Community and the individual member states to be properly safeguarded. In fact, the limited negotiating leverage of the individual member states resulted in a disequilibrium of traffic rights in favor of the U.S. carriers, in that the exchange of traffic rights enabled U.S. carriers to fly from any point in Europe, while obliging European carriers to operate only from their home bases—open skies agreements being always bilateral agreements. In addition, the prohibition of cabotage services in the United States further reduced the options of European airlines when they exercised their beyond rights.

Moreover, the Commission argued that the nationality clauses included in all open skies agreements and in the U.S.-U.K. bilateral agreement impinged upon the fundamental principle of freedom of establishment, enshrined in Article 43 and, therefore, had to be abolished.¹³⁶ The completion of the liberalization process in Europe, and, in particular, the adoption of Regulation 2407/92 on licensing of air carriers, marked the transition from nationally owned and controlled airlines to community owned and controlled airlines. The right of establishment entailed the obligation of the member states' aeronautical authorities to grant an operating license to any airline that was majority owned and effectively controlled by a member state of the Community or its nationals.¹³⁷ The nationality clauses, by reserving such designation for the airlines of the country of designation exclusively, violated the freedom of establishment.¹³⁸

2002 E.C.R. I-09575; Case C-469/98, *Comm'n v. Republic of Fin.*, 2002 E.C.R. I-09635; Case C-471/98, *Comm'n v. Kingdom of Belg.*, 2002 E.C.R. I-09681; Case C-472/98, *Grand Duchy of Lux.*, 2002 E.C.R. I-09741; Case C-475/98, *Comm'n v. Republic of Austria*, 2002 E.C.R. I-09797; Case C-476/98, *Comm'n v. Fed. Republic of Ger.*, 2002 E.C.R. I-09855.

¹³⁵ See, e.g., Case C-467/98, *Kingdom of Den.*, 2002 E.C.R. I-09519, ¶¶ 44–49, 65–72.

¹³⁶ *Id.* ¶¶ 113–15.

¹³⁷ Council Regulation 2407/92, *supra* note 45, art. 2; Council Regulation 2408/92, *supra* note 106, art. 3(1).

¹³⁸ Case C-467/98, *Kingdom of Den.*, 2002 E.C.R. I-09519, ¶¶ 113–16.

According to the Commission, the net result of this described discrimination on the basis of nationality was the distortion of competition between Community Carriers, as well as the prevention of the consolidation of the industry through mergers and acquisitions. That was so because the latter transactions, by reshuffling airlines' ownership and control, could jeopardize traffic rights exchanged bilaterally with third countries on the basis of the nationality principle.

Contrary to the Commission's contention that Article 80(2) constituted the legal basis for its exclusive external competence in the field of air transport, the Court clarified that the said provision, while empowering the Council to confer such an authority on the Community, did not in itself establish such an authority.¹³⁹ The Court further examined whether the Community's external competence could be implied from the completion of the European common air transport market.¹⁴⁰ In examining the internal rules adopted and whether the open skies agreements jeopardized or could jeopardize the objectives of these rules, the Court concluded that to the extent the Licensing and Market Access Regulations applied exclusively to Community Carriers and by no means to carriers of third countries, no exclusive external competence of the Community could be substantiated.¹⁴¹ Therefore, the member states retained their competence to conclude air services agreements with third countries.¹⁴² Nevertheless, the Court identified three areas where the common rules adopted had deprived the member states of their right to assume obligations towards third countries, conferring, as a consequence, exclusive competence on the Community.¹⁴³ These areas pertained to the setting of fares and rates for intra-Community routes, computer reservation systems, and slot allocation. Given that none of the open skies agreements under scrutiny contained rules on slot allocation, the member states had only trespassed on the Community's competence with regard to the remaining two issues.

However, as far as the nationality clauses were concerned, the Court upheld the Commission's view as to their illegality.¹⁴⁴ Given that the ownership and control clauses authorized the

¹³⁹ *Id.* ¶¶ 54–55.

¹⁴⁰ *Id.* ¶¶ 60.

¹⁴¹ *Id.* ¶¶ 61–62.

¹⁴² *Id.* ¶¶ 63–64.

¹⁴³ *Id.* ¶¶ 96–108.

¹⁴⁴ *Id.* ¶¶ 222–33.

United States to withdraw, suspend, or limit the operating licenses or technical authorizations of Community airlines owned and controlled by a member state other than the contracting one under the open skies agreement, Community airlines suffered discrimination on the basis of nationality. As a result, the freedom of establishment could not be exercised properly.¹⁴⁵

The open skies judgments of the Court could not but streamline developments in the field of regulation of international air transport. While the member states were by no means deprived of their privilege under public international law to conclude air services agreements with third countries, unless the very few issues of exclusive Community competence were concerned, they were under a concrete legal obligation to amend their open skies agreements in so far as they were declared illegal and abstain from committing the same infringements in the future.¹⁴⁶ The Court's ruling, though addressed to the defendant member states, created an obligation for all member states to renegotiate their bilateral agreements in order to align them with Community law.¹⁴⁷ Given the dense web of bilateral agreements created over the years, all of which contained nationality clauses, the challenge of negotiating with third countries was evidently great. Convincing third countries to consent to a Community Carrier designation clause was not only a matter of legal obligation, but also of extreme commercial importance.¹⁴⁸ The legal uncertainty that would be generated by a possible refusal of third countries to consent as to the validity of the bilaterals, as well as the traffic rights at stake in the event of unilateral denunciation of the ASAs, highlighted the need for delicate handling of the matter.

In June 2003, the Council, in response to the legal pressure, granted the Commission the long-sought comprehensive mandate to negotiate with the United States and other third countries.¹⁴⁹ Along the lines of the Commission's package of

¹⁴⁵ *Id.*

¹⁴⁶ See *Proposal for a European Parliament and Council Regulation on the Negotiation and Implementation of Air Service Agreements Between Member States and Third Countries*, COM (2003) 94 final (Feb. 2, 2003).

¹⁴⁷ Case C-469/98, *Comm'n v. Republic of Fin.*, 2002 E.C.R. I-09635, ¶¶ 7-8.

¹⁴⁸ *Id.* ¶¶ 9-13.

¹⁴⁹ Press Release, European Comm'n, *New Era for Air Transport: Loyola de Palacio Welcomes the Mandate Given to the European Comm'n for Negotiating an Open Aviation Area with the U.S.* (IP/03/806), at 1 (June 5, 2003); see also Allan I. Mendelsohn, *The USA and the EU - Aviation Relations: An Impasse or an Opportunity?*, 29 AIR & SPACE L. 263, 268 (2004).

proposals communicated in February 2003, the mandate authorized the Commission:

- ➔ “to open negotiations with the United States” for the establishment of an “Open Aviation Area”;
- ➔ “to open negotiations with third countries [for] the replacement of certain provisions in existing bilateral agreements with a Community agreement;” and
- ➔ to prepare “a proposal for a Regulation of the European Parliament and of the Council on the negotiation and implementation of air service agreements between member [s]tates and third countries.”¹⁵⁰

The idea of creating a Transatlantic Common Aviation Area (TCAA), underpinned by the notion that liberalization and harmonization of competitive conditions must go hand in hand, belongs to the Association of European Airlines (AEA).¹⁵¹ Inspired by the establishment of a single air transport market in Europe, following the liberalization of the industry, the AEA envisaged, in 1995, the replication of this model in the transatlantic market.¹⁵² The AEA’s vision was soon espoused by the Commission, which affirmed that

[t]he common transatlantic area will create the biggest liberalised airspace in the world: any airline, European or American, will be able to operate freely without restrictions on traffic rights, subject to compliance with the rules agreed between the parties on competition, safety, and the environment. These rules will be administered by common bodies.¹⁵³

Interestingly, the concept of a TCAA was later replaced with that of an “Open Aviation Area” (OAA). The reasons behind this seem to be of both a practical and a political nature. A TCAA, geographically defined as it is, does not allow for future expansion through the accession of third countries. Moreover, it might come across as some kind of enlargement of the European Common Aviation Area (ECAA), an idea not cherished by the United States.

The *raison d’être* of the general mandate enabling the Commission to negotiate Community-level agreements with third countries was obviously the correction of the legal problems

¹⁵⁰ *Id.*

¹⁵¹ *Open Skies: The EU-US Air Transport Agreement*, ASS’N EUR. AIRLINES, <http://files.aea.be/News/News020408.pdf> (last visited Sept. 21, 2011).

¹⁵² *Id.*

¹⁵³ *Commission White Paper on European Transport Policy for 2010: Time to Decide*, at 100, COM (2001) 370 final (Sept. 12, 2001).

highlighted by the Court and especially the substitution of updated EU clauses for traditional nationality provisions. The alignment of the many hundreds of existing bilaterals with EU standards constituted a real challenge to the extent it required not only the joint action of the Commission and the member states, but also the willingness of the third countries involved to cooperate. In this regard, it was deemed necessary that the member states could negotiate not only in their own areas of competence, but also on issues subject to the horizontal mandate granted to the Commission. To eliminate the risk of inconsistencies, the Commission prepared a standard designation article to replace the old O&C clauses to which the member states had to adhere.¹⁵⁴

Lastly, Regulation 847/2004¹⁵⁵ provided the framework for individual negotiations between member states and foreign states either for the establishment of a new ASA or for the modification of an existing one. Although Regulation 847/2004 affirmed the right of member states to retain control of virtually all aspects of the international commitments they assumed, it rendered the standard EU clauses a *sine qua non* for all agreements.¹⁵⁶ A system of notification by member states and Commission approval, as well as the active participation of other stakeholders in the ASA-making process, was provided for as the necessary safeguard against discrimination between Community Carriers.¹⁵⁷

F. FIRST-STAGE EU-U.S. AIR TRANSPORT AGREEMENT

Soon after the Council's mandate, representatives of the two biggest aviation markets in the world announced their agreement to begin comprehensive negotiations "with the goal of maximising benefits for consumers, airlines, and communities on both sides of the Atlantic."¹⁵⁸ Right from the outset, the EU institutions made clear that they were not willing to accept a

¹⁵⁴ Press Release, European Comm'n, 2515th Council Meeting: Transport, Telecommunications and Energy (9686/03), at 19–20 (June 5, 2003).

¹⁵⁵ See Regulation 847/2004, of the European Parliament and of the Council of 29 April 2004 on the Negotiation and Implementation of Air Service Agreements Between Member States and Third Countries, 2004 O.J. (L 157) 7.

¹⁵⁶ *Id.* art. 1.

¹⁵⁷ See generally *id.* arts. 1–2.

¹⁵⁸ Press Release, European Comm'n, European Union and the United States of America Agree on Opening Negotiations on Open Aviation Area (IP/03/897), at 1 (June 25, 2003).

minimalist “early harvest” agreement.¹⁵⁹ On the other hand, the United States, having negotiated and actually safeguarded an expanded network of access points in Europe thanks to its open skies agreements with many member states, campaigned for a multinationalization of the O&C clauses.¹⁶⁰ However, despite the clash of interests between the two parties, the reality of the Court’s verdict and the consequences that choosing not to act would have had for both aviation markets brought the two parties to the negotiating table with the concrete and time-limited goal of reaching an operational consensus.

An EU-U.S. agreement could not have had any other goal other than the restructuring of the industry in such a way as to allow for efficient cross-border cooperation. The first obvious obstacle to be overcome was the O&C restrictions, as well as the cabotage limitations. The European solution put forward to get around these problems, which also constituted an interesting insight into the future of civil aviation in general, was the concept of an OAA.¹⁶¹ The replacement of the old system of traffic rights with a new one of unlimited access, whereby any licensed airline, either European or American, would be able to operate freely within an open aviation area, subject only to commonly agreed rules on operational safety, security, competition, and environmental protection,¹⁶² has been modeled on a three-tier, rather phased structure. Matters on which a consensus could be reached fairly easily would be addressed first.¹⁶³ Matters whose treatment could take the form of mutual recognition, and as such would be more time-consuming, would follow.¹⁶⁴ Finally, the most contentious and complex aviation issues would be left for the end of the negotiation efforts.¹⁶⁵ As their successful tackling is dependent to a great degree upon prior legislative

¹⁵⁹ Directorate-General for Energy & Transp. European Comm’n, *Information Note on Air Transport Agreement Between the EU and US*, at 1 (Mar. 6, 2007) [hereinafter European Comm’n, *Information Note*].

¹⁶⁰ Mendelsohn, *supra* note 149, at 265, 269.

¹⁶¹ Christian Hofer & Martin Dresner, *The United States—European Union Open Aviation Area: The American Perspective*, 46 J. TRANSP. RES. F. 129, 131 (2007).

¹⁶² *See id.*

¹⁶³ *See id.* at 133.

¹⁶⁴ *Second Stage EU-US “Open Skies” Agreement and Existing First Stage Air Services Agreement – Briefing*, EU Bus. (Mar. 25, 2010), <http://eubusiness.com/topics/transport/open-skies.2/>.

¹⁶⁵ *Id.*

changes, the third phase of the negotiations is expected to last longer.¹⁶⁶

The United States, for its part, came up with an alternative proposal, based on the immediate adoption of an open skies policy, on the replacement of the nationality clauses with a non-discriminatory EU clause, and on the extension of the twenty-five percent foreign ownership of U.S. airlines threshold to forty-nine percent. The underlying reason for the U.S. proposal was Heathrow airport.¹⁶⁷ Implementation of the U.S. open skies regime would entail the opening up of Heathrow to players other than the ones monopolizing its slots up until that time (i.e., British Airways and Virgin Atlantic on the one hand and American Airlines and United Airlines on the other).¹⁶⁸ While this prospect would be optimal for the United States, which steadily supported the obsolescence of the Bermuda II agreement, it faced opposition from the United Kingdom, which had an interest in keeping access to Heathrow limited. With the United Kingdom passionately “lobbying” its case, the U.S. proposal was bound to fail.

Nevertheless, the negotiations were not interrupted. On November 18, 2005, the EU and the United States reached a compromise on the text of an *inter-partes* open skies agreement, which was seen as a first stage in opening markets and enhancing cooperation.¹⁶⁹ Initially, the success of the venture appeared contingent upon the DOT’s ability to convince Congress to approve its Notice of Proposed Rule Making (NPRM).¹⁷⁰ The NPRM, issued in November 2005, covered the “actual control” criterion, relaxing the current limits and thus paving the way for easier access to foreign capital for U.S. air carriers.¹⁷¹ The agreement, being of mixed nature, needed to be ratified by both the Community and the member states. The Council of Transport made clear that its decision would be dependent upon the outcome of the U.S. rulemaking process and stressed the importance of “clear, meaningful[,] and robust policy

¹⁶⁶ *Id.*

¹⁶⁷ Hofer & Dresner, *supra* note 161, at 131, 134–35.

¹⁶⁸ *Id.* at 135.

¹⁶⁹ European Comm’n, *Information Note*, *supra* note 159.

¹⁷⁰ Actual Control of U.S. Air Carriers, 70 Fed. Reg. 67,389 (proposed Nov. 7, 2005) (to be codified at 14 C.F.R. pt. 204, 399).

¹⁷¹ *Id.*

changes” in the area of foreign control of U.S. airlines.¹⁷² However, as probably expected, the adoption of the rule met significant opposition from Congress, in response to which the DOT issued a modified proposal in May 2006 and allowed for further time for consultation.¹⁷³ Despite the efforts of the U.S. administration to educate both Congress and the American public to dissociate national security and defense considerations from the issue of O&C, the opposition continued, obliging the DOT to formally withdraw its proposal in December 2006.¹⁷⁴

The rather discouraging, albeit to some extent expected, outcome of the DOT’s educational efforts did not hinder the Council from requesting the Commission to enter into urgent consultations with the United States, seeking elements that could be used to restore a proper balance of interests. After three rounds of negotiations since the beginning of 2007, and in total eleven rounds of negotiations lasting for four years, the two sides reached the ATA, initialed on March 2, 2007, and finally signed on April 30, 2007 in Washington D.C. at the EU-U.S. Transatlantic Summit.¹⁷⁵ The European Parliament welcomed the draft agreement “as an important step toward[] an integrated transatlantic aviation market” to the benefit of consumers,¹⁷⁶ while the Commission hailed the first-stage treaty as “a centrepiece for a reinvigorated transatlantic relationship” and a big step forward in international aviation.¹⁷⁷

The first-stage agreement, which became effective on March 30, 2008, following a period of provisional application, super-

¹⁷² *Procedure File for the EC/United States Agreement: Air Services, Replacing the Bilateral Agreements by a Community Agreement*, EUR. PARLIAMENT, <http://www.europarl.europa.eu/oeil/file.jsp?id=5336262> (last visited Sept. 22, 2011).

¹⁷³ European Comm’n, *Information Note*, *supra* note 159, at 3–4.

¹⁷⁴ *See id.*

¹⁷⁵ Press Release, European Comm’n, EU-US Open Skies: A New Era in Transatlantic Aviation Starts on 30 March (IP/08/474) (Mar. 28, 2008) [hereinafter Press Release, European Comm’n, IP/08/474], *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/474&format=HTML&aged=0&language=EN&guiLanguage=en>; Press Release, European Parliament, Open Skies EU-US Agreement – MEPs Call for It to Be Endorsed (Mar. 14, 2007), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20070309BRI03996+ITEM-004-EN+OC+XML+V0//EN&language=EN>; Press Release, European Comm’n, Open Sky: Jacques Barrot Welcomes the Draft Aviation Agreement Reached by the EU-US Negotiators (IP/07/277), at 1 (Mar. 2, 2007), [hereinafter Press Release, European Comm’n, IP/07/277], *available at* http://ec.europa.eu/transport/air_portal/international/pillars/global_partners/doc/us/press_release_020307.pdf.

¹⁷⁶ Press Release, European Parliament, *supra* note 175.

¹⁷⁷ Press Release, European Comm’n, IP/07/277, *supra* note 175.

seded the existing bilaterals, putting an end to the fragmentation of the regulatory framework.¹⁷⁸ All EU member states, irrespective of whether they had in the past signed a bilateral air services agreement with the United States, are now bound by common rules along the lines of the recognition by the United States of all European airlines as "Community air carriers."¹⁷⁹ In practice, this paves the way for the consolidation of the European air transport market through mergers and acquisitions as it preempts the danger of traffic rights being lost as a result of changes in the airlines' O&C regime following a merger.¹⁸⁰

In terms of market access, in addition to unlimited third, fourth, and fifth freedom rights, provided for already by the preliminary 2005 agreement, limited seventh freedom passenger rights and unlimited all-cargo rights were for the first time introduced for EU airlines exclusively.¹⁸¹ In line with the parties' desire to promote an international aviation system based on competition in the marketplace with minimum government interference, no restrictions were introduced on the frequency and capacity of the services offered.¹⁸² Moreover, with the exception that U.S. carriers are not allowed to price-lead on intra-EU routes, free pricing was established.¹⁸³ Market access was combined with a spectrum of commercial opportunities for airlines to enter, *inter alia*, into blocked-space or code-sharing agreements, franchising or branding arrangements, as well as wet-leasing arrangements.¹⁸⁴ Additionally, Community Carriers are granted the right to participate in the U.S. "Fly America" program provided that the transportation of passengers and cargo at stake is financed by a U.S. government civilian department, as opposed to a military department.¹⁸⁵ Lastly, guarantees have been granted that applications for antitrust immunity with

¹⁷⁸ Memorandum, European Comm'n, Negotiations on a Second Stage EU-US "Open Skies" Agreement and Existing First Stage Air Services Agreement – Frequently Asked Questions (MEMO/10/74), at 1 (Mar. 10, 2010) [hereinafter Memorandum, European Comm'n, MEMO/10/74].

¹⁷⁹ Press Release, European Comm'n, IP/07/277, *supra* note 175, at 2.

¹⁸⁰ Commission Decision of 11 February 2004 in Case COMP/M.3280-Air France/KLM, 2004 O.J. (L 60) 5.

¹⁸¹ Directorate-Gen. Energy & Transp., European Comm'n, EU/US First-Stage Air Transport Agreement Presentation, at 4, *available at* http://ec.europa.eu/transport/air/international_aviation/country_index/doc/2007_03_27_back_ground_briefing_slides.pdf.

¹⁸² Air Transport Agreement, *supra* note 58, art. 3(4).

¹⁸³ *Id.* art. 13.

¹⁸⁴ *Id.* art. 10(7)–(9).

¹⁸⁵ *Id.* at 41 & annex 3.

regard to airline agreements and cooperative arrangements will be given "fair and expeditious consideration."¹⁸⁶ In practice, this means that Community airlines qualify for ATI under the ATA.

Although the first-stage agreement constitutes a brave step forward in the area of market access, it does not go so far as to open up domestic markets to competition. On the contrary, the ATA makes it clear that cabotage is not conferred on either party's airlines.¹⁸⁷ Yet, the explicit prohibition of cabotage is far from symmetrical if one considers that the European airspace has constituted a large cabotage area since 1997.¹⁸⁸ In practice, this means that although U.S. airlines are allowed to carry traffic between any two domestic EU points, provided of course that the latter do not belong to the same member state, EU airlines do not enjoy equivalent rights in the United States.

Arguably, an effective way to achieve widespread market access is to relax the O&C thresholds in the parties' respective legislation. The agreement introduced an extended ownership clause, whereby the eventuality of EU ownership of fifty percent or more of the total equity of a U.S. airline should not be excluded, but "considered on a case-by-case basis."¹⁸⁹ Such an extension is, nevertheless, effectively preempted by being subject to the unequivocal statement that said ownership should not be presumed to constitute control of that airline.¹⁹⁰ O&C being two sides of the same coin, it is difficult to see how the new clause could ever incentivize the free flow of capital. While the ATA changed very little, if anything at all, in the O&C regime—the O&C limitations in the parties' national legislations having stayed intact—it introduced an interesting provision on the O&C of third-country airlines. Specifically, if third-country airlines are substantially owned by either EU or U.S. nationals, neither party should disallow their designation on the basis of the ASA signed with the third country concerned.¹⁹¹ Moreover, the United States unilaterally assumed the obligation not to oppose the designation of airlines of Liechtenstein, Switzerland, the ECAA, or any African country that has entered into an open

¹⁸⁶ *Id.* ¶ 48, at 40.

¹⁸⁷ *Id.* annex 5.

¹⁸⁸ See Nils Danklefsen, *Air Transport: Market Access*, EUR. PARLIAMENT, 1 (July 2008), http://www.europarl.europa.eu/ftu/pdf/en//FTU_4.6.5.pdf.

¹⁸⁹ Air Transport Agreement, *supra* note 58, annex 4, art. 1(b).

¹⁹⁰ See *id.*

¹⁹¹ *Id.* annex 4, art. 2.

skies agreement with the United States on the grounds that their effective control is vested in EU interests.¹⁹² Apart from its practical value, the provision in question indirectly, but effectively, broadens the ATA's scope of application. This is in line with the parties' expressed will to extend the ATA to include third countries.¹⁹³

Its most interesting feature is that it provides for extensive regulatory cooperation over a range of areas: security, safety, competition, government subsidies, and environment.¹⁹⁴ The realization that the viability of a final agreement is dependent upon a degree of regulatory convergence necessitated not only the adoption of these provisions but also the establishment of a joint committee, a body consisting of representatives of the parties entrusted with the task of reviewing the application of the ATA and resolving, where necessary, questions relating to its interpretation and application.¹⁹⁵ In the event that a dispute is not settled by the Joint Committee, it may be referred to arbitration, unless competition issues are concerned, in which case the authorities in charge are the Commission and the DOT.¹⁹⁶

In line with the EU negotiating mandate and in order to ensure progression to subsequent stages, the first-stage agreement "contain[ed] a strong mechanism for" phase-two agreement within a strictly defined timescale and a list of priority items.¹⁹⁷ Along the lines of this mechanism, second-stage negotiations were initiated on May 15, 2008, soon after the successful launch of the first-stage EU-U.S. ATA on March 30, 2008.¹⁹⁸ The key issues under discussion pertained to "further liberalization of traffic rights," "additional foreign investment opportunities," "environmental measures and infrastructure constraints," further access to Fly America, and wet-leasing.¹⁹⁹ A last minute addition to the ATA was a suspension clause whereby each party reserved the right to suspend rights specified in the ATA if no second-stage agreement was reached by November 2010.²⁰⁰ Although the suspension clause was included in the ATA at the

¹⁹² *Id.*

¹⁹³ *See id.* art. 21.

¹⁹⁴ *See id.* arts. 8, 9, 14, 15, 20.

¹⁹⁵ *See id.* art. 18.

¹⁹⁶ *See id.* arts. 18, 19.

¹⁹⁷ *Id.* art. 21; Press Release, European Comm'n, IP/08/474, at 1, *supra* note 175.

¹⁹⁸ Memorandum, European Comm'n, MEMO/10/74, *supra* note 178, at 2.

¹⁹⁹ Air Transport Agreement, *supra* note 58, art. 21(2).

²⁰⁰ *Id.* art. 21(3).

insistence of the EU, which wanted to ensure that the United States would not simply rely on the *acquis* of the first-stage agreement, stalling further negotiations, it may be seen as a lever of pressure on both sides to further broaden the scope of aviation liberalization.²⁰¹

G. SECOND-STAGE EU-U.S. AIR TRANSPORT AGREEMENT

As wished for, the negotiations continued to come to fruition on March 25, 2010, when a Protocol to Amend the Air Transport Agreement (Protocol) was adopted.²⁰² The initialing of the second-stage agreement was followed by its formal adoption by the Council of Transport Ministers on June 24, 2010, and its official signing by the United States, the EU member states, and the European Commission on the same day.²⁰³

The second-stage agreement is arguably not far-reaching in terms of its contribution to the establishment of an OAA. In terms of market access, very little changed. Domestic cabotage remained a “national” privilege, while traffic rights were not further liberalized.²⁰⁴ Nevertheless, in the area of U.S. Government Procured Transportation a slight improvement did occur to the extent that EU airlines were granted the right to offer services between the United States and non-EU countries (as opposed to services solely between the United States and EU countries, which was the case before).²⁰⁵

The thorniest issue on the list of priority items defined by the parties in Article 21 of the 2007 ATA was that of additional foreign investment opportunities.²⁰⁶ It would not be an exaggeration to contend that, as in the area of liberalization of traffic rights, lip service was paid to this item too. Thus, the EU and its member states undertook to allow majority ownership and effective control of their airlines by the United States or its nationals on the basis of reciprocity, upon confirmation by the Joint Committee that the laws and regulations of the United States permit

²⁰¹ See EU-US ‘Open Skies’ Agreement, EURACTIV.COM, <http://www.euractiv.com/transport/eu-us-open-skies-agreement/article-167482> (last visited Oct. 31, 2011).

²⁰² Protocol to Amend the Air Transport Agreement Between the United States of America and the European Community and Its Member States, Mar. 25, 2010, 2010 O.J. (L 223) 3, 15 [hereinafter ATA Protocol].

²⁰³ Press Release, Council of European Union, 3024th Council Meeting: Transp. Telecomms. & Energy, at 7 (June 24, 2010).

²⁰⁴ ATA Protocol, *supra* note 202, art. 6(4).

²⁰⁵ Compare *id.* art. 7, with Air Transport Agreement, *supra* note 58, annex 3.

²⁰⁶ See Air Transport Agreement, *supra* note 58, art. 21.

majority ownership and effective control of its airlines by the member states or their nationals.²⁰⁷ To the extent that no new concrete obligations were assumed, the issue was effectively left intact.²⁰⁸

Unlike the issue of wet-leasing, which was given no consideration by the parties in the second-stage agreement despite its inclusion in the list of priority items in Article 21 of the ATA, environmental matters were addressed by the second-stage agreement.²⁰⁹ A new, expanded provision on the environment was adopted, accompanied by a Joint Statement on Environmental Cooperation and some eight paragraphs in the MoC dedicated to the environment.²¹⁰ The new provisions provide for regulatory cooperation in a range of environmental issues, often within the framework of the ICAO or the United Nations.²¹¹ The Commission stated that the changes introduced

will strengthen cooperation on environmental matters by requiring the compatibility and interaction of market-based measures (such as emission trading schemes) to avoid duplication; by promoting greater transparency for noise-based airport measures; and by enhancing green technologies, fuels[,] and air traffic management. This cooperation is key to effectively decarbonising international aviation.²¹²

An area that, although not earmarked for consideration in the list of priority items, found its way into the new Protocol is that of aviation security.²¹³ The proclaimed enhanced cooperation between the parties' (respective) regulatory and other authorities aims at achieving a balance between efficiency, on the one hand, and security, on the other hand.²¹⁴ The need to facilitate air transportation in the most economical way, without compromising aviation security, may only be satisfied through a high level of cooperation. The latter may take the form of mu-

²⁰⁷ ATA Protocol, *supra* note 202, art. 6(2).

²⁰⁸ Compare *id.*, with Air Transport Agreement, *supra* note 58, annex 4, art. 1.

²⁰⁹ See ATA Protocol, *supra* note 202, art. 3; see also Air Transport Agreement, *supra* note 58, art. 21.

²¹⁰ ATA Protocol, *supra* note 202, art. 3 & pp. 16–17 & attachment c.

²¹¹ *Id.*

²¹² Press Release, European Comm'n, Breakthrough in EU-US Second-Stage Open Skies Negotiations: Vice-President Kallas Welcomes Draft Agreement (IP/10/371), at 2 (Mar. 25, 2010) (emphasis omitted) [hereinafter Press Release, European Comm'n, IP/10/371].

²¹³ See ATA Protocol, *supra* note 202, at 16 & art. 5(4)(h), (j).

²¹⁴ See *id.* at 16.

tual reliance on the other party's security measures, as well as swift and coordinated responses to new threats.²¹⁵

An innovation of the 2010 Protocol is a provision entitled "Social Dimension."²¹⁶ The creation of transnational companies as a corollary to market liberalization has raised concerns as to possible negative implications for labor.²¹⁷ The new provision could be seen as a commitment or an affirmation that "[t]he opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties' respective laws."²¹⁸ In this respect, an important role has been reserved for the joint committee to the extent that the latter is entrusted with the task of monitoring "the social effects of the Agreement and the development of appropriate responses to [legitimate] concerns."²¹⁹ Despite the Commission's statement that the provision "will not only ensure that the existing legal rights of airline employees are preserved, but that the implementation of the agreement contributes to high labour standards," the selection of the verb "intended" in the relevant Article 17(1) may, in practice, prove problematic.²²⁰

In recognition of the fact that the success of the Protocol presupposes a high degree of regulatory cooperation, the role of the Joint Committee appears enhanced. This is so not only because further issues are brought within the remit of the committee's powers,²²¹ but also because the committee has now been authorized to develop "arrangements for the reciprocal recognition of regulatory determinations"²²²—an authorization that under the 2007 ATA had only been granted with regard to airline fitness and citizenship.²²³ This is arguably a very modest but important step forward, as it might contribute to the ultimate

²¹⁵ See *id.* at 16, art. 5(4)(h), (j).

²¹⁶ See *id.* art. 4.

²¹⁷ See CLAUDE CHÊNE, SPECIAL ADVISOR TO THE EUROPEAN COMM'N, TRANSATLANTIC TRANS-NATIONAL AIRLINE COMPANIES: TAKING ACCOUNT OF SOCIAL ISSUES, at 4 (Sept. 11, 2009), available at http://ec.europa.eu/transport/air/international_aviation/country_index/doc/us_2009_11_10_chene_report.pdf.

²¹⁸ ATA Protocol, *supra* note 202, art. 4(1).

²¹⁹ See *id.* art. 4(2).

²²⁰ Press Release, European Comm'n, IP/10/371, *supra* note 212; see ATA Protocol, *supra* note 202, art. 4(1).

²²¹ See, e.g., ATA Protocol, *supra* note 202, arts. 4(2), 5.

²²² See *id.* art. 5(4)(e).

²²³ Compare Air Transport Agreement, *supra* note 58, art. 18, with ATA Protocol, *supra* note 202, arts. 2, 5(4)(e).

goal of regulatory convergence, if not, ideally, regulatory harmonization.

The conclusion of the second-stage agreement and its entry into force leads inexorably to the question of whether a final agreement is going to be reached, and, if so, when. Arguably, a crucial difference between the first-stage and second-stage agreements is that although in the 2007 ATA the parties agreed on a timeframe within which certain issues had to be resolved, in the 2010 Protocol no such provision was included and, consequently, no suspension clause applies anymore.²²⁴ Although it might be considered justified in view of the delicacy of the issues that have to be handled and finally settled in the final stage of the negotiations and, as such, in line with the EU mandate, the possibility remains that the parties will procrastinate further developments and eventually settle for the 2010 *acquis*.

H. TOWARD SECOND GENERATION OPEN SKIES JUDGMENTS?

Unlike the United States, which has never (at least officially) contested the jurisdiction of the Court to adjudicate on the legality of the nationality clauses under EU law, and therefore, the binding force of its judgments *erga* at least the member states, Russia is one of the few countries in the world that refuses to recognize the EU designation clauses and, thus, indirectly the authority of the Court to bind member states in their relations with third countries.²²⁵ As a result, the member states' bilateral agreements with Russia have not been updated following the open skies judgments, Russia exercising its right not to allow the designation of airlines that are not majority owned and effectively controlled by the other contracting party or its nationals. Russia's insistence on the status quo *ante* the open skies judgments creates problems not only when member states want to designate EU airlines established in their respective territories, which, nevertheless, are not owned and controlled by them or their nationals, but also in cases of airline mergers.²²⁶ Following the takeover of Austrian Airlines by Lufthansa, for instance, Russia "argue[d] that flights operated by Austrian Airlines to Russia would no longer be covered by the ASA between Austria and

²²⁴ Compare Air Transport Agreement, *supra* note 58, art. 21, with ATA Protocol, *supra* note 202, art. 6.

²²⁵ See Memorandum, European Comm'n, Air Transport: Infringements Concerning Bilateral Aviation Agreements with Russia (MEMO/11/167) (Mar. 14, 2011) [hereinafter Memorandum, European Comm'n, MEMO/11/167].

²²⁶ See *id.* at 2.

Russia because the airline was no longer owned by Austrian interests.”²²⁷ As the Commission noted, “To the extent that ‘traffic rights’ for flying over Russian territory are so far only granted for short time periods, this creates uncertainty as to whether Austrian Airlines – not being recognized as an ‘EU carrier’ – might continue to have the right to fly over Russian territory.”²²⁸ Obviously, similar considerations arise in all intra-EU airline merger and acquisition cases (e.g., so far, British Airways/Iberia, Lufthansa/Brussels Airlines, Lufthansa/British Midlands, and Air France/KLM).²²⁹

To Russia’s reluctance to recognize the notion of “EU carrier” and therefore allow for EU designation clauses substituting for traditional nationality clauses, one could also add Russia’s practice of imposing charges on EU airlines for Siberian overflights.²³⁰ In particular, EU airlines overflying Siberia on their way to Asian destinations are obliged to pay special royalties, most of them directly to the Russian airline Aeroflot.²³¹ According to the European Commission, in 2008 alone EU carriers were subjected to charges of approximately \$420 million.²³² The Siberian overflights issue is not new and has constituted an area of tension for a considerable period of time. “In May 2004, the Russian government submitted a commitment to the European Commission, according to which the system of overflight payments would be abolished and modernised by December 2013 at the latest.”²³³ In March 2006, the Commission was mandated by the Council

to negotiate an agreement with the Russian government assuring[:]

- the complete abolition of payments at the latest by 31 December 2013;
- progressive reduction of payments during the transition period from 2006 onwards;
- the end of mandatory commercial agreements related to the overflight of the territory of the Russian Federation by 2013 at the latest;

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *See id.*

²³⁰ *See id.* at 1–2.

²³¹ *Id.* at 2.

²³² *Id.*

²³³ *See International Aviation: Russia*, EUR. COMM’N: MOBILITY & TRANSP. http://ec.europa.eu/transport/air/international_aviation/country_index/russia_en.htm, (last updated Oct. 30, 2010).

- ➔ gradual removal of restrictions on overflights over Russian territory between Europe and Asia and complete elimination of all non-technical restrictions by 2013 at the latest.²³⁴

Later in that year, at the EU-Russia summit in Helsinki, the parties did indeed initial an agreement entitled “Agreed Principles.”²³⁵ Nevertheless, while the agreement was adopted by the Council in May 2007, the Russian Federation has not yet signed it, “as it has linked its implementation with the need to first be allowed to become a fully fledged WTO partner. Since then, Member States efforts to address the issue with Russia bilaterally have failed.”²³⁶

In view of the fact that the aforementioned restrictions stem from the bilateral ASAs between Russia and the member states, the Commission has initiated infringement proceedings under Article 258 of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) against almost the totality of the member states²³⁷ on the grounds that: 1) the nationality clauses infringe upon the freedom of establishment, as declared by the Court in the open skies cases; 2) the obligatory charges for Siberian overflights may violate international law, since pursuant to Article 15 of the Chicago Convention “[n]o

²³⁴ Press Release, Council of the European Union, Council Conclusions on Siberia (Mar. 27, 2006).

²³⁵ See *International Aviation: Russia*, *supra* note 233.

²³⁶ Memorandum, European Comm’n, MEMO/11/167, *supra* note 225; *International Aviation: Russia*, *supra* note 233.

²³⁷ E.g., Press Release, European Comm’n, Air Transport: Commission Launches Infringement Procedures Against Romania over Agreements with Russia on Equal Treatment of EU Airlines (IP/11/586) (May 19, 2011); Memorandum, European Comm’n, EU Law: Commission Acts to Ensure That European Legislation Is Fully and Properly Implemented (MEMO/11/312) (May 19, 2011); Press Release, European Comm’n, Air Transport: Commission Launches Infringement Procedures Against Two Member States over Agreements with Russia on Equal Treatment of EU Airlines and Siberian Flights (IP/11/424) (Apr. 6, 2011); Press Release, European Comm’n, Air Transport: Commission Launches Infringement Procedures Against Six Member States over Agreements with Russia on Equal Treatment of EU Airlines and Siberian Overflights (IP/11/298) (Mar. 14, 2011); Press Release, European Comm’n, Air Transport: Commission Launches Infringement Procedures Against Six Member States over Agreements with Russia on Equal Treatment of EU Airlines and Siberian Overflights (IP/11/186) (Feb. 16, 2011); Press Release, European Comm’n, Air Transport: Commission Launches Infringement Procedures Against Seven Member States over Agreements with Russia on Siberian Overflights (IP/11/74) (Jan. 27, 2011); Press Release, European Comm’n, Air Transport: Commission Launches Infringement Procedures Against France, Germany, Austria, and Finland over Agreements with Russia on Siberian Overflights (IP/10/1425) (Oct. 28, 2010) [hereinafter Press Release, European Comm’n, IP/10/1425].

fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon;"²³⁸ and 3) the obligation of EU airlines to pay overflight charges directly to Aeroflot may infringe "EU antitrust law whereby airlines should not be forced into concluding a commercial agreement with a direct competitor."²³⁹

The Commission's action against the member states raises a number of issues. With regard to the nationality clauses, the issue appears to be what are a member state's obligations under EU law when concluding, amending, or applying a bilateral ASA with a third country when the latter refuses to recognize the *acquis communautaire* as construed by the Court in the open skies cases. The matter becomes more interesting if one considers that the European Commission has not been mandated by the Council to negotiate an ASA with Russia on behalf of the member states, as is the case with the United States, but only to negotiate an agreement concerning the termination of Siberian overflight charges.²⁴⁰ In practice, this means that air transport operations between Russia and the member states may only occur on the basis of existing bilaterals. Were the member states to denounce their bilateral agreements with Russia due to the latter's reluctance to accept the replacement of the nationality clauses with standard EU designation ones, air transportation between the respective territories would be effectively disrupted. It therefore appears that the member states are effectively between a rock and a hard place, as fulfillment of their obligations under EU law amounts to violation of their obligations under international law and vice versa.²⁴¹ Leaving aside the legal parameters of the issue, nevertheless, it could be argued that the ultimate aim of the Commission's action against the member states on these grounds is the retrieval of a mandate to negotiate a multilateral ASA with Russia on behalf of the member states.

The same could not intuitively be said about the invocation by the Commission of Article 15 of the Chicago Convention.²⁴² Article 92 thereof reserves adherence to the Convention to

²³⁸ Chicago Convention, *supra* note 11, art. 15.

²³⁹ See generally sources cited *supra* note 237.

²⁴⁰ See Press Release, Council of the European Union, *supra* note 234.

²⁴¹ See, in this respect, ANGELOS DIMOPOULOS, REGULATION OF FOREIGN INVESTMENT IN EU EXTERNAL RELATIONS LAW (forthcoming 2011).

²⁴² See Chicago Convention, *supra* note 11.

"States,"²⁴³ with the EU enjoying simply observer participation in the ICAO.²⁴⁴ This practically means that the EU cannot possibly demand the application of Article 15 but may only rely on the individual member states' initiative to raise the issue with the ICAO. While it seems that this is exactly what the Commission was aiming at by invoking Article 15 of the Chicago Convention, it is interesting to note that in 2002 the Commission proposed to the EU Council of Ministers that it formally start negotiations on Community membership in ICAO with a view to ensuring a single EU representation.²⁴⁵ Arguably, given that the member states have not yet taken any action on the recommendation, the Commission's action could be seen as an indirect but effective way to readdress the issue.²⁴⁶

Last, but not least, the Commission is concerned that the obligation imposed on EU carriers to pay special royalties to Aeroflot may amount to infringement of EU antitrust law.²⁴⁷ In its 2005 communication on EU-Russia air transport relations, the Commission clarified that the payments in question were "imposed by Russia in the bilateral agreements with Member States through mandatory commercial agreements between EU airlines and Aeroflot."²⁴⁸ Moreover, in a press release regarding action against France, Germany, Austria, and Finland, the Commission stated that the bilaterals "between the four Member States and Russia contain specific provisions . . . on the modalities for fixing the charges that EU-designated carriers must pay to Aeroflot."²⁴⁹ The Commission's concern in this respect appears to be twofold: in the first place, designated EU airlines are de facto forced into concluding commercial agreements with a direct competitor, something that, in the second place, "could

²⁴³ See *id.* art. 92(a) ("This Convention shall be open for adherence by members of the United Nations and States associated with them . . .").

²⁴⁴ See *Recommendation from the Commission to the Council in Order to Authorize the Commission to Open and Conduct Negotiations with the International Civil Aviation Organization (ICAO) on the Conditions and Arrangements for Accession by the European Community*, at 3, SEC (2002) 381 final (Apr. 9, 2002).

²⁴⁵ See *id.* at 1, 3; see also *The European Community at ICAO*, EUR. COMM'N: MOBILITY & TRANSP. http://ec.europa.eu/transport/air/international_aviation/european_community_icao/european_community_icao_en.htm, (last updated Oct. 31, 2010).

²⁴⁶ *The European Community at ICAO*, *supra* note 245.

²⁴⁷ Press Release, European Comm'n, IP/10/1425, *supra* note 237, at 2.

²⁴⁸ *Communication from the Commission to the European Parliament and the Council: A Framework for Developing Relations with the Russian Federation in the Field of Air Transport*, at 3.2.2.1, COM (2005) 77 final (Mar. 14, 2005).

²⁴⁹ Press Release, European Comm'n, IP/10/1425, *supra* note 237, at 2.

lead to competition distortions to the disadvantage of both EU airlines and consumers.”²⁵⁰ Although the Commission has not yet explicitly stated in any of its press releases or other documentation which provisions of the treaty are being violated, it appears that there is room for Article 106(1) of the TFEU to apply, in conjunction with Article 4(3) of the Treaty of the European Union (TEU) and Article 101 of the TFEU.²⁵¹

Following the drafting of this article, a number of important and rather promising developments occurred in the field of EU-Russia aviation relations, briefly mentioned herein. The first important development comes from the field of bilateral air services agreements. Following the initiation of infringement proceedings by the Commission against Finland over its bilateral ASA with Russia in October 2010,²⁵² Finland and Russia undertook, in December 2010, to commence negotiations with a view to amend their bilateral concluded in 1993.²⁵³ A first meeting was held in Helsinki on February 17–18, 2011, where the delegations of the aeronautical authorities agreed to a number of amendments to the 1993 Protocol to bring it into conformity with EU law, subject to approval by the respective governments.²⁵⁴ The next round of formal consultations was held in Russia in June 2011. The consultations culminated in a 2011 Protocol amending the 1993 ASA, signed in Moscow on September 26, 2011, by the Finish and Russian Transport Ministers.²⁵⁵

The 2011 Protocol does away with the nationality principle, setting as a standard of designation the criterion of establishment and the possession of a valid operating license and air operator certificate (all elements being regulated in accordance with the law of the designating country).²⁵⁶ In addition, it

²⁵⁰ *Id.*

²⁵¹ See Consolidated Version of the Treaty on the Functioning of the European Union arts. 101, 106, Sept. 5, 2008, 2008 O.J. (C 115) 47, 88–90; Treaty of the European Union art. 4(3), Feb. 7, 1992, 1992 O.J. (C 191) 1. See also, in this respect, JOSÉ LUIS BUENDIA SIERRE, *EXCLUSIVE RIGHTS AND STATE MONOPOLIES UNDER EC LAW: ARTICLE 86 (FORMER ARTICLE 90) OF THE EC TREATY* (1999).

²⁵² Press Release, European Comm’n, IP/10/1425, *supra* note 237, at 1.

²⁵³ Press Release, Ministry of Transp. and Commc’ns, Amendment to Agreement Provides a New Basis for Air Services Between Finland and Russia (Sept. 27, 2011), available at <http://www.lvm.fi/web/en/pressReleases/-/view/1272609>.

²⁵⁴ *Agreed Minutes*, FREIBURGER AUSBILDUNGSINSTITUT FÜR VERHAITENSTHERAPIE GMBH AN DER UNIVERSITÄT FREIBURG (Feb. 18, 2011), http://favt.ru/favt_new/sites/default/files/Finland.pdf.

²⁵⁵ Press Release, Ministry of Transp. and Commc’ns, *supra* note 253.

²⁵⁶ See generally Pablo Mendes de Leon, *Establishment of Air Transport Undertakings—Towards a More Holistic Approach*, 15 J. AIR TRANSP. MGMT. 96 (2009).

removes obligatory commercial agreements between airlines, therefore resolving the issue of overflight payments to Aeroflot and effectively preempting the Commission's infringement proceedings against Finland.

A further development worth mentioning (in which the aforementioned issues were discussed) is the realization of an EU-Russia aviation summit on October 12–13, 2011, in St. Petersburg. Session I of the Summit was dedicated to the "Policy framework for the development of EU-Russia aviation relations and the prospects of the EU-Russia aviation market."²⁵⁷ In his opening speech, Vice-President of the commission and Commissioner for Transport, Siim Kallas, congratulated Russia on its recent agreement with Finland, calling for the swift enshrinement of the principle of EU designation into all bilateral agreements Russia has concluded with EU member states.²⁵⁸ In its MEMO of October 12, the Commission went a step further, stating that "Russia has recently for the first time accepted the principle of EU designation in its bilateral agreement with one EU Member State and has agreed to use this 'pilot' agreement as a basis for restoring legal certainty to all its bilateral ASAs with EU Member States."²⁵⁹

With regard to the issue of Siberian overflights, Vice-President Kallas drew attention to the pending implementation of the 2006 agreement by Russia, rendering clear that: "Agreed Principles' must enter into force no later than the date on which the final decision on Russia's WTO accession is taken."²⁶⁰ A few days later, on October 21, 2011, the EU's Trade Commissioner announced the settlement of the last outstanding issues in EU-

²⁵⁷ Programme, EU-Russia Aviation Summit October 12–13, 2011, at the Hotel Corinthia, St. Petersburg (October 12–13, 2011) *available at* <http://ec.europa.eu/transport/air/events/doc/eu-russia/programme.pdf>.

²⁵⁸ Siim Kallas, Vice President & Comm'r, European Comm'n, Speech at the EU-Russia Aviation Summit (Oct. 12, 2011) ("I congratulate Russia for its recent agreement with Finland in which Russia for the first time accepts the principle of EU designation. This principle must now be quickly enshrined into all other bilateral agreements that Russia has with EU Member States: this is a pre-requisite for liberalizing air traffic between the EU and Russia. The Finland–Russia agreement could probably serve as inspiration, but not necessarily as a model, for these other agreements.").

²⁵⁹ Memorandum, European Comm'n, EU-Russia Aviation Summit: 12–13 October, 2011 (MEMO/11/695), at 1 (Oct. 12, 2011) [hereinafter Memorandum, European Comm'n, MEMO/11/695].

²⁶⁰ Kallas, *supra* note 258; *see also* Memorandum, European Comm'n, MEMO/11/695, *supra* note 259 ("Russia has confirmed that the agreement will be signed and take effect before a decision is taken on Russia's accession to the WTO.").

Russia relations before Russia's accession to the WTO: "We have struck a deal on the final outstanding bilateral issues, leaving the way open for Russia to join the WTO by the end of this year."²⁶¹ Concerning the issue of Siberian overflights, "the EU has secured a guarantee from Russia that an agreement to amend the system of Siberian overflight payments . . . will be implemented in the coming weeks."²⁶²

Despite the admittedly impressive developments in the field of EU-Russia aviation relations at a political level, the reality on the ground as experienced by the industry might be somewhat different. Addressing the EU-Russia Summit of October 12–13, Olivier Jankovec, Director General ACI Europe, commented: "Not only has the Siberian over-flight issue not been resolved, but red tape and unnecessary restrictions on aviation have actually increased in Russia. The latest example is the imposition of border control measures at airports for crews of foreign aircraft—which are in breach of well-established ICAO standards."²⁶³ It is hoped that the agreement that seems to have been reached between Russia and Finland on simplified arrival and departure procedures for crewmembers²⁶⁴ will be generalized and extended to all bilateral between Russia and the EU member states.

²⁶¹ Press Release, European Comm'n, EU and Russia Agree Terms for Moscow's Eventual WTO Accession (IP/11/1231), at 1 (Oct. 21, 2011).

²⁶² *Id.*; see also Memorandum, European Comm'n, Statement by President Barroso on the Conclusion of a Bilateral Agreement Between Georgia and Russia on Russia's Accession to the World Trade Organization (WTO) (MEMO/11/759), at 1 (Nov. 3, 2011) ("The EU now looks forward to seeing Russia's WTO accession finalised with a view to reaching a consensus decision at the WTO Ministerial Council meeting on 15-17 December in Geneva.").

²⁶³ See *Report, EU-Russia Aviation Summit*, AIR TRANSP. NEWS (Oct. 23, 2011), http://www.airtransportnews.aero/print_analysis.pl?id=1115.

²⁶⁴ *Agreed Minutes*, *supra* note 254, ¶ 7 ("Article 14 quarter, 1. Contracting parties shall, in accordance with the Convention and legislation binding on each Contracting Party, apply on mutual basis simplified procedures of arrival to and departure from the territory of the Russian Federation and the territory of Finland accordingly for members of crewmembers of airlines of the Russian Federation and Finland providing agreed air services on the routes specified in the [present Agreement] including non-regular flights 2. Similar procedure is applied to those crew members participating in non-regular flights from (or in direct of) international airports").

III. A FLIGHT INTO THE FUTURE—EU-U.S. OPEN AVIATION AREA: PROSPECTS AND CHALLENGES FOR COMPETITION

A. INTRODUCTION

The intensification of efforts to reach a final EU-U.S. ATA illustrates the parties' belief in the need to establish an OAA. In fact, both the United States and the EU have either prepared or commissioned studies primarily on the economic impacts and effects of a transatlantic OAA.²⁶⁵ All studies forecast far-reaching benefits for all air travelers, employees, and airlines.²⁶⁶ Although the credibility of these studies has been questioned on the grounds, amongst other things, that they were prepared before the financial crisis and, therefore, all financial projections and relevant quantifications produced fail to reflect current realities,²⁶⁷ the economics of the OAA is the area attracting the most interest and on which all seem to agree.

The recognition by the United States of all member states' airlines as EU airlines has expanded the latter's market access opportunities significantly, as they can now fly from any point in Europe to the United States.²⁶⁸ Moreover, despite the maintenance of the O&C limitations, the possibility has opened up for intra-European mergers, as there is no fear that traffic rights will be lost due to the United States' refusal to approve the designa-

²⁶⁵ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-835, TRANSATLANTIC AVIATION: EFFECTS OF EASING RESTRICTIONS ON U.S.-EUROPEAN MARKETS (2004); BOOZ ALLEN HAMILTON, THE ECONOMIC IMPACTS OF AN OPEN AVIATION AREA BETWEEN THE EU AND THE U.S. (2007), available at http://ec.europa.eu/transport/air_portal/international/pillars/global_partners/doc/us/eu_us_study_executive_summary.pdf; BRATTLE GROUP, THE ECONOMIC IMPACT OF AN EU-U.S. OPEN AVIATION AREA (2002), available at <http://www.brattle.com/Publications/AllPublications.asp>; CHÊNE, *supra* note 217 (discussing the social implications of the Agreement); DEEP INTEGRATION: HOW TRANSATLANTIC MARKETS ARE LEADING GLOBALIZATION (Daniel S. Hamilton & Joseph P. Quinlan eds., 2005), available at <http://www.ceps.eu/book/deep-integration-how-transatlantic-markets-are-leading-globalization>.

²⁶⁶ See, e.g., BOOZ ALLEN HAMILTON, *supra* note 265, at iii (asserting that within five years of its implementation, an OAA will bring about €12 billion in economic benefits; 72,000 new jobs; and 26 million additional passengers).

²⁶⁷ See Mark A. Glynn, *Birds of a Feather: Network Carriers Flock Together in Early Experiences of Transatlantic Open Skies*, 34 ANNALS AIR & SPACE L. 207, 232–34 (2009) (criticizing the 2007 Booz Allen Hamilton study).

²⁶⁸ For instance, following the 2007 ATA, Air France introduced stand-alone services from Heathrow to Los Angeles, while British Airways' subsidiary "Open Skies" started up operations from Paris to New York. See *id.* at 238–39.

tion of the merged entity.²⁶⁹ Of course, this only holds for flights to the United States, as the likelihood still exists that other third countries will continue to exercise their rights under their bilaterals with the member states.²⁷⁰ Although it is true that the EU-U.S. market represents approximately sixty percent of world traffic, the precedent of Russia provides an illustration of the risks EU airlines assume when merging.²⁷¹ The same implication could arise in the event of mergers between EU and U.S. airlines should a final agreement be reached.

This last point provides a first indication of how challenging a final agreement is. This is so not only because it interferes with the regulatory and operational identity of the aviation industry, but mainly because it entrusts the parties with the duty to foresee possible implications and prospects. The analysis that follows aims at illustrating how important it is to fully comprehend what the agreement at issue entails. Thereafter, the ground could be prepared so that the dangers can be effectively prevented and the prospects adequately exploited. The main angle from which the issue will be approached is that of competition law.

B. PROSPECTS AND CHALLENGES

1. *The Consumer Experience*

a. Prospects

Arguably, at the core of each competition-law analysis is and should be the consumer. Air travelers being the consumers of air transport services, it should first be considered what the im-

²⁶⁹ See ATA Protocol, *supra* note 202, art. 6. Since the 2007 ATA, the Commission approved the acquisition of BMI by Lufthansa, see Information from European Union Institution and Bodies: Non-Opportunity to a Notified Concentration Case COMP/M.5403, 2009 O.J. (C 158) 1, 1, the merger between Lufthansa and SNAH (Brussels Airlines), see Summary of Commission Decision Declaring a Concentration Compatible with the Common Market and EEA Agreement Case COMP/M.5335, 2009 O.J. (L 295) 11, 13, the merger between Lufthansa and Austrian Airlines, see Summary of Commission Decision Declaring a Concentration Compatible with the Common Market and EEA Agreement Case COMP/M.5440, 2010 O.J. (C 16) 11, 16, and the merger between British Airways and Iberia, see Information from European Union Institution, Bodies, Offices, and Agencies: Non-Opportunity to a Notified Concentration Case COMP/M.5756, 2010 O.J. (C 241) 1, 1.

²⁷⁰ See ATA Protocol, *supra* note 202, annex 6.

²⁷¹ Press Release, European Parliament, Safeguards for Workers and Environment as Transatlantic Aviation Market Opens Up (May 24, 2011); Memorandum, European Comm'n, MEMO/11/167, *supra* note 225.

pact of a final agreement will be on them. Given that each prospect comes together with a challenge and vice versa, both ends of the spectrum should be considered simultaneously. The immediate effect of expanded market access opportunities is the introduction of new services or increased frequencies of already existing services.²⁷² Market entry is expected to fuel competition and lead to better quality services and lower prices.²⁷³ Innovation is a key word in this respect, as the new business reality might lead to the development of new business models, beyond the already existing ones of hub-and-spoke or network carriers and low-cost carriers.²⁷⁴

The anticipated consolidation and rationalization of the transatlantic market through mergers and acquisitions is meant to bring about efficiencies, which will eventually be passed on to consumers.²⁷⁵ Integration of operations is expected to unleash the value that exists in increased network scale.²⁷⁶ Mergers between airlines with complementary networks are expected to increase connectivity.²⁷⁷ This is translated into more destinations served, but also into the provision of seamless and most likely direct service, as opposed to connecting service, by a single carrier. Mergers between airlines with overlapping networks are expected to lead to network rationalization.²⁷⁸ This translates into better aircraft utilization and thus to lower fares and a more pleasant travel experience for consumers.²⁷⁹ The rationalization of overlapping networks might in turn lead to network expansion, as the released capacity (i.e., aircraft and slots) could be used to penetrate new markets. Moreover, integration of operations is going to unleash the value that exists in enhanced market impact. The greater breadth of service brought about

²⁷² See Org. for Econ. Co-operation & Dev. [OECD], *Airline Mergers and Alliances*, at 8, DAFNE/CLP (2000) 1 (Jan. 26, 2000), available at <http://www.oecd.org/dataoecd/1/15/2379233.pdf>.

²⁷³ See Glynn, *supra* note 267, at 230.

²⁷⁴ *Id.* Soon after the conclusion of the 2007 ATA, Ryanair announced its intention to enter the transatlantic market, modifying its business model so as to offer both premium services and low-cost services. See *id.*

²⁷⁵ See Dorothy Robyn, James Rfitzes & Boaz Moselle, *Beyond Open Skies: The Economic Impact of a U.S.-EU Open Aviation Area*, in DEEP INTEGRATION: HOW TRANSATLANTIC MARKETS ARE LEADING GLOBALIZATION 50, 62 (Daniel S. Hamilton & Joseph P. Quinlan eds., 2005).

²⁷⁶ See *id.* at 59.

²⁷⁷ See *id.*

²⁷⁸ See *id.*

²⁷⁹ This is so, as more comfortable, wide-bodied aircraft will replace the existing ones.

following an airline merger is of utmost interest to corporate clients, as are the merged airlines' combined frequent flyer programs (FFPs). Consumers could further avail themselves of the new entity's enhanced distribution reach.²⁸⁰

b. Challenges

To the extent that consolidation and concentration are inextricable, challenges to consumer welfare could not be excluded. Past experience in the U.S. air transport market following deregulation provides an illustration of what consumers might be faced with should a final agreement come into force. The liberalization of the market following the promulgation of the 1978 Airline Deregulation Act led to a merger wave that literally swept the industry, leaving it with some six mega-carriers (the so-called "big six").²⁸¹ Although the consolidation achieved was initially seen as positive, as it effectively dispensed with the overcapacity that plagued the industry, it soon proved pernicious to competition and consumer welfare.²⁸² The big six, enjoying considerable market shares and, therefore, respective market power, engaged in relentless predation, condemning almost to failure any attempt to enter the market.²⁸³ The predatory practices of dominant U.S. airlines (which, paradoxically, found their best ally in the U.S. judiciary, the latter being influenced by Chicago theorists) lasted for decades, leading in 2001 to a seminal report by the DOT entitled "Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry."²⁸⁴

The likelihood that the same scenario could be replicated in the transatlantic market, even with magnified negative results given the latter's greater size, cannot be excluded. The elimination of the O&C limitations could result in U.S. giants (of American Airlines' and United Airlines' size) merging with European mega-carriers (like Air France-KLM) to create mammoth airlines. The emergence of such transnational, if not transconti-

²⁸⁰ See BOOZ ALLEN HAMILTON, AIRLINE MERGER INTEGRATION: TAKE OFF CHECKLIST 3 (2001), available at http://www.boozallen.com/media/file/Airline_Merger_Integration.pdf.

²⁸¹ See Rodney E. Slater, *How Antitrust Failed in America: The Sad Case of Predatory Pricing in the U.S. Airline Industry*, 32 ANTITRUST L. & ECON. REV. 1, 84 (2003).

²⁸² See *id.*

²⁸³ See *id.*

²⁸⁴ See Charles E. Mueller, *Foreword: Beginning of the End of Monopoly in the U.S. Airline Industry?*, 33 ANTITRUST L. & ECON. REV. 1, 2-3, 10-11 (2006); see also U.S. DOT, Docket No. OST-98-3713, ENFORCEMENT POLICY REGARDING UNFAIR EXCLUSIONARY CONDUCT IN THE AIR TRANSPORTATION INDUSTRY (Jan. 17, 2001).

mental, undertakings itself could arguably prevent new entry or even induce exit. If, in addition, these undertakings were to engage in predatory or other anti-competitive conduct, the outcome would be harmful to all stakeholders. Going a step further, as a merging initiative of that type could not but coerce other airlines to join forces, the possibility of eventually being left with a highly concentrated market is huge. That obviously entails the disappearance of several hundred airlines, ranging from the traditional national flag carriers to regional and other feeder carriers, as a process mainly of either hostile acquisitions or bankruptcies. The immediate elimination of choice entailed might deprive consumers of the service currently enjoyed. Although, for instance, as things stand, the combination of the hub-and-spoke model with that of point-to-point service provides a guarantee that all destinations are being served, the disappearance of smaller airlines, which currently connect secondary markets to big hubs and provide feeder traffic, could amount to services in these markets being reduced or even disrupted. This is so as the design of the merged entities' network, the choice of the destinations served, and the frequencies offered will necessarily be made on the basis of criteria so far pretty much unknown. The likelihood of arbitrariness in this respect remains open. What is more, quality of service may also be affected, further degrading the air travel experience.

The concentration described could distort competition further in the event the very few airlines dominating the market decide to collude. If such collusion also takes place within the context of airline alliances (leading to a global cartel), consumers are only left with the competition authorities' ability to prevent such an action or swiftly intervene in an effective way. The repercussions of such a cartelization cannot but have a global dimension, threatening consumer welfare everywhere on the globe. Last, but not least, one could further wonder whether, in the event a merged entity simply fails, it would ever be left to fail. Keeping in mind the economic, social, and also political interests at stake, the temptation for the U.S. government and the EU to bail out the company could result in the granting of immense subsidies out of tax payers' monies. The consumer harm in this case appears magnified, as it relates to both the inefficiency of the airline and the subsidies themselves.

2. *The Airline Industry Experience*

a. Prospects

The liberalization of the transatlantic air transport market is expected to have a huge impact on the identity of the aviation industry. Airlines are already exploiting enhanced market access opportunities by increasing their services, while also operating from outside their home country. The abolition of cabotage limitations, should a final agreement be reached, will offer airlines great operational flexibility, as they will be entitled to full entry into each other's market. For EU airlines in particular, the lifting of wet-leasing restrictions in the United States, as well as their full participation in the Fly America Program, will put them on an equal competitive footing with their U.S. counterparts.

Obviously, the area where the greatest efficiencies and cost synergies could be exploited is that of mergers. The extremely high operating costs of the airline industry render the need for synergies imperative. Network rationalization on the basis of the merging parties' combined passenger volume may only lead to efficiencies, translated into profits for the airlines. This can happen in manifold ways. By exiting thin routes (i.e., routes with insufficient demand to justify service), airlines could take advantage of the released capacity to either introduce new services to profitable destinations, or to lease, sell, or otherwise commercially exploit the relevant assets. Where demand justifies it, airlines could consider whether they could benefit by economies of airline densities. In the case of overlapping networks, airlines could reduce service by using bigger aircraft. Thus, it might be that a destination that before the merger used to be served by both parties can now be served by the merged entity on a reduced scale in terms of frequency, thanks to the use of bigger aircraft—the passenger volume always being the same. The assets freed in this way could again be commercially exploited in a variety of ways. In the case of network complementarities, the demand for the network as a whole increases as a corollary to the additional destinations served. Except for efficiencies that can be gained from a certain rationalization therein, the provision of seamless services leaves room for further gains. Evidently, significant value could be unleashed in a number of subsidiary areas. For instance, the pooled negotiating leverage of the merged entity could lead to significant cost savings in the area of procurement, especially airline and fuel

procurement. Manpower rationalization, facility consolidation, and balance sheet restructuring are all areas of potential cost synergies.²⁸⁵

b. Challenges

The immediate effect on the industry of a process of consolidation cannot be other than the disappearance of smaller carriers as a result of bankruptcies, voluntary exits, acquisitions, takeovers, or mergers. The elimination of market participants might lead to elimination of competition and finally to collusion. This outcome will deprive the industry of any motive to innovate and improve its products and services, something that, in turn, might result in losses of market shares. Especially in Europe, where high-speed rail is quite developed, the likelihood that consumers switch from air transport to rail transport, especially on short-haul routes, should not be underestimated.

Moving away from the worst-case scenario just described and looking specifically into mergers between U.S. and European airlines, making such a transaction a success is arguably already a challenge. If one considers that the majority of ordinary mergers fail in their implementation,²⁸⁶ the undertaking of turning a transaction unprecedented in all respects into a success appears to be a herculean task. The risks involved are obviously enormous, as are the hurdles that need to be overcome. While both the EU and U.S. air transport markets are mature, they present large differences. Swift adaptation within an open aviation area, a prerequisite for the merger's success, appears dependent upon accurate business estimations that need to be carried out *ex ante* or at least in time to allow for effective implementation.²⁸⁷ As the experience of intra-European cross-border merg-

²⁸⁵ For a comprehensive analysis of airline mergers, see OECD, *supra* note 272.

²⁸⁶ See BOOZ ALLEN HAMILTON, *supra* note 265, at 1.

²⁸⁷ See Jean-Cyrill Spinetta, Chairman, Air Fr.-KLM Grp., Speech at the Nyenrode European Business Forum: The AIR FRANCE KLM Story (Feb. 23, 2006), available at http://corporate.airfrance.com/uploads/media/Speech_by_JC_Spinetta_Nyenrode_European_Business_Forum.pdf. See, in this respect, the Air France-KLM experience, as described by the companies' CEOs at Nyenrode Business Universiteit on February 23, 2006. *Two's Company* (on file with author). Commenting on the idea that the enterprise of cross-border mergers is like building a bridge as you walk across it ("the direction might seem clear, but you have to deal with obstacles as you encounter them"), KLM's former CEO confessed that "walking on a bridge as you build it is indeed an interesting experience. We had a shared vision and many ideas, otherwise we didn't have a clue. It was very inspiring and, of course, nothing beats success." *Id.*

ers and acquisitions (M&As) indicates, besides the economics of the transaction that have to work out, there is also a range of additional factors that need to be addressed related to cultural and language issues, as well as to emotional and political parameters.²⁸⁸ As these hurdles are part and parcel of any EU-U.S. transaction of that type, the challenge inherent in the whole idea of consolidation is even greater.

The current financial crisis accentuates another reality: the industry's exposure to numerous destabilizing factors historically appearing around the world. Wars, terrorist attacks, recessions, oil crises, and even epidemics severely affect the profitability of the industry, either by increasing its operating costs (for example, in the case of high fuel prices or increased security measures) or by reducing its proceeds due to decreased demand for air transport services (such as following terrorist attacks, epidemics, wars, financial crises, etc.).²⁸⁹ Arguably, the current structure of the industry provides a certain protection against similar occurrences. The national or regional character of the majority of airlines eliminates the impact of calamities striking in different parts of the world. The operational equilibrium that has been achieved in terms of business models (e.g., hub-and-spoke, point-to-point, etc.) and methods (such as interlining, code-sharing, sharing of FFPs, participation in computer reservation systems (CRSs), etc.)²⁹⁰ effectively addresses the risks inherent in the global character of the industry. The creation of open aviation areas and the emergence of global airlines will automatically lift that protection. Designing the different business models and methods that this process necessitates in such a way as to minimize the negative effects of global operations, while at the same time maximizing the respective positive effects, is an enterprise in itself.

²⁸⁸ Spinetta, *supra* note 287.

²⁸⁹ See, e.g., *id.* (discussing the effect of steep oil prices on airlines); Dep't of Air Transp. at Cranfield Univ., *Changes in Demand for Air Travel*, AIRPORT INT'L, <http://www.airport-int.com/article/changes-in-demand-for-air-travel.html> (last visited Sept. 27, 2011) (discussing decreases in demand resulting from the September 11 terrorist attacks, SARS, and the Iraq war).

²⁹⁰ See European Comm'n & U.S. Dep't of Transp. [EC/DOT], *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches* at 1, 4 (Nov. 16, 2010), available at http://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf.

3. *The Competition Law Experience*

As already mentioned, although the economics of the Protocol have been considered (both the United States and the EU having prepared or commissioned relevant studies) no similar efforts have been made with regard to the legal implications of the Protocol. This is striking, given that the need for regulatory convergence has been, at least implicitly, recognized.²⁹¹ Although it is true that the Protocol provides explicitly for regulatory cooperation, taking mainly the form of inter-agency exchanges, it could be inferred both from the frequency with which mention is made therein of the need for extensive regulatory cooperation and from the wording itself that regulatory convergence is indispensable. As the latter outcome is neither easy to achieve nor unproblematic, the final part of the analysis will focus on the prospects and challenges associated with the implementation of the Protocol, examining the matter always from the perspective of competition law.

a. Prospects

If one considers the differences between the U.S. legal system and the EU legal system, speaking about regulatory convergence (let alone regulatory harmonization) might seem like joining the two sides of the Atlantic together. As air transport, since its very existence, has been doing exactly that, it might well be that it will become, once again, the vehicle bridging the gap between the EU and the U.S. legal systems.

Considering the prospects that open up for competition law from the implementation of the Protocol, in essence, answers the question: "Why is there a need for regulatory convergence?" The answer is obviously related to the necessity of safeguarding fair competition for all market participants. Air transport being by nature the international mode of transport *par excellence*, it can only operate efficiently if it is governed by global rules. Since the majority of airlines operate international networks, the potential for distortion of competition due to the lack of a

²⁹¹ See ATA Protocol, *supra* note 202, art. 5(3) ("conflicting regulatory requirements"); Air Transport Agreement, *supra* note 58, arts. 9(7), 17; see also ATA Protocol, *supra* note 202, arts. 2, 5(4)(e) ("reciprocal recognition of regulatory determinations"); ATA Protocol, *supra* note 202, art. 5(4)(j) ("exchanges on new legislative or regulatory initiatives and developments"); ATA Protocol, *supra* note 202, art. 5(4)(c) ("maintaining an inventory of issues regarding government subsidies").

uniform system of rules is significant. The creation of an OAA, predicated on common rules, will exacerbate the need for alignment of U.S. antitrust law and EU competition law.

To achieve the ultimate goal of a level playing field, a number of practical needs should be met. As already mentioned in Part II.D, the implications linked with cross-border mergers have led to the formation of airline alliances. An alliance is a commercial cooperation agreement, which, though not leading to legal and financial integration the way a merger does, depending on its intensity and scope, might lead to far-reaching operational integration that resembles a merger.²⁹² Although today there are thousands of alliance agreements worldwide, there is a clear trend toward the formation of global alliances.²⁹³ As the level of cooperation between the members of an alliance is often high, the potential of alliance agreements to distort competition renders scrutiny under competition law indispensable.

The latter aspect (scrutiny) would not be problematic if there were just a single authority in charge, applying uniform rules across the board. Nevertheless, to the extent that approval or clearance of the same transaction is the task of several authorities, each one of them applying different rules, things in practice tend to be rather complicated. Thus, while in the United States the authority in charge of approving an alliance and granting antitrust immunity (the latter being the equivalent of an exemption, as provided for in Article 101(3) TFEU) is the DOT,²⁹⁴ in Europe, as of May 1, 2004, following the advent of Regulation 1/2003²⁹⁵ and Regulation 411/2004,²⁹⁶ it is the alliance parties' own responsibility to safeguard compliance with Article 101 TFEU. The new arrangement renders not only the Commission, but also the National Competition Authorities

²⁹² See EC/DOT, *supra* note 290, ¶¶ 16–21. In fact, there have been alliances, which have been seen as full function joint ventures (FFJVs) within the meaning of Article 3(4) of the Commission Merger Regulation 139/2004, 2004 O.J. (L 24) 1, and treated accordingly. See, e.g., Regulation (ECC) No 4064/89, Merger Procedure, Case No COMP/JV.19, at 3.2 (Nov. 8, 1999) (approving the 1999 alliance between Alitalia and KLM and classifying it as a FFJV).

²⁹³ See EC/DOT, *supra* note 290, at 6, tbl.1 (displaying the historical development of airline alliances).

²⁹⁴ EC/DOT, *supra* note 290, ¶ 51.

²⁹⁵ Council Regulation 1/2003, on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1 (EC).

²⁹⁶ Council Regulation 411/2004, Repealing Regulation (EEC) No 3975/87 and Amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in Connection with Air Transport Between the Community and Third Countries, 2004 O.J. (L 68) 1 (EC).

(NCAs) and national courts competent to scrutinize alliance agreements in light of Article 101 TFEU. Since transatlantic alliances are treated by the DOT as virtual mergers (as if they were a single carrier and the effects would be equivalent to a merger), application for approval and antitrust immunity is obligatory.²⁹⁷ The involvement of the U.S. authorities will most likely entail the involvement of the European Commission and probably of the respective NCAs. So far, the harm for the parties seems to lie in the administrative burden of having to communicate and cooperate with a number of authorities located in different places and at different times, as not all investigations commence simultaneously. Arguably, the real problems begin when the authorities engage in their scrutiny of the transaction.

The DOT pursues a two-step analysis.²⁹⁸ In the first instance, it determines whether the alliance merits approval. This is so if:

- it is not adverse to the public interest; and
- in the event it substantially reduces or eliminates competition,
 - a. it is necessary to meet a serious transportation need or to secure important public benefits; and
 - b. the benefits thereof cannot be secured by reasonably available alternative means having materially less anti-competitive effects.²⁹⁹

Thereafter, if the agreement is approved, the authority examines whether immunity from antitrust laws should be granted.³⁰⁰

This is so when:

- the parties would not otherwise proceed with the agreement; and
- the grant of ATI is required by the public interest.³⁰¹

The DOT's statutory obligation to consider the public interest in its antitrust law analysis stems from its authority as "a general regulator and policy maker in the U.S. transport industry."³⁰² The same could not be said about the EU system, whereby, while the Directorate General for Competition (DG COMP) is entrusted with the enforcement of EU competition law, the general transport policy lies with the Directorate General for

²⁹⁷ See EC/DOT, *supra* note 290, ¶¶ 26, 51.

²⁹⁸ *Id.* ¶ 52.

²⁹⁹ *Id.*

³⁰⁰ *Id.* ¶ 53.

³⁰¹ *Id.*

³⁰² *Id.* ¶ 69.

Mobility and Transport (DG MOVE).³⁰³ This division of competences entails that DG COMP, when reviewing the airline cooperation agreements, is only entitled to apply the legal tests provided for by Articles 101 and 102 TFEU (i.e., the potential of consumer welfare being harmed).³⁰⁴ Although U.S. antitrust and EU competition law are generally inspired by similar principles and pursue similar goals, the different scope of the authorities' review is in itself sufficient to differentiate the outcomes of the competition law analysis significantly. This reality exposes the parties to an alliance agreement not only to legal uncertainty, but often to conflicting legal obligations stemming from contradictory decisions (e.g., conflicting remedies).

In the absence of regulatory convergence, the situation just described will be replicated in the field of merger control should a final agreement come into force. Arguably, given that a merger amounts to legal, financial, and operational integration, as opposed to alliance agreements, which constitute looser forms of commercial cooperation, the likelihood of regulatory divergence dissuading airlines from merging is not negligible. Although EU-U.S. inter-agency cooperation is not a new concept if one considers that the ATA between the EU and the United States regarding the application of their competition laws dates back to 1991,³⁰⁵ regulatory convergence remains a theoretical concept. The proliferation of relevant documents on inter-agency cooperation recently experienced,³⁰⁶ however significant, falls short of providing the market with the clarity

³⁰³ *Id.*

³⁰⁴ *Id.* ¶ 70.

³⁰⁵ *E.g.*, Agreement Between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, U.S.-European Communities, Apr. 27, 1995, 1995 O.J. (L 95) 45; Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 18, 1998, 1998 O.J. (L 173) 28.

³⁰⁶ *See, e.g.*, US-EU Merger Working Grp., *Best Practices on Cooperation in Merger Investigations* (2011), available at http://ec.europa.eu/competition/mergers/legislation/eu_us.pdf; Int'l Competition Network, *Waivers of Confidentiality in Merger Investigations* (2011), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>; European Competition Auths. (ECA), *The Exchange of Information Between Members on Multijurisdictional Mergers* (2011), available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/ECA/ECA_procedures_guide_post_Athens.pdf; *see also* Merger Working Grp., *Draft/Best Practices on Cooperation Between EU National Competition Authorities in Merger Review* (2011), available at http://ec.europa.eu/competition/consultations/2011_merger_best_practices/en.pdf.

necessary for cross-border transactions of a certain magnitude to occur. Although the successful implementation of the final agreement is dependent upon consistent and coherent rules, the practical needs behind its adoption could be seen as, and finally constitute, a lever of pressure, leading to regulatory convergence.

The benefits associated with alignment of EU and U.S. legislation are manifold. On the practical side, the immediate outcome of this process is a more efficient use of resources on behalf of both the parties to an agreement and the reviewing authorities. Convergence of procedural rules could dispense with the current multiplication of costs due to multiple notifications to several authorities. Dealing with a single authority will release human and material resources to be allocated in a more efficient way.

At the same time, the involvement of a single authority will speed up the decision-making process considerably, and by the same token, the implementation of the cooperation agreement. This is so since the current need for extensive cooperation between, on the one hand, the parties and the various authorities and, on the other hand, the authorities themselves, will not exist anymore. Equally, delays due to the parties' stand-still obligations (until the various authorities adopt their respective decisions) will be avoided.

On the substantive side, the elimination of red tape will enhance legal certainty. The rationalization of the review process will act as a catalyst to transactions, offering to the market the necessary guarantees to operate properly. The avoidance of conflicting decisions creating conflicting legal obligations will bolster the credibility of the legal system, encouraging compliance and naturally leading to a level playing field. At the enforcement level, the danger of extraterritorial application of national competition laws that currently exists will diminish.³⁰⁷ The said danger arises in instances where, in the absence of an international framework of competition rules, the extraterritorial application of national competition laws is deemed necessary to patch up loopholes emerging from the territorial reach

³⁰⁷ At the Fifth Worldwide Air Transport Conference organized by the ICAO, states were urged to be careful when applying national competition law to international air transport so as to avoid unilateral action. See ICAO, *Consolidated Conclusions, Model Clauses, Recommendations and Declaration*, at 2.3, ICAO Doc. ATConf/5 (Mar. 31, 2003), available at http://www.icao.int/icao/en/atb/meetings/2003/atconf5/docs/ATConf5_conclusions_en.pdf.

of national jurisdiction.³⁰⁸ According to the “effects doctrine” developed in U.S. law, commercial conduct carried out overseas but intended or calculated to affect the United States is subject to U.S. antitrust laws.³⁰⁹ Equally, according to the “place of implementation” test developed in EU law,³¹⁰ the jurisdiction of the Union in competition matters is determined by the place where the anti-competitive arrangements take effect.

The application of national competition laws to transnational conduct, albeit reasonable, might interfere with the efficiency, regularity, and viability of international air transport. In fact, the Fifth ICAO Worldwide Air Transport Conference urged states to take into account, when applying antitrust or competition laws to such arrangements, the need for inter-carrier cooperation, including interlining, to continue when it benefits users and air carriers.³¹¹ It is clear that the convergence of U.S. antitrust and EU competition law will eliminate legal uncertainty as to types of commercial conduct that could trigger the extraterritorial application of national laws. Moreover, it will enhance legal efficiency by facilitating enforcement and dispensing with existing difficulties to establish forum and jurisdiction.³¹²

An area of law whose evolution the adoption of a final agreement could help enormously is that of state aid. The EU is the only trading block in the world that has a state aid regime.³¹³ Articles 107-109 TFEU have played a very important role in the maintenance of a level playing field within the EU and have provided the legal basis for the adoption of air transport-specific rules on illegal state aid.³¹⁴ The Commission’s contribution to

³⁰⁸ See Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT’L L. 1, 16 (1992).

³⁰⁹ *Id.* at 8–9.

³¹⁰ See Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85, & C-129/85, *Ahlström Osakeyhtiö v. Comm’n*, 1993 E.C.R. I-1307, ¶¶ 139–43.

³¹¹ See ICAO, *supra* note 307.

³¹² For a discussion on extraterritoriality, see Abeyratne, *supra* note 72, at 58–62.

³¹³ See Claus-Dieter Ehlermann & Martin Goyette, *The Interface Between EU State Aid Control and the WTO Disciplines on Subsidies*, 4 EUR. ST. AID. L.Q. 695, 695 (2006).

³¹⁴ Michael Blauburger & Rike U. Krämer, *European Competition vs. Global Competitiveness: Transferring EU Rules on State Aid and Public Procurement Beyond Europe* 8–9 (Ctr. for Competition Policy, Working Paper No. 10-10, 2010), available at http://cadmus.eui.eu/bitstream/handle/1814/15502/Blauburger_Kramer_2010_CCP%20EU%20Rule%20Transfer.pdf?sequence=4.

the enforcement of these rules has been great.³¹⁵ The United States, on the other hand, lacks a comprehensive set of rules on state aid, relying on WTO provisions on subsidies.³¹⁶ This may be explained by the fact that while in Europe subsidies to airlines are granted by the individual member states, in the United States, it is the federal state itself that subsidizes U.S. airlines rather than the individual states. This means, in practice, that while in the case of the EU, its supranational dimension absolutely justifies the existence of a state aid regime, in the case of the United States, if any legislation on subsidies' control were to be promulgated, its addressee would necessarily be the federal state, which would be restricted in its industrial policy as a result. This discrepancy has resulted in a situation whereby EU member states are obliged to abide by a tight regulatory framework in all their dealings with airlines, whereas the U.S. government is bound by no rules whatsoever, save for WTO rules, which are loose and often unenforceable.³¹⁷

Leaving aside the harm this reality has caused the European aviation industry³¹⁸ (if not the American aviation industry also),³¹⁹ Article 14 of the EU-U.S. ATA on Government Subsidies and Support opens the door to the evolution of state aid law.³²⁰ Regulatory cooperation, as provided for in the ATA and Protocol, could eventually lead to the adoption by the United States of a comprehensive system of rules on subsidies alongside the EU state aid regime. In fact, the latter could constitute a source of inspiration in this respect, given its degree of development

³¹⁵ *Id.* at 8.

³¹⁶ *Financial Support for Car Manufacturers: An Overview of Relevant WTO and EU Law Rules*, HERBERT SMITH, <http://www.herbertsmith.com/NR/rdonlyres/AEBE3398-A735-4161-8C55-61C7CD8E9751/9140/Financialsupportforcarmanufacturersanoverviewofrel.html> (last visited Sept. 27, 2011) [hereinafter *Financial Support*]; see also Vassilis Akritidis, Jochen P. Beck, Riccardo Croce & Yves Melin, *EU Substantive Areas: Trade*, GLOBAL COMPETITION REV., <http://www.globalcompetitionreview.com/reviews/28/sections/98/chapters/1090/trade/> (last visited Sept. 27, 2011); Ehlermann & Goyette, *supra* note 313.

³¹⁷ See *Financial Support*, *supra* note 316.

³¹⁸ See Council Regulation 868/2004, of the European Parliament and of the Council of 21 April 2004 Concerning Protection Against Subsidization and Unfair Pricing Practices Causing Injury to Community Air Carriers in the Supply of Air Services from Countries not Members of the European Community, 2004 O.J. (L 162) 1 (EC).

³¹⁹ See Christopher McBay, Comment, *Airline Deregulation Deserves Another Shot: How Foreign Investment Restrictions and Subsidies Actually Hurt the Airline Industry*, 72 J. AIR L. & COM. 173, 173 (2007).

³²⁰ See Air Transport Agreement, *supra* note 58, art. 14; ATA Protocol, *supra* note 202, art. 5(4)(c).

and sophistication. As state aid law constitutes an integral part of EU competition law, its transposition into U.S. antitrust law would further assist the evolution of the latter.

The process of regulatory convergence may, if properly conducted, lead to a better legal system. The interaction between U.S. antitrust and EU competition law may not only assist the understanding of each legal system, but also lead to an outcome whereby the strengths of one legal system remedy the weaknesses of the other. These exchanges could finally result in the fusion of the two, and thus in the emergence of a single, streamlined, and more just system of rules. To the extent that a global industry, like air transport, is in need of global rules to maximize its efficiency, the harmonization of U.S. antitrust and EU competition law, due to the creation of a transatlantic open aviation area, could lay the foundations for similar action being pursued in other fields of law and other parts of the world.

b. Challenges

Arguably, if the prospects the implementation of the ATA and Protocol brings about for competition law are great, the challenges that need to be met in practice are even greater. At this stage, the challenge appears to lie in foreseeing the negative implications thereof in order to effectively prevent them. As both the prediction of dangers and the laying down of safeguards to preempt them require extensive knowledge of both legal systems, it is suggested that investing time and energy in this task is crucial.

Probably an orthodox way to commence the analysis would be by first examining whether the sector of air transport could benefit by past experience gained in other sectors of the economy, which, at a certain stage of their evolution, were faced with similar challenges.³²¹ Although the aviation industry is not the only global industry that exists (especially in an increasingly globalized economy), the way it has been regulated historically is distinct.³²² This may imply that challenges that have manifested themselves in different contexts of liberalization may not be rel-

³²¹ For an account of telecommunications liberalization, see Marco Bronckers & Pierre Larouche, *A Review of the WTO Regime for Telecommunications Services*, in *THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES* 319, 319–79 (Kern Alexander & Mads Andenas eds., 2008).

³²² See Khalil Ahmad & Mukhtar M. Kahn, *A Comparative Analysis of Productivity of Airline Industry: Evidence from Selected Asian Airlines*, 15 *INT'L J. BUS. & SOC. SCI.* 224, 224–25 (2011).

evant. By contrast, valuable experience could be obtained from challenges that have already manifested themselves in the aviation industry itself.

As transatlantic airline mergers have not yet materialized, the example of transatlantic alliances could be considered. Although both the DOT and the Commission treat alliances as virtual mergers,³²³ their competition analysis varies considerably. Starting from the definition of the relevant market, while the Commission has mainly focused on city pairs (point of origin-point of destination), the DOT has also considered the airlines' network as a whole.³²⁴ The Commission's focus on the effects of an alliance on city pairs has been justified on the grounds that in the passenger air transportation market, widespread demand-side substitution does not exist:

If confronted with high prices due to a monopoly on a particular O & D [(origin and destination)] pair, a passenger may find little comfort in the fact that airlines compete world-wide in the development of their respective networks. . . . The Commission therefore maintains that consumers wishing to travel from a point of origin to a specific point of destination will consider the various possibilities to travel to the point of destination. Hence, consumers will take into account the network aspects such as for example frequent flyer programs only to the extent that airlines or alliances serve the O&D pair between which they wish to travel.³²⁵

In other words, "[i]f the price of travel in City-Pair A increases, consumers would not generally consider substituting travel in City-Pair B."³²⁶ By contrast, the U.S. DOT has factored in its analysis (except for the effect of the alliance at a city-pair and country-pair level) its effect at a network level, air transport being a network industry.³²⁷ The shift in focus places at the center of the DOT's attention not the air travelers, but the airlines themselves: "Carriers make decisions relating to an individual city-pair by assessing not only the O&D market but also implications for their overall networks. For example, a carrier may

³²³ Albeit assessed under the antitrust provisions of the TFEU, rather than under the Merger Regulation, alliances have been considered by the Commission to have the same competitive effects as mergers. See EC/DOT, *supra* note 290, at 7–8.

³²⁴ *Id.* at 20–21.

³²⁵ Commission Decision of 11 February 2004 in Case COMP/M.3280, *supra* note 180, ¶¶ 11–12.

³²⁶ EC/DOT, *supra* note 290, ¶ 78.

³²⁷ *Id.* ¶ 79.

choose to enter an unprofitable route if that route would provide important feeder traffic to other routes within its network."³²⁸ The last statement is best understood if the business model of the allied airlines is taken into account (i.e., the hub-and-spoke model).³²⁹

Moving on to the issue of antitrust immunity/exemption from competition laws and relevant conditions thereof, further differences in approaches can be easily detected. Generally, the Commission tends to be very accommodating concerning whether an alliance agreement should be considered for clearance or rejected outright, but very strict concerning the conditions to be fulfilled by the parties. The DOT, on the other hand, appears to espouse the opposite approach: while it would not hesitate to reject an alliance agreement outright, if considered manifestly anti-competitive, it tends to be more relaxed concerning the conditions to be fulfilled. Thus, although the Commission has considered for clearance and finally cleared upon onerous conditions agreements between airlines with overlapping networks,³³⁰ the DOT sees value in complementarities.³³¹ This is comprehensible in view of the DOT's focus on the airlines' network when defining the relevant market. The Commission's analysis appears equally coherent: its consideration of overlapping routes as liable for exemption upon conditions is consistent with its focus on city-pairs when defining the relevant market.³³² Nevertheless, the different rationale underpinning each analysis is clear: as it has been commented,³³³ the DOT is reluctant to interfere with the transaction's business rationale through the imposition of conditions, therefore considering that to be the parties' responsibility. The Commission, on the other hand, is more interventionist, imposing stringent conditions meant to ensure that competition will not be distorted.

³²⁸ *Id.*

³²⁹ So far, there have been no alliances between low cost carriers (point-to-point service). *See id.* ¶ 36.

³³⁰ *See* Commission Decision, of 5 July 2002 Relating to a Proceeding Pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement in Case COMP/37.730-AUA/LH, 2002 O.J. (L 242) 25 [hereinafter Commission Decision in Case COMP/37.730].

³³¹ Specifically on this matter, see Geert Goeteyn, *Issues Raised by the U.S. Department of Transportation's Decision in the Skyteam Case: A Comparative Analysis*, 31 *AIR & SPACE L.* 291 (2006).

³³² *See* Commission Decision in Case COMP/37.730, *supra* note 330, at 29.

³³³ Goeteyn, *supra* note 331.

Looking more specifically into remedies imposed by the authorities or commitments given by the parties, it is not striking that the most popular of the Commission's remedies (i.e., divestment of slots) is the least cherished on the other side of the Atlantic, while the most popular of the DOT's remedies (i.e., carve-outs) is unknown in Europe. Obliging parties to release slots to competitors is the Commission's preferred way to engineer new entry.³³⁴ Given that slots at hub airports are scarce, partly due to the network carriers' business model (hub-and-spoke) and partly due to the slot allocation system in Europe (grandfathering rights), new entry is difficult. A way to demolish that barrier, fueling competition on problematic routes, is by asking parties to divest slots. Yet, depriving parties of their assets to protect competition is perceived in the United States as too onerous a remedy to impose.³³⁵ Instead, the DOT has opted for a solution whereby the parties are prohibited from jointly setting fares on markets (mainly hub-to-hub routes) where competition might be affected.³³⁶ Although both slot divestments and carve-outs have been criticized for their efficiency (each one for different reasons), they are illustrative of the authorities' perception as to how far they could and should go when exercising their enforcement power.

The aforementioned examples of how divergent the U.S. and the EU views might be on the same matters could be easily multiplied if discrepancies between general U.S. antitrust and EU competition law are considered. The notion of market dominance in the respective jurisdiction is just a little example thereof. Given that a sector-specific competition law analysis, based on sectoral rules, is always conducted within the wider context of general competition law, when contemplating align-

³³⁴ European Competition Authorities (ECA) Air Traffic Working Group, *Mergers and Alliances in Civil Aviation—An Overview of the Current Enforcement Practices of the ECA Concerning Market Definition, Competition Assessment and Remedies*, at ¶ 66 (2011), available at <http://ec.europa.eu/competition/publications/eca/report.pdf>.

³³⁵ John M. Nannes, Deputy Assistant Att'y Gen., Dep't of Justice Antitrust Div., Address Before the A.B.A. Section of Public Utility Communications & Transportation Law, *Strategic Alliances & Converging Industries: The Government's Perspective on Corporate Combinations* (Apr. 13, 1999), available at <http://www.justice.gov/atr/public/speeches/2356.htm>.

³³⁶ On carve-outs specifically, see Jan K. Brueckner & Stef Proost, *Carve-Outs Under Airline Antitrust Immunity: In the Public Interest?*, COMPETITION POL'Y INT'L, GCP: THE ANTITRUST CHRON., Sept. 2009, available at http://www.kasperlee-aviation.com/thought_leadership/Brueckner-SEP-09_1_.pdf.

ing sectoral rules, one should always take into account repercussions that may be produced within the wider context of competition law. This mainly suggests that convergence of air transport rules presupposes convergence of (certain) general competition rules also. The challenges inherent in this process are many. An issue arises as to whether there should be the alignment of sectoral rules that triggers the alignment of general rules or as to whether sectoral rules should be adjusted in accordance with aligned general rules. Arguably, the latter course of action seems to be more appropriate. If general rules are reformulated to accommodate the needs of converged sectoral rules, it is certain that serious and often unpredictable implications will be caused in other fields of law, whose regulation the parties (the European Union and the United States) might have valid reasons not to align.

If this train of thought is correct, the question that is posed is whether the conditions are ripe for U.S. antitrust and EU competition law to be converged. This question opens the door to a whole new set of challenges that should be considered. First of all, a determination should be made as to whether the need for regulatory convergence created by multi-jurisdictional transactions is enough to justify the abolition of our legal traditions and their replacement with a fused version thereof. Arguably, if our legal traditions and relevant solutions devised within their context are still representative and meet our needs, then they should be respected.

It is frequently said that the market is ahead of the regulator, the latter always being reactive to changes happening within the former rather than proactive. This criticism seems to suggest that the task of the regulator is to foresee developments and adopt the instruments that will maximize the benefits and minimize the harm thereof. The fulfillment of this mission requires intelligence and knowledge. The challenge EU and U.S. negotiators are faced with at the moment is exactly that: to foresee what the course of things will be if they act or refrain from acting and mold the law accordingly.

Arguably, while all that untimely regulatory intervention generates is a multiplication and magnification of already existing problems, aligning U.S. antitrust and EU competition law just for the sake of doing it might lead to legal inefficiency and increased legal uncertainty—the opposite outcome than desired. Under the current regime, each jurisdiction has devised its own legal solutions to problems inherent in the operation of the

market. Despite occasional failures, both jurisdictions have catered to the market's needs, devising workable solutions. The parameters to be taken into account in this process are related to the peculiarities and particularities of each market (i.e., their historical regulation, degree of maturity, and orientation). Regulatory convergence might deprive the system of the flexibility it now enjoys, advancing compromise solutions unfit to address the challenges of each market.

In addition to the danger of turning a flexible system into an inflexible one, regulatory convergence might also turn a legally safe system into a legally unsafe one. The plurality of legal arrangements devised under the different legal systems to deal more or less with the same issues offers a protection to the system as a whole, as it discourages illegality. The practical difficulties associated with the familiarization with several legal systems, arguably, discourages attempts to evade legal obligations by means of forum shopping or free-riding types of behavior. The substitution of an OAA for the individual U.S.-EU member states' markets may remove the legislative safeguards currently in place, especially in fields as sensitive as that of safety and security, exposing the market and its participants to unforeseeable threats. The principle of reciprocity that has historically constituted the main axis of air transport regulation, apart from aiming at equality of opportunity,³³⁷ aims also at rendering the country of airline designation responsible for the designated carrier's operations. Although it is true that the new EU-U.S. Protocol contains comprehensive provisions on the safety and security of air transport operations, it does not allay fears as to safety and security dumping phenomena that may appear as a result of flagging-out opportunities. As the ultimate objective of the Protocol is to be extended to include third countries, the fears described are amplified.³³⁸

Although the embarkation on a process of regulatory cooperation, aimed at alignment of rules and procedures, is in itself indicative of the parties' respect for each other's legal system, at the stage of implementation, tensions due to competition be-

³³⁷ Air Transport Agreement, *supra* note 58, art. 2 ("Each Party shall allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement.").

³³⁸ On the dangers associated with liberalization, see ICAO, *Liberalizing Air Carrier Ownership and Control*, at 3.6, ICAO Doc. ATConf/S-WP/7 (Oct. 21, 2002), available at http://www.icao.int/icao/en/atb/meetings/2003/atconf5/docs/ATConf5_wp007_en.pdf.

tween the EU and the U.S. legal system could not be excluded. The contribution of the United States to antitrust law is indisputable. In fact, the world, and Europe in particular, is "historically indebted to the [United States] for having invented antitrust."³³⁹ EU competition law may only be greatly influenced and inspired by U.S. antitrust law. Nevertheless, EU competition law, seen within the wider context of EU law, is also a reflection of member states' laws and legal traditions. This means that, contrary to U.S. antitrust law, as expressed within the context of common law, competition law is a corollary of a mixed system, whereby common law and civil law traditions co-exist. Although this last feature of EU competition law may only facilitate the process of regulatory convergence with U.S. antitrust law, it is not in itself sufficient to prevent conflicts between the respective legal systems.

The contingency of experiencing this type of competition in practice could manifest itself at three levels: at the law-making level, at the enforcement level, and at the judicial level. This is so since conflicts as to which system should prevail may arise not only when the law is being promulgated, but also when the law is being interpreted. Supposing that the final agreement will preempt tensions at the law-making level, showing the direction secondary legislation should take, and that cooperation at the enforcement level, as provided for in the ATA and Protocol, will be equally effective, what is still unclear is the application and interpretation of the law by the courts. Though not touched upon by the ATA and Protocol, judicial cooperation is an *acquis* of our legal civilization, as is the cooperation of the courts in the field of competition with NCAs and similar administrative agencies. Although resort to these "remedies" is normally very effective, it could by no means interfere with the judiciary's functional independence and relevant power to adjudicate as deemed appropriate. The eventuality of irreconcilable interpretations and conflicting judgments becomes even clearer if actions brought by individuals before national courts on both sides of the Atlantic are considered. The latter statement suggests that even in the hypothetical scenario that the parties agree to the establishment of a single court empowered to hear relevant cases, it is difficult to see how the involvement of na-

³³⁹ Mario Monti, European Comm'r for Competition, Comments to the Speech Given by R. Hew Pate at the "Antitrust in a Transatlantic Context" Conference, at 1 (June 7, 2004), available at http://ec.europa.eu/competition/speeches/text/sp2004_005_en.pdf.

tional courts could be avoided. As conflicting judgments may only harm legal certainty, undermining the process of regulatory convergence and, therefore, discouraging transactions, the *raison d'être* of the Protocol itself appears questionable.

Summing up the analysis of this part, the great challenge from a competition law perspective appears to be to avoid a regulatory failure that will induce multiple market failures. Regulatory convergence may only aim at improving the current system by enhancing legal efficiency and eliminating legal uncertainty. It should, therefore, only be performed if and when it is virtually certain that these outcomes will be achieved. Although the novelty of the establishment of an OAA is almost synonymous with the unknown, the inescapable period of transition from the old system to the new one should not be a period of experimentation. Although it might be true that compromise solutions that are unworkable in practice are eventually aborted by the market, it is also true that in the meanwhile, they have harmed competition. It is, therefore, the task of the regulator to ensure that legal efficiency and legal certainty are protected and enhanced from the very beginning of the process of regulatory convergence, and that the latter is not an experiment at the expense of stakeholders, but only the prelude to the regulatory concert to come.

IV. CONCLUSION

Drawing up conclusions on issues as open as the OAA is probably an oxymoron. Keeping that in mind, what could realistically be expected for the future of the aviation industry is pretty much dependent upon the outcome of the ongoing negotiations. The political parameters of the matter should not be underestimated. What triggered the United States to launch its open skies policy in 1992 was the creation of a single market in Europe and the emergence of Community Carriers.³⁴⁰ The United States, having always pioneered the regulation of the sector of air transport and having an interest in continuing to do so, did not hesitate to immunize conduct that under U.S. anti-trust law is *per se* illegal in exchange for the signing of an open skies agreement. The granting of antitrust immunity only to those alliances or individual airlines whose governments have concluded an open skies agreement with the United States

³⁴⁰ See Alan P. Dobson & Joseph A. McKinney, *Sovereignty, Politics and U.S. International Airline Policy*, 74 J. AIR L. & COM. 527, 536–37 (2009).

aimed at preserving the status quo as to the ownership and control requirements and at steering the regulation of the sector towards the direction of airline alliances. On the other side of the Atlantic, the *fait accompli* of a single air transport market opened up new horizons for European carriers that could not be overseen either by the industry itself or by the Commission. The suggestion of the Association of European Airlines to create a TCAA was immediately espoused by the Commission and became the axis of the EU's future air transport policy.³⁴¹ The TCAA was soon renamed "Open Aviation Area" to alleviate American reaction to the "allusion" that the EU is expanding towards the other side of the Atlantic,³⁴² and the negotiations commenced.

Whether a final agreement will eventually be reached is as clear as the future. It is interesting to note that American officials call the EU-U.S. ATA already in place an "open skies plus" agreement.³⁴³ Whether this is suggestive of the stance the American side will adopt in the future belongs equally to the sphere of the unknown. What is certain, except for Europe's commitment to the "normalization" of the industry,³⁴⁴ is that the latter's needs have changed ever since its regulation was conceived, as has the environment within which it operates. Defining the current and future needs of the industry, taking into account its mission, is a task difficult to perform, yet necessary to determine the way ahead.

The current regulatory *acquis*, based on the O&C requirements, has manifestly succeeded in excluding altogether free-riding phenomena and in safeguarding high standards of safety and security oversight. Where it has probably failed is in safeguarding the airlines' long-term financial viability without resort

³⁴¹ See Chris Lyle, *Freedom's Paths*, FLIGHTGLOBAL (Jan. 3, 2000), <http://www.flightglobal.com/news/articles/freedoms-paths-62785/>.

³⁴² See John R. Byerly, Deputy Assistant Sec'y for Transp. Affairs, U.S. Dep't of State, Speech at the European Aviation Club, The U.S.-EU Air Transport Agreement: Making the Most of the Second Stage, at 9 (May 13, 2008) ("I, like many Americans, admire and salute what Europe has accomplished. We do not, however, wish to join the EU—at least not right now!"), available at http://www.europeanaviationclub.com/docs/20080513_Presentation.pdf.

³⁴³ *Id.* at 4.

³⁴⁴ See Press Release, European Comm'n IP/08/474, *supra* note 175, at 1 ("Building on the success of the European internal aviation market, this agreement is an important first step towards the normalisation of the international aviation industry. The ultimate objective of the European Union is to create a transatlantic Open Aviation Area.").

to public monies. The challenge facing EU and U.S. negotiators is to create the regulatory environment that will allow the industry to prosper without compromising oversight standards and, in addition, without threatening consumer welfare. The solution devised by the parties in the form of an OAA implies a transition from bilateralism to multilateralism.³⁴⁵ The prospects and challenges inherent in this process are manifold.

This article focused on competition along the lines of the parties' statement that "competition among airlines in the transatlantic market is important to promote the objectives of the Agreement" and their confirmation "that they apply their respective competition regimes to protect and enhance overall competition and not individual competitors."³⁴⁶ The impact of the new conditions of competition that the application of the final agreement might bring about has been examined in relation to consumers, airlines, and finally the law itself. The analysis produced has been triggered by the striking absence of any comprehensive study on the issues discussed. While the economics of the ATA and Protocol have attracted a great deal of attention on both sides of the Atlantic, its legal component has been neglected. Whether the prospect of experiencing second-generation open skies judgments of the European Court of Justice (following the Commission's action to initiate infringement proceedings against almost the entirety of the Member States regarding their bilateral agreements with Russia) will re-invigorate legal interest in air transport matters remains to be seen. What seems imperative at this stage is to prepare the ground for the smooth adaptation of the ATA. This may only be achieved if the prospects and challenges thereof are foreseen so that the prospects are adequately explored and the challenges are effectively addressed. Despite the difficulties inherent in prospective analysis, the benefits to be reaped justify the effort.

³⁴⁵ See BOOZ ALLEN HAMILTON, *supra* note 265, at iii. The idea that the regulation of the sector should be "normalized" is not shared by the United States: "It's simply not enough to assert that the rules for investment in airlines should be 'normalized.' There are many—not just in the United States—who believe that airlines are anything but a normal service industry." John R. Byerly, Deputy Assistant Sec'y for Transp. Affairs, Remarks to the European Aviation Club in Brussels, Belgium (May 13, 2008).

³⁴⁶ Air Transport Agreement, *supra* note 58, art. 20.

