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ATTEMPT TO REGULATE RESTRICTIVE COMMERCIAL PRACTICES IN THE FIELD OF AIR TRANSPORTATION WITHIN A TRANSNATIONAL ANTITRUST LEGAL AND INSTITUTIONAL FRAMEWORK

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THERE ARE VERY few economic activities with an international or transnational dimension which prominently feature the direct exercise of national governmental powers. Air transportation, however, is one area of economic activity in which states have emphasized the need for the exercise of their national sovereign powers. For that reason, effective commercial competition in the air transportation industry may have become unattainable. It is no exaggeration to state that over the past sixty years a national-governmental right of intervention in the operations of the air transportation industry has been recognized under public international law. Indeed, by granting states complete and exclusive sovereignty over the air space above their respective national territories, the Paris Convention on the Regulation of Aerial Navigation of 1919 appears to have given this right universally binding legal force.¹ Later, the Chicago Con-

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¹ Convention Relating to the Regulation of Aerial Navigation, *opened for signature* Oct. 13, 1919, 11 L.N.T.S. 173. Article 1 states:

The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention, the territory of a State shall be understood as including the national territory, both

vention on International Civil Aviation of 1944 reinforced that provision of the Paris Convention.² Moreover, since the end of the Second World War, scheduled air transport service has been under the special legal control of individual states.³

The result of this individualized control has been the severe restriction of open commercial competition in the operations of the air transportation industry. Indeed, whatever element of commercial competition is to be found in the international air transportation industry, particularly with respect to travel or carriage across international routes, has, to a large extent, been made possible by means of bilateral agreements between various national governments. As one commentator has observed, "open competition is not an available option because of the legal environment within which air transport services have to operate."⁴ While it cannot be overlooked that the 1948 Bermuda Conference on International Civil Aviation sought to establish a regime of commercial competition in the provision of air transport services by different national operators,⁵ very little appears to have been accomplished in that respect. Moreover, one aviation transportation expert has expressed the view that for open commercial competition to be possible in transnational air transportation, a number of conditions must be met: (1) the principle of complete and exclusive sovereignty over territorial airspace must be overturned; (2) individual states must be persuaded to relinquish control over routes, rights, fares,

that of the mother country and of the colonies, and the territorial waters adjacent thereto.

Id. at 190.

² Convention on International Civil Aviation of 1944, 61 Stat. 1180, T.I.A.S. No. 1591.

³ See AIR TRANSPORT: A COMMUNITY APPROACH: MEMORANDUM OF THE COMMISSION OF THE EUROPEAN COMMUNITIES, at 24-25 (Bulletin of the European Communities, Supp. May, 1979) [hereinafter cited as *Air Transport*]. See also Dold, *The Competitive Regime in International Air Transportation*, 5 AIR L. 139, 141 (1980); Beane, *The Antitrust Implications of Airline Deregulation*, 45 J. AIR L. & COM. 1001, 1003 (1980).

⁴ Forest, *Is Open Competition Preferable to Regulation?*, 6 AIR L. 7, 11 (1981).

⁵ See Dold, *supra* note 3, at 139.

and rates; and (3) the system of bilateral agreements must be dismantled and a new legal regime invented to replace it.⁶ Needless to say, such conditions are viewed as formidable.⁷

At an international level, the foregoing conditions may be difficult or impossible to achieve. However, they seem possible within the legal and institutional framework of an integrated, regional grouping of states. Indeed, the European Economic Community (EEC) is in the process of seeking open, international competition in the field of transnational air transportation. Toward this goal, the Commission of the European Communities (EC Commission), has submitted to the Council of European Communities (EC Council) a proposal for the adoption and promulgation of EEC secondary legislation to apply the antitrust provisions of the EEC Treaty and to regulate various forms of anticompetitive commercial activities in the air transportation industry within the EEC.⁸

⁶ See Forest, *supra* note 4, at 8.

⁷ *Id.*

⁸ See The EC Commissions's Tenth Report on Competition Policy at 94 (Brussels-Luxembourg Apr. 1981). Under the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter cited as EEC Treaty], article 189, the EC Council and the EC Commission are, respectively, empowered to (1) adopt Regulations; and (2) issue Directives or make Decisions, for the general purpose of effecting the objectives and the programs of the EEC in establishing the European Common Market. EEC Regulations are of general application in all the Member States of the EEC and are directly applicable and legally binding in their entirety. Consequently, they have immediate legal force in all the Member States of the EEC, without enactment of specific national laws. EEC Directives also have binding legal force in the Member States of the EEC, albeit only with respect of the results intended by their implementation. The national authorities of the Member States of the EEC appear to have been left with some discretion as to the choice of form and methodology by which EEC Directives are to be given effect within the various national territories. Usually, proposals for the adoption of an EEC Directive are made by the EC Commission and submitted to the EC Council for consideration and adoption into EEC law. While some proposals of the EC Commission are adopted and promulgated into EEC law, others are either delayed or not adopted at all. Often, national economic and political self-interest tends to determine whether or not particular proposals of the EC Commission are adopted by the EC Council and promulgated into EEC law. It should be noted that the EC Council is the principal EEC organ responsible for the making of essential policies of the EEC and for the enactment of EEC secondary legislation in the forms of Regulations and Directives. EEC Decisions,

Consequently, it is the principal goal of this article to examine the potential impact upon the commercial operations of the air transportation industry within the EEC of the EC Commission proposal, should it be adopted and promulgated by the EC Council into binding EEC law. It is necessary at the outset, however, to identify some of the principal types of anti-competitive commercial practices of air transportation operators. Following that examination, this article will outline some of the essential features of the antitrust law of the EEC. In conclusion, the final two sections will serve to place this article into proper perspective.

I. SOME IMPORTANT FORMS OF ANTI-COMPETITIVE COMMERCIAL PRACTICE IN THE FIELD OF AIR TRANSPORTATION

Among the important forms of restrictive commercial activities which are practiced by airline operators are monopolization or attempts to monopolize, fare-fixing, market allocation or market-sharing, group boycott, and the operation of tying agreements or arrangements.⁹ Moreover, individual national governments tend to operate or exercise direct control over the operations of the major airlines in their respective territories. These practices tend to limit or restrict effective commercial competition in the air transportation industry. Considerations of national sovereignty and national prestige have motivated individual national governments to restrict commercial competition in international or transnational air transportation. As a leading British weekly news magazine has observed,

The air above a nation is as sovereign as its soul, pene-

although also having binding legal force, tend to be addressed to particular Member States or to individual natural and juridical persons. It has become accepted practice to refer to EEC Regulations, Directives, and Decisions as constituent forms of EEC secondary legislation. See The EC Commission's Tenth Report on Competition Policy, *supra* this note.

⁹ Cf. Beane, *supra* note 3, at 1014-15.

trated only by express permission. Add to that the prestige which many nations attach to their national airlines, and you have a recipe for permanent protectionism. A third-world nation will limit competition from efficient airlines because it wants to keep its own national airline aloft. A nation like Switzerland also turns protectionist, not because Swissair is inefficient but because Swiss labor costs are too high for Switzerland to be an economical country to run an airline from.¹⁰

There seems to be a general view that a monopolization within the air transportation industry is a "natural" occurrence.¹¹ On the strength of this view, it is sometimes thought that a monopoly situation in the air transportation industry brings about economies of scale.¹² However, one legal commentator has observed the situation in the air transportation industry in the United States, stating that "[t]he available evidence clearly indicates that all of the current trunk and local-service carriers have reached a size at which scale no longer affects unit costs."¹³ It is indeed questionable whether at the present state of the development of the air transportation industry there are real benefits of economies of scale to be derived from monopolization of or mergers within that industry. Moreover, the existence of state monopoly or overall control in the air transportation industry could render it difficult or impossible for private enterprise to enter the international market for scheduled air services and charter flights.

In addition, the power of individual national governments over the determination of air fares and over tariff-fixing cannot be overlooked. The EC Commission has

¹⁰ See *Free Trade in the Sky*, 287 THE ECONOMIST, June 4, 1983, at 14.

¹¹ See, e.g., White, *Economies of Scale and the Question of 'Natural Monopoly' in the Airline Industry*, 44 J. AIR L. & COM. 545 (1979). In other words, monopoly or monopolization in the air transportation industry tends to come about as a result of structural and economic factors and circumstances which are, by and large, unavoidable. The upshot is that the air transportation industry then comes to be dominated by a few large airline companies. *Id.*

¹² *Id.*

¹³ *Id.* at 573.

pointed out that "[g]overnments usually have the final say in setting fares for scheduled air services following negotiations between companies as expressly laid down in government agreements."¹⁴ In other words, while individual airlines may appear to have complete freedom to determine what fares to charge for the provision of air transportation services, in reality they merely carry out the instructions of their national governments.¹⁵ This is the case even though the setting of fares for scheduled international air transportation services is negotiated and agreed upon by individual national governments within the general legal framework of the International Air Transport Association (IATA). Consequently, the fixing of individual air fares has tended to make political, rather than economic, sense. In most circumstances, national economic protectionism tends to be a dominant motive. Consequently, taxpayers and airline passengers are made to bear the cost of economic inefficiency. As *The Economist* magazine has observed, "[p]rotectionism then fosters higher costs, which have to be met by passengers or taxpayers or both. Some passengers are priced out of traveling, which means the airlines price themselves into overcapacity. This is further promoted by airlines which offer frequency of service as a convenience to passengers."¹⁶

National governments often impose restrictions upon the operations of foreign airlines or carriers which enter or leave their territorial airspace. In this context, foreign airlines or air carriers may be required to comply with var-

¹⁴ See EC Commission's Tenth Report on Competition Policy, *supra* note 8, at 22. See also Dold, *supra* note 3, at 141, where reference is made to the anomalous situation by which the "actions of the scheduled international airline industry are both highly regulated and interdependent." *Id.*

¹⁵ Cf. EC Commissions's Tenth Report on Competition Policy, *supra* note 8, at 23.

¹⁶ See *Free Trade in the Sky*, *supra* note 10, at 14. The observation apparently was prompted by the antagonism of various Atlantic-route-operating airlines towards People Express Airlines for its undertaking to fly passengers cheaply across the Atlantic. *Id.*

ious nation-specific procedures and standards.¹⁷ In addition, restrictions may take the form of user charges on foreign airlines, without the same charges being levied on domestic airlines.¹⁸ Understandably, this has generated disagreements between states¹⁹ despite existing bilateral agreements between some states. The Member States of the EEC, among others, have been parties to such disagreements. As the EC Commission has pointed out,

[e]ach State carries out a protectionist policy for its national air carriers, aimed to preserve its political prerogatives and to profit itself from its advantages. These may be its geographical location, the importance and composition of its national market and its special relations with this or that part of the world.²⁰

Arguably, only the establishment of a transnational antitrust legal regime, under which the operations of individual airlines could be kept under proper scrutiny, would ensure more effective commercial competition in the air transportation industry.²¹ The achievement of this end may require the conclusion of an appropriate international convention. Unfortunately, the conclusion of such an international convention is unlikely to be forthcoming.²² Thus, this is still greater rationale for the EC Commission's attempt to persuade the EC Council to adopt and promulgate EEC secondary legislation for the anti-trust regulation of various restrictive commercial practices

¹⁷ Beane, *supra* note 3, at 1021-22. It is contended that standards and procedures governing route entry and exit may also be anti-competitive. *Id.*

¹⁸ See, e.g., Dold, *supra* note 3, at 139, where reference is made to the claim of United States airlines that "foreign authorities enforce grossly unfair user charges which cannot be economically justified and discriminate in favor of their own national carriers." *Id.*

¹⁹ *Id.* at 141. See also Bin Cheng, *The Right to Fly*, 42 THE GROTIUS SOCIETY 99 (1957).

²⁰ See *Air Transport*, *supra* note 3, at 27.

²¹ See, e.g., Dold, *supra* note 3, at 155, where the idea of "full multilateralism," as suggested by states such as Canada at the Chicago Conference of 1944 for ensuring effective competition in the international air transportation industry, is supported. Moreover, it has been suggested that such an approach might be instituted on a regional basis. *Id.*

²² Cf. Dold, *supra* note 3, at 154-55.

in the air transportation industry.²³

II. BASIC FEATURES OF THE ANTITRUST LAW AND PRACTICE OF THE EEC

There are two main features of EEC antitrust law and practice which need to be outlined. One feature relates to the substantive elements of the antitrust law of the EEC, while the other concerns the essential procedural aspects of the law. It is convenient to examine each of the two main features separately.

A. *Essential Substantive Antitrust Law of the EEC*

The essential substantive provisions of EEC antitrust law are contained in articles 85 and 86 of the EEC Treaty.²⁴ These articles are elaborated upon by the jurisprudence of the EC Commission and supplemented by the decisions of the Court of Justice of the European Communities (EC Court). The general principle governing the legal system of the EEC, the primacy of EEC law over the respective national laws of the individual Member States of the EEC,²⁵ applies with equal force in the field of antitrust regulation. The EC Court has had occasion to emphasize this principle in its preliminary ruling in the leading case of *Walt Wilhelm and Others v.*

²³ It cannot be overlooked that, before submitting its proposal to the EC Council for adoption and promulgation of EEC secondary legislation, the EC Commission was confronted with the case of *Sterling Airways* in which a Danish private airline operator sought to challenge the exercise of the monopoly power of the state-controlled Scandinavian Airlines System (SAS). However, the EC Commission felt that it had no power of its own to investigate and impose penalties in those circumstances. See EC Commission's Tenth Report on Competition Policy, *supra* note 8, at 94.

²⁴ EEC Treaty among Belgium, The Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands, signed in Rome on Mar. 27, 1957, effective Jan. 1, 1958, 298 U.N.T.S. 3; [1972] Cmnd. 4864.

²⁵ This means that in any situation where the application or the enforcement of a national law or measure of a Member State of the EEC tends to conflict with a given EEC law or measure, the latter shall prevail. Consequently, national laws or measures of individual Member States of the EEC which happen to be incompatible with a given EEC law become invalid under the legal system of the EEC. This could be said to constitute the essence of the establishment and the operation of the European Common Market system.

Budekaterllamt.²⁶ The individual Member States of the EEC are required to ensure that their respective national antitrust laws are applied to avoid conflict with those of the EEC. In that context, the antitrust authorities of the Member States of the EEC are required to collaborate with the EC Commission to ensure the general implementation of EEC antitrust provisions in their respective national territories. However, the lack of appropriate EEC antitrust law in particular situations²⁷ entitles the antitrust authorities of the Member States of the EEC to apply their own national antitrust laws in such situations.²⁸

As far as the substantive provisions of the EEC Treaty are concerned, it is important to examine those of article 85 before proceeding to examine those of article 86. The provisions of article 85(1) of the EEC treaty outlaw both the formation of cartels and the conclusion of various forms of restrictive business or commercial transactions, each because of its incompatibility with the establishment and the operation of the European Common Market. Agreements between business or commercial enterprises, concerted practices on the part of such enterprises, and decisions of an association of such enterprises may become legally prohibited for as long as they are characterized by two factors. Such agreements, concerted practices, and decisions are prohibited if, first, they have the effect of distorting, preventing, or restricting economic competition within the European Common Mar-

²⁶ [1969] 8 COMMON MKT. L.R. 100. The significance of the case lies in its making it clear that the EEC antitrust authorities are ready to treat as invalid any provision of the antitrust law of a Member State of the EEC which is incompatible with that of the antitrust law of the EEC. Before the EC Court's preliminary ruling in the case, the legal position was uncertain. Cf., e.g., Markert, *The Dyestuff Case: A Contribution to the Relationship Between the Antitrust Laws of the European Economic Community and Its Member States*, 14 ANTITRUST BULL. 869 (1969).

²⁷ This is true particularly where alleged restrictive or monopolistic business or commercial practices do not tend to have an adverse impact on the conduct of trade between the Member States of the EEC or where the EC Commission may have decided to close its files on individual cases.

²⁸ See, e.g., The Preliminary Ruling of the EC Court in Joined Cases 253/78, 1 to 3/79, *Procureur de la Republique v. Guerlain, S.A. and Others*, [1981] 19 COMMON MKT. L.R. 99.

ket,²⁹ and second, they have an adverse impact on the conduct of trade between the Member States of the EEC.³⁰

From the foregoing EEC Treaty provisions it may be assumed that business or commercial agreements, concerted practices, and group decisions of enterprises which are not characterized by the envisaged conditions or factors would not be prohibited by the EEC Treaty provisions. However, there is some evidence to suggest that EEC Treaty requirements are often construed and applied by the antitrust authorities of the EEC in a rather flexible manner. Consequently, various agreements, concerted practices, and decisions of business or commercial enterprises which may not have constituted *prima facie* breaches of EEC antitrust law have been treated as constituting actual violations.³¹

Be that as it may, there are particular forms of business or commercial activity or practice which article 85(1) of the EEC Treaty seeks to prohibit. Thus, business or commercial activities which, directly or indirectly, exhibit any of the following features are sought to be directly prohibited: (1) price fixing;³² (2) imposing onerous trading conditions;³³ (3) controlling or limiting production, markets,

²⁹ EEC Treaty, *supra* note 8, art. 85(1), at 47-48.

³⁰ *Id.*

³¹ See, e.g., Case 56/65, *Societe Technique Miniere v. Societe Maschinenbau Ulm*, [1966] 6 COMMON MKT. L.R. 197; Joined Cases 48 to 57/69, *Imperial Chemical Indus. Ltd. v. EC Comm'n*, [1972] 9 COMMON MKT. L.R. 494. See also *Re Davison Rubber Co.*, [1972] 15 O.J. EUR. COMM. (No. L 143), 11 COMMON MKT. L.R. D52, D67; *Re Vacuum Interrupters Ltd.*, [1977] 20 O.J. EUR. COMM. (No. L 48) 32, 19 COMMON MKT. L.R. D67.

³² See, e.g., Joined Cases 48 to 57/69, *Imperial Chemical Indus. Ltd. (I.C.I.) v. EC Comm'n*, [1972] 11 COMMON MKT. L.R. 494; IFTRA Rules for Producers of Virgin Aluminum, [1975] 18 O.J. EUR. COMM. (No. L 228), 16 COMMON MKT. L.R. D20; Case 73/74, *Groupeement des Fabricants de Papiers Peints de Belgique v. EC Comm'n*, [1976] 17 COMMON MKT. L.R. 589.

³³ See, e.g., *Pabst & Richarzkg v. BNIA*, [1976] 18 COMMON MKT. L. R. D63 (relating to an agreement not to supply a product in bulk); Case 73/74, *Groupeement des Fabricants de Papiers Peints de Belgique v. EC Comm'n*, [1976] 17 COMMON MKT. L.R. 589. (involving an agreement to sell only on prescribed general conditions of sale).

technical development, or investment;³⁴ (4) partitioning markets or sharing sources of supply;³⁵ (5) applying dissimilar conditions to equivalent transactions with other trading parties and thereby placing the latter at a competitive disadvantage;³⁶ and (6) rendering the conclusion of contracts subject to acceptance by other contracting parties of supplementary obligations customarily unconnected with the subject-matter of such contracts.³⁷

Business or commercial activities or transactions which exhibit any of the foregoing characteristics become automatically void.³⁸ Consequently, those activities are incapable of being invoked or relied upon in any proceedings before the competent institutions of the EEC; furthermore, they cannot be pleaded against third parties.³⁹ By the same token, they cannot be pleaded or relied upon before the competent antitrust authorities of the individual Member States of the EEC. Indeed, this exclusion was

³⁴ See, e.g., *Buchler & Co. v. EC Comm'n* [1967-70 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8084, 8214-21; *Boehringer Mannheim GmbH v. EC Comm'n* [1967-70 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8085, 8242-49 (involving the fixing of product quotas); *Re Belgian Central Heating Agreement*, [1972] COMMON MKT. L.R. D130 (concerning an agreement between manufacturers and installers of central heating that only equipment certified by the parties as satisfying certain standards would be purchased).

³⁵ See, e.g., *Re Van Katwijk N.V.'s Agreement*, [1970] 9 COMMON MKT. L.R. D43; *Re Omega Watches*, [1970] 9 COMMON MKT. L.R. D49; *Re Agreement of William Prym-Werke KG* [1973] 12 COMMON MKT. L.R. D250; *Re Franco-Japanese Ballbearings Agreement*, [1974] 17 O.J. EUR. COMM. (No. L 343) 19, [1975] 15 COMMON MKT. L.R. D8; *Re the French and Taiwanese Mushroom Packers*, [1975] 15 COMMON MKT. L.R. D83. For an examination of the subject, see Bentil, *Control of Market-Sharing Agreements Under EEC Cartel Law*, 26 N. IRELAND LEGAL Q. 188 (1975).

³⁶ See, e.g., *Re German Ceramic Tiles Discount Agreement*, [1971] COMMON MKT. L.R. D6; *Re Gas Water-Heaters*, [1973] 12 COMMON MKT. L.R. D231; *Case 85/76, Hoffman-LaRoche & Co. AG v. EC Comm'n.*, [1979] 26 COMMON MKT. L.R. 211 (involving the negotiating of aggregated rebate cartels).

³⁷ See, e.g., *Re the Application of UNIDI*, [1975] 18 J. O. EUR. COMM. (No. L 228) 180, [1975] 16 COMMON MKT. L.R. D51; *Re CECIMO*, [1969] 13 J.O. EUR. COMM. (No. L69), [1969] 8 COMMON MKT. L.R. D1; *Re CEMATEX*, 26 J.O. EUR. COMM. (No. 227) (1971), [1973] 12 COMMON MKT. L.R. D135 (involving restrictive conditions associated with the holding of trade exhibitions or fairs).

³⁸ EEC Treaty, *supra* note 8, art. 85(2).

³⁹ See e.g., *Beguelin Import Co. v. G.L. Import Export SA*, [1972] COMMON MKT. L.R. 81, 97-98.

implicit in the recent preliminary ruling of the EC Court in the joined cases of *Procureur de la Republique v. Bruno Giry and Guerlain S.A.*⁴⁰

However, it may not be assumed that the prohibition under article 85(1) of the EEC Treaty is of an absolute character. On the contrary, exemptions are available under certain economic conditions. Consequently, individual business or commercial agreements between enterprises, concerted practices on the part of such enterprises, and decisions by an association of such enterprises may qualify for an exemption should they meet the relevant economic conditions or criteria.⁴¹ Thus, should they improve the production or distribution of goods, or promote technical or economic progress while still allowing consumers a fair share of the resulting benefit, they may then be exempted from the EEC legal prohibition. Even then, however, such enterprises would need to be less restrictive of economic competition with respect to a substantial proportion of the goods involved.

At first sight it might be thought that the provisions of

⁴⁰ [1981] 31 COMMON MKT. L.R. 99. In this case, the Tribunal de Grande Instance of Paris requested that the EC Court rule on the legality of the establishment of selective distribution systems for certain perfumery products within parts of France. The request to the EC Court was made following criminal proceedings instituted before the competent French court against the defendant suppliers of the products in question for allegedly charging illegal prices. The institution of the criminal proceedings was prompted by complaints with claims for damages lodged by some retailers of perfumery products to whom the defendant companies had refused to sell such products. In response to the complaints, the defendant companies sought to justify their refusal to sell the required perfumery products to the plaintiff retailers on the basis that (1) there already existed legitimate distribution systems for the products in question; and (2) the agreements on which those systems were based had been authorized by the EC Commission. In an earlier application to the EC Commission for negative clearance in respect of the agreements establishing the selective distribution systems concerned, the EC Commission appears to have granted such application. However, in its preliminary ruling, the EC Court appears to have seen nothing untoward about the competent French authorities exercising their antitrust jurisdiction in respect of the matter. Thus, the EC Court maintained that the EEC antitrust law did "not prevent the application of national provisions prohibiting a refusal to sell even where the agreements relied upon for the purpose of justifying that refusal have formed the subject-matter of a decision by the [EC] Commission to close the file on the case." *Id.* at 136-37.

⁴¹ EEC Treaty, *supra* note 8, art. 85(3) at 48.

article 85(1) of the EEC Treaty are concerned primarily with the control or the regulation of anticompetitive business or commercial practices as they pertain to the sale or supply of goods. Yet, article 85(1) is also concerned with the control or regulation of similar practices in the service sector of the economy. Indeed, the EC Court and the EC Commission have sought to underline this in their recent jurisprudence. In *SRL Ufficio Hanry van Emeyde v. SRL Ufficio Centrale Italiano di Assistenza Assicurative Automobilisti in Circolazione Internazionale (UCI)*,⁴² the EC Court indicated that the antitrust provisions of article 85(1) of the EEC Treaty are applicable to control the anti-competitive business or commercial activities of a national insurance bureau and its members. In addition, the EC Court has underlined the same point with respect to the restrictive practices of commercial banks.⁴³ Moreover, the EC Commission has stressed the same point in relation to (1) the

⁴² Case 90/71, [1977] E.C.R. 1091, [1977] 20 COMMON MKT. L.R. 478. The case took the form of a request by the Tribunale Civile e Penale di Milano, to the EC Court for preliminary ruling as to the compatibility of certain national provisions or agreements between various national insurance bureaus or their members with the antitrust laws of the EEC. The request to the EC Court for a preliminary ruling was occasioned by proceedings brought before the competent Italian court by an Italian subsidiary of a Netherlands company which was carrying on business as a loss-adjuster in the insurance business. In those proceedings, the company sued the UCI (the Italian Clearing Office for International Motor Vehicle Insurance) on the ground that either by a decision of the latter or its members, or by a concerted practice on the part of such members, the plaintiff company had been improperly excluded from the market in which it had specialized. The relevant market was for the settlement of claims arising from accidents caused by foreign vehicles in Italy. In 1972, the EEC established a uniform motor vehicle accident insurance system (best known as the "green card system"), in conformity with which the individual national motor vehicle accident insurance systems are meant to operate.

In its preliminary ruling the EC Court pointed out that the relevant EEC laws should not be regarded as authorizing the existence of national provisions or agreements between national insurance bureaus, or their members, which conflicted with the antitrust rules and procedures of the EEC. However, the EC Court maintained that a national provision or agreement between national insurance bureaus, in the context of the green card system, which declared the national bureaus to bear sole responsibility for the investigation and settlement of damage claims caused in the given EEC Member State by foreign vehicles to be compatible with the antitrust rules of the EEC.

⁴³ See, e.g., Case 172/80, *Gerhard Zuchner v. Bayerische Vereinsbank AG* (1981) E.C.R. 2021, [1982] 33 COMMON MKT. L.R. 313.

restrictive business practices of an association of property insurers;⁴⁴ (2) the anti-competitive practices of artists, such as leading opera singers;⁴⁵ and (3) restrictive commercial practices associated with the holding of international exhibitions or trade fairs.⁴⁶

Clearly, therefore, the antitrust provisions of article 85 of the EEC Treaty are applicable to the different forms of anti-competitive commercial practice engaged in by operators in the air transportation industry. In other words, since the air transportation industry undertakes the provision of services for the public, its anti-competitive commercial practices are controllable by means of the antitrust provisions of article 85 of the EEC Treaty. Consequently, it is understandable that the EC Commission should seek to bring about this result.

Apart from the antitrust provisions of article 85 of the EEC Treaty, article 86 of the same Treaty seeks to control monopolistic, oligopolistic, monopsonic, or oligopsonic market power, as exercised by enterprises within the European Common Market. The mere existence of such power alone does not constitute an infringement of article 86. Rather, only the abuse of that power constitutes a violation. Although article 86 of the EEC Treaty is underpinned by the concepts of "dominant market position" and "abuse," such concepts are undefined. It has, therefore, been left to the antitrust authorities of the EEC to define the nature and scope of application of such con-

⁴⁴ See, e.g., *Re Industrial Fire Ins.*, [1982] 34 COMMON MKT. L.R. 159.

⁴⁵ See, e.g., *Re Unitel Film-und Fernseh-Produktionsgesellschaft GmbH & Co.* (78/516/EEC), [1978] 23 COMMON MKT. L.R. 306.

⁴⁶ See, e.g., *Re Application of the Union Nazionale Industrie Dentare Italiane (UNIDI)*, [1975] 14 O.J. EUR. COMM. (No. L 220) (1975), [1975] 16 COMMON MKT. L.R. D51; *Re Comité European de Cooperation des Industries de la Machine - Outils (CECIMO)*, [1969] J.O. EUR. COMM. (No. L 69) (1969), 8 COMMON MKT. L.R. D1; *Re Comité European des Constructeurs de Matériel Textile (CE-MATEX)* (71/337/EEC); [1971] J.O. EUR. COMM. L227/26 of Oct. 8, 1971, [1973] 12 COMMON MKT. L.R. D135; *Re International Permanent Bureau of Motor Mfrs. (BPICA)* (77/722/EEC), 18 O.J. EUR. COMM. (No. 229) (1977), [1977] 20 COMMON MKT. L.R. D43; *Re Society of Motor Mfrs. and Traders Ltd. (SMM&T): Notice of the EC Comm'n*, O.J. EUR. COMM. C 216/2 (1980), [1980] 29 COMMON MKT. L.R. 119.

cepts.⁴⁷ At the same time, it cannot be overlooked that virtually the same business or commercial activities which are sought to be prohibited by article 85 of the EEC Treaty are treated similarly within the provisions of article 86 of the Treaty. Conversely, whereas article 85 provides for an exemption for particular restrictive business or commercial practices, article 86 alludes only slightly to any such exemption. This may reflect the desire of the drafters of the antitrust provisions of the EEC Treaty to ensure that market concentration, more than the other forms of restrictive business or commercial practice, was kept under very strict control.

Just as the provisions of article 85 of the EEC Treaty are applicable in both the goods and the services sectors of the EEC economy for the control of anti-competitive business or commercial practices, the same is true of the application of the provisions of article 86 of the Treaty. The EC Court's preliminary ruling in each of the following cases makes this inclusiveness apparent: *SRL Ufficio Henry van Ameyde v. Sr. Ufficio Centrale Italiano di Assistenza Assicurativa Automobiliste in Circolazione Internazionale (UCI)*,⁴⁸ *General Motors Continental IN. v. EC Comm'n*,⁴⁹ *Greenwich Film Production v. Societe des Suterus, Compositeurs et Editeurs de Musique (SACEM) and Another*,⁵⁰ *Gerhard Zuchner v. Bayerische Vereinsbank AG*.⁵¹ The provisions of article 86 of the EEC Treaty are applicable to regulate abuses of dominant market power in the air transportation industry within the EEC.

⁴⁷ For an indication of what constitutes a "dominant market position" and its "abuse," see, e.g., *Instituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. EC Comm'n*, [1974] E.C.R. 223, [1974] 1 COMMON MKT. L.R. 309; *Joined Cases 4-48, 50, 54-56, 111 & 113-114/73, Cooperatieve Vereniging "Suiker Unie UA" and Others v. EC Comm'n*, [1975] E.C.R. 1663; [1976] 17 COMMON MKT. L.R. 295; *United Brands Co. & United Brands Continental BV v. E.C. Comm'n*, [1978] E.C.R. 217, [1978] 21 COMMON MKT. L.R. 429; *Hoffmann-La Roche & Co. AG v. EC Comm'n*, [1979] E.C.R. 461, [1979] 26 COMMON MKT. L.R. 211.

⁴⁸ See *supra* note 42.

⁴⁹ Case 26/75, [1975] E.C.R. 1367, [1976] 19 COMMON MKT. L.R. 195.

⁵⁰ Case 22/79, [1979] E.C.R. 3275, [1980] 27 COMMON MKT. L.R. 629.

⁵¹ 1981 E. COMM. CT. J. REP. 2021, [1981] 33 COMMON MKT. L.R. 313.

B. Essential Procedural Provisions of EEC Antitrust Law

As already noted, some of the procedural provisions of antitrust law are to be found in article 85(3) of the EEC Treaty, while others are contained in major EEC secondary legislation. The administration of the exemption provisions of article 85(3) is entrusted to the EC Commission. In this regard, the EC Commission has the power to exempt individual business or commercial practices from the legal prohibition under article 85(1) if it considers that the necessary economic criteria are likely to be satisfied.

Obviously, the EC Commission is obligated to weigh various economic factors before deciding to grant an exemption. It is also evident that when refusing to grant an exemption, the EC Commission is bound to give tenable economic reasons. The EEC Treaty, however, does not clarify whether refusal is reviewable by the EC Court at the insistence of an aggrieved business or commercial enterprise. Nevertheless, aggrieved business or commercial enterprises appear to have an indirect means of getting the EC Court to review a refusal of the EC Commission. That is, the issue may be raised by an aggrieved business or commercial enterprise when it appeals to the EC Court against a decision of the EC Commission which may have adjudged it guilty of violating the antitrust provisions of the EEC Treaty or which may have imposed some legal or financial sanction on it.⁵² It is important to note that the EC Commission is vested with discretionary power to attach conditions and obligations to any exemption granted by it.⁵³

In addition to its task of administering the system of exemptions envisaged under article 85(3), the EC Commission is also vested with the power of granting "negative clearance," as provided by the first major EEC antitrust

⁵² EEC Antitrust Regulation No. 17, art. 8, as adopted by the EC Council, 13 J.O. COMM. EUR. 204 (1962).

⁵³ *Id.*

secondary legislation for the implementation of the substantive provisions of articles 85 and 86.⁵⁴ The EC Commission is required to grant such negative clearance as long as the evidence at its disposal suggests that the business or commercial agreement between enterprises does not constitute a *prima facie* breach of article 85(1).⁵⁵ In other words, the EC Commission may rule that particular forms of agreements between business or commercial enterprises are incapable or less capable of occasioning a breach of the antitrust provisions of article 85. The procedure of negative clearance provides a legal safeguard by which business or commercial enterprises which are uncertain whether particular activities constitute an infringement of the antitrust provisions of the EEC Treaty may become more certain of the legality or the validity of such activities.

It is apparent that there is a difference between the EC Commission's power to grant an exemption and its power to grant negative clearance. While the granting of negative clearance presupposes no *prima facie* violations of article 85(1), the granting of an exemption allows business or commercial transactions which constitute *prima facie* violations or infringements of EEC Treaty provisions. This seems to be the principal rationale for grounding the grant of an exemption upon the presence of prescribed economic criteria. In the exercise of its power to grant negative clearance, however, the EC Commission is not expected to eschew economic considerations; nonetheless, it may take economic considerations into account only in general terms.⁵⁶

⁵⁴ See generally EEC Antitrust Regulation No. 17, 13 J.O. COMM. EUR. 204 (1962).

⁵⁵ EEC Antitrust Regulation No. 17, art. 2, 13 J.O. COMM. EUR. 204 (1962).

⁵⁶ For an examination and assessment of the distinction of the two procedural mechanisms, exemption and negative clearance, see Bentil, *International Trade Fairs Under EEC Competition Law*, 124 NEW L.J. 193, 194-95 (1974); Bentil, *The Prohibition of Resale Price Maintenance Under the Commercial Law of the European Economic Community*, 3 ANGLO AM. L. REV. 380, 381-87 (1974); Bentil, *A Comparative Study of the Regulation of the Practices of Resale Price Maintenance in Australian and EEC Restrictive Trade Practices Laws*, 10 U. OF QUEENSLAND L.J. 172, 181 (1978); C.W. BELLAMY

It is possible for applications to be made in a given case for the granting of both an exemption and negative clearance, although the grants affect separate parts or sections of an agreement, decision, or concerted practice on the part of business or commercial enterprises.⁵⁷ It has been observed in one leading textbook on EEC antitrust law that "there is little point in applying for negative clearance for an agreement without at the same time notifying for an exemption under Article 85(3) [of the EEC Treaty.]"⁵⁸ Even then, it cannot be overlooked that the two forms of EEC procedural mechanisms could be invoked as alternatives, rather than as a composite.

Moreover, the EC Commission is vested with the power of issuing a cease and desist order against a business or commercial enterprise which acts in breach of the antitrust provisions of the EEC Treaty.⁵⁹ Additionally, the EC Commission is empowered to impose fines⁶⁰ or periodic penalty payments⁶¹ on business or commercial enterprises in violation of the treaty. Fines may be imposed where individual business or commercial enterprises intentionally or negligently: (1) supply incorrect or misleading information to the EC Commission in an application for negative clearance; (2) supply incorrect information in response to a request, made by the EC Commission, in the course of an antitrust investigation;⁶² (3) produce re-

& G.D. CHILD, *COMMON MARKET LAW OF COMPETITION* 144-47 (1st ed. 1973); D. BAROUNOUS, D. HALL & J. JAMES, *EEC ANTI-TRUST LAW: PRINCIPLES AND PRACTICE*, 251-52 (1975).

⁵⁷ See, e.g., *Re Schwarzwälder Apparate-Bau-Anstalt August Schwer und Sohne GmbH (SABA)*, 19 O.J. EUR. COMM. (No. L 119) (1976), [1976] 17 COMMON MKT. L.R. D61, in which the EC Commission granted both exemption and negative clearance at the same time. This was upheld by the EC Court in a subsequent appeal concerning the same case. *Metro-SB-Grossmärkte GmbH & Co. KG v. EC Comm'n* (1977) E.C.R. 1875, [1978] 22 COMMON MKT. L.R. 1.

⁵⁸ C. W. BELLAMY & G.D. CHILD, *supra* note 56, at 110.

⁵⁹ EEC Antitrust Regulation No. 17, art. 3, 13 J.O. COMM. EUR. 204 (1962).

⁶⁰ EEC Antitrust Regulation No. 17, art. 15, 13 J.O. COMM. EUR. 204 (1962).

⁶¹ EEC Antitrust Regulation No. 17, art. 16, 13 J.O. COMM. EUR. 204 (1962).

⁶² For example, in *The Community v. Telos SA*, [1982] 33 COMMON MKT. L.R. 267, the EC Commission imposed a maximum fine on a French firm for providing inaccurate answers to questions by officials of the EC Commission during the course of an antitrust investigation. Equally, in the case of *The Community v. SA*

quired books or other business or commercial records in incomplete form during the course of antitrust investigations by the EC Commission into alleged or suspected violations of the antitrust provisions of the EEC Treaty;⁶³ or (4) refuse to submit to an investigation order, issued by the EC Commission, regarding alleged or suspected violations of the antitrust provisions of the EEC Treaty.⁶⁴ In any of the foregoing situations, the EC Commission is to take account of both the gravity and the duration of a violation of the antitrust provisions of the EEC Treaty when it fixes the amount of a fine.⁶⁵

Conversely, the imposition of periodic penalty payments by the EC Commission is meant to compel delinquent business or commercial enterprises to: (1) end infringement of the antitrust provisions of the EEC Treaty; (2) refrain from any act where the EC Commission

National Panasonic (Belgium) NV, 18 O.J. EUR. COMM. (No. L 113) (1982), [1982] 34 COMMON MKT. L.R. 410, the EC Commission imposed a fine on a Belgian company because the Managing Director of the company's subsidiary knowingly provided false information during the course of an antitrust investigation by officials of the EC Commission. Furthermore, in *The Community v. National Panasonic (France) S.A.*, 18 O.J. EUR. COMM. (No. L 211) (1982), [1982] 35 COMMON MKT. L.R. 623, the EC Commission imposed a fine on a French company for providing incorrect information in response to a request for price lists during an antitrust inquiry.

⁶³ In *The Community v. Fabbrica Lastre di Vetro Pietro Sciarra*, O.J. EUR. COMM. (No. L 75) (1980), [1980] 23 COMMON MKT. L.R. 362, the EC Commission imposed a fine on an Italian company for failing to produce all correspondence connected with the glass industry during an antitrust investigation by officials of the EC Commission. It also appears that a deliberate attempt to withhold particular business documents or records from the attention of the EC Commission may be the functional equivalent of producing business documents or records in incomplete form. For example, in *The Community v. Fabbrica Pisani*, O.J. EUR. COMM. (No. L 75) (1980), [1980] 28 COMMON MKT. L.R. 354, the EC Commission imposed a fine on an Italian company for not making available to officials of the EC Commission some highly relevant business documents during an antitrust investigation.

⁶⁴ See *The Community v. Federation Nationale de L'Industrie de la Chaussure de France*, O.J. EUR. COMM. (No. L 319) (1982), [1983] 36 COMMON MKT. L.R. 575, where the EC Commission imposed a fine on a French trade association for deliberately refusing to produce minutes of its council and other management bodies when ordered to do so by the EC Commission.

⁶⁵ EEC Antitrust Regulation No. 17, art. 15(2), 13 J.O. COMM. EUR. 204 (1962). For the text of the EEC Antitrust Regulations, see D. BAROUNOUS, *EEC ANTITRUST LAW* 328-29 (1975).

has revoked or amended its decision or prohibition of particular antitrust activities; (3) supply complete and correct information requested by the EC Commission during an antitrust investigation; or (4) submit to an investigation ordered by the EC Commission regarding an alleged or suspected violation of the antitrust provisions of the EEC Treaty.⁶⁶

In any of the foregoing circumstances decisions of the EC Commission are reviewable by the EC Court.⁶⁷ In other words, the EC Court is empowered to review decisions of the EC Commission which impose a fine or periodic penalty payment on a business or commercial enterprise. Before the EC Court can exercise its powers of review, business or commercial enterprises must apply to the EC Court. Through the exercise of its review powers the EC Court may cancel,⁶⁸ reduce,⁶⁹ or increase⁷⁰ a fine or periodic penalty payment imposed by the EC Com-

⁶⁶ EEC Antitrust Regulation No. 17, art. 16(1), 13 J.O. COMM. EUR. 204 (1962).

⁶⁷ EEC Antitrust Regulation No. 17, art. 17, 13 J.O. COMM. EUR. 204 (1962).

⁶⁸ See, e.g., *General Motors Continental NV v. EC Commission*, [1975] E.C.R. 1367, [1976] 17 COMMON MKT. L.R. 95, where the EC Court annulled a decision of the EC Commission by which a fine had been imposed on the plaintiff firm for an alleged violation of article 86 of the EEC Treaty. The EC Court appears to have based its annulment of the relevant decision of the EC Commission on the fact that there had been no abuse of a dominant market position by the plaintiff firm. Equally, in *Groupement des Fabricants de Papiers Peints de Belgique and Others v. EC Commission*, [1975] E.C.R. 491, [1976] 17 COMMON MKT. L.R. 589, the EC Court annulled, for lack of adequate reasons, the part of the decision of the EC Commission by which a fine had been imposed on a trading group of five Belgian wall-paper producers and importers. Furthermore, in *Hugin Kassaregister AB and Another v. EC Comm'n* [1979] E.C.R. 1969, [1979] 26 COMMON MKT. L.R. 345, the EC Court annulled a decision of the EC Commission by which a fine had been imposed on a Swedish company and its British subsidiary for an alleged refusal to supply spare parts for the plaintiff company's machines. The EC Court's annulment of the EC Commission's decision appears to have been based on the ground that the alleged conduct of the two companies concerned had no actual or potential effect on interstate trade in the EEC.

⁶⁹ See, e.g., *Joined Cases 48-57/69, I.C.I. Ltd. and Others v. EC Comm'n*, *supra* note 32, *Joined Cases 6-7/73, Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. EC Commission*, [1974] E.C.R. 223, [1974] 13 COMMON MKT. L.R. 309; *Hoffmann-La Roche & Co. AG v. EC Comm'n*, [1979] E.C.R. 461, [1979] 26 COMMON MKT. L.R. 211.

⁷⁰ As far as this discussion is concerned, the EC Court appears not to have found it necessary to increase the amount of a fine or periodic penalty payment imposed by the EC Commission on individual business or commercial enterprises.

mission. It is conceivable that the EC Court could annul, as well as reduce, a fine or periodic penalty payment.⁷¹ This presupposes, however, the imposition of multiple fines or periodic penalty payments on two or more business or commercial enterprises, or the imposition of different categories of penalty on individual enterprises.

Another feature of the procedural framework of the EEC's antitrust legal system relates to the extraterritorial application or enforcement of the provisions of articles 85 and 86 of the EEC Treaty. Although neither the actual provisions of the EEC Treaty nor those of EEC Regulation No. 17 seek to cater to extraterritorial application or enforcement of the antitrust provisions of the EEC Treaty, both the EC Court⁷² and the EC Commission⁷³ have sought to bring about that result.⁷⁴ The extraterritorial application or enforcement of the antitrust law of the EEC is generally based on: (1) the so-called antitrust "effects doctrine;"⁷⁵ (2) the fact that a foreign parent com-

⁷¹ See, e.g., Joined Cases, 40-48/73, 50/73, 54-56/73, 111/73, 113-14/73, "Suiker Unie" UA v. EC Comm'n, [1975] E.C.R. 1663, [1976] 17 COMMON MKT. L.R. 295; United Brands Co. & United Brands Continentaal v. EC Comm'n, [1978] E.C.R. 207, [1978] 21 COMMON MKT. L.R. 429.

⁷² See, e.g., Case 22/17, Beguelin Import Co. v. SAGL Import Export, *supra* note 39; Joined Cases 48-57/69, I.C.I. Ltd. v. EC Comm'n, *supra* note 31; Europemballage Corp. & Continental Can Co. v. EC Comm'n, [1973] 12 COMMON MKT. L.R. 199; Joined Cases 6-7/73, Istituto Chemoterapico Italiano spA & Commercial Solvents Corp. v. EC Comm'n, *supra* note 69; Case 18/77, Tepea V.V. v. EC Comm'n, [1978] 23 COMMON MKT. L.R. 392; Case 85/76, Hoffmann-La Roche & Co. AG v. EC Comm'n, *supra* note 69.

⁷³ See, e.g., *In Re Franco-Japanese Ballbearings Agreement* (74/634/EEC), 17 O.J. EUR. COMM. (No. L 343) (1974), [1975] 15 COMMON MKT. L.R. D8, *Re The French and Taiwanese Mushroom Packers Agreement* (75/77/EEC), 18 O.J. EUR. COMM. (No. L 29) (1975) 26, [1975] 15 COMMON MKT. L.R. D83; *Wilkes v. Theal N.V. & Watts Ltd.* (77/129/EEC), 20 O.J. EUR. COMM. (No. L 39) (1977) 19, [1977] 19 COMMON MKT. L.R. D44.

⁷⁴ For a consideration of the extraterritorial exercise by antitrust authorities of the EEC of their jurisdiction, see Bentil, *Extra-territorial Effect of E.E.C. Anti-Trust Law*, THE SCOTS L. TIMES 149 (1975); Bentil, *Control of the Abuse of Monopoly Power in EEC Business Law*, 12 COMMON MKT. L. REV. 59, 65-66 (1975); Mann, *The Dye-stuffs Case in the Court of Justice of the European Communities*, 22 INT'L & COMP. L.Q. 35 (1973).

⁷⁵ The doctrine is that national administrative bodies or tribunals are entitled to exercise jurisdiction over activities outside their respective national territories, as long as such activities affect aspects of life in the territories concerned. For an

pany has a subsidiary established within the European Common Market area;⁷⁶ (3) the fact that a foreign parent company is the grantor of trading concessions with respect to its products to concessionaires in the EEC;⁷⁷ or (4) a combination of two or all three of the foregoing grounds.

Arguably, extraterritorial application or enforcement of EEC antitrust law has tended to be less obtrusive, resulting in little or no controversy or foreign governmental objection. This contrasts with the political and economic controversies surrounding extraterritorial application or enforcement of the antitrust laws of the United States.⁷⁸

Futhermore, it should be noted that neither the antitrust provisions of the EEC Treaty nor those of EEC Regulation No. 17 attempt to allow persons aggrieved by the proven anti-competitive business or commercial practices of individual enterprises to sue for damages before the EC Commission or the EC Court. Neither has the EC Court nor the EC Commission found it necessary to rule on that issue.⁷⁹ Indeed, it has been observed that "[t]here exists as yet no case law of the EC Court of Justice [of] the possibility for injured third parties (competitors, buyers, and suppliers) and for injured parties to sue for damages

evaluation of the doctrine, see the Report of the Committee of Experts on Restrictive Business Practices of the Organization for Economic Co-operation and Development [OECDG], entitled *Restrictive Business Practices of Multinational Enterprises*, at 37-38 (1977).

⁷⁶ See, e.g., Joined Cases 48-57/69, *I.C.I. Ltd. v. EC Comm'n*, *supra* note 32; *Re Pittsburgh Corning Europe*, (1972) 15 O.J. EUR. COMM. (No. L 272) 35; [1972] COMMON MKT. L.R. D2; *Erim Pharm GmbH v. Johnson & Jameson Inc.*, 23 O.J. EUR. COMM. (No. L 377) (1980) 16; [1981] 31 COMMON MKT. L.R. 287.

⁷⁷ See, e.g., *Re Pittsburgh Corning Europe*, *supra* note 76.

⁷⁸ For example, reference should be made to the reaction of the Australian Commonwealth Parliament, in enacting the Foreign Antitrust (Restriction of Enforcement) Act of 1979, as a means of expressing its resentment of the extraterritorial enforcement of the antitrust laws of the United States against Australian-based companies. In addition, the British Parliament passed the Protection of Trading Interests Act of 1980 for the same reason.

⁷⁹ This contrasts with the right of individual aggrieved parties to sue for damages of all kinds under the antitrust laws of the United States.

against parties to prohibited agreement”⁸⁰ However, while an aggrieved third party may lack the necessary legal standing to institute proceedings before the EC Court in the envisaged context, it is arguable that such person may be able to bring a tort action for damages before a national court or tribunal.⁸¹

III. GENERAL BACKGROUND TO THE ATTEMPT TO REGULATE RESTRICTIVE COMMERCIAL PRACTICES IN THE AIR TRANSPORTATION INDUSTRY OF THE EEC

A number of issues arise in the context of anti-competitive commercial practices in the air transportation industry in the EEC. First of all, it is necessary to consider the basic difficulties which relate to the application of existing EEC antitrust law for the possible regulation of anti-competitive commercial activities in the air transportation industry of the EEC. Second, it is necessary to consider the efforts of the EC Commission in submitting a proposal to the EC Council for the adoption and the promulgation of an appropriate EEC secondary legislation for the effective control of anti-competitive commercial activities.

⁸⁰ P. KAPTEYN & P. VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES, 262-263 (1973).

⁸¹ *Cf., e.g., id.*, where it is observed that “[i]n general it is assumed that parties injured by prohibited agreement can indeed sue for damages [of all kinds] in accordance with the rules of municipal law.” *Id.* at 263. It is noteworthy that in the recent English case of *Garden Cottage Foods Ltd. v. Milk Mktg. Bd.*, [1983] 3 W.L.R. 143, [1983] 2 All E.R. 770, [1983] 33 COMMON MKT. L.R. 43, the House of Lords was called upon to pronounce on the entitlement of a company to both damages and injunctive relief upon the finding of a breach by the dependent municipal corporation of some provisions of EEC antitrust law. By a four to one vote, the House of Lords held that relief in damages, rather than injunction, was the relief available to the appellant company against the respondent public corporation. Although the decision of the House of Lords may have been tentative, the legal significance of some of its underlying principles can hardly be ignored.

A. *Problems and Issues Concerning the Application of Existing Antitrust Provisions of the EEC Treaty to the Air Transportation Industry*

Although the drafters of the EEC Treaty contemplated the establishment of an EEC common transport policy,⁸² only rail, road, and inland waterway transportation systems were meant to be directly subsumed under EEC transportation policy.⁸³ Nevertheless, the systems of air and sea transportation could be subsumed under a common transport policy after the EC Council has unanimously adopted appropriate EEC secondary legislation.⁸⁴ The procedure to be followed, however, by the EC Council in adopting appropriate EEC control measures is unclear. As has been observed by one writer, "[a]rticle 84(2) [of the EEC Treaty] is exceptional in that it does not lay down the procedure whereby [EC] Council decisions may be adopted for the air and maritime sectors."⁸⁵ Therefore, until such time as the EC Council adopts the necessary EEC control measures to bring the systems of air and sea transportation within the ambit of the EEC's common transport policy, the two systems of transportation would seem to fall outside the limits of direct and proper EEC regulation. Unfortunately, the EC Council has as yet failed to bring the two systems of transportation within the general scope of application of an EEC common transport policy.⁸⁶

It may have been thought that the antitrust provisions of the EEC Treaty could not be utilized to regulate anti-competitive commercial practices engaged in by operators

⁸² EEC Treaty, *supra* note 8, arts. 73-83.

⁸³ EEC Treaty, *supra* note 8, art. 84(1).

⁸⁴ EEC Treaty, *supra* note 8, art. 84(2).

⁸⁵ Close, *Article 84 EEC: The Development of Transport Policy in the Sea and Air Sectors*, 5 EUR. L. REV. 188, 197 (1980).

⁸⁶ See, e.g., Dagoglou, *Air Transport and the European Community*, 6 EUR. L. REV. 335 (1981), where it is pointed out that the EC Council "has remained inactive for decades even though air transport has become increasingly important and there has been no lack of suggestions and proposals from the [EC] Commission, particularly in recent years."

in the air and sea transportation industries.⁸⁷ As the EC Commission observed of the issue in 1975,

[T]he law as it now stands does not allow for the consistent application of the rules of competition to sea and air transport in a manner reflecting the special features of these industries. Furthermore, the fact that there are no precise provisions for the application of Articles 85 and 86 [of the EEC Treaty] to them makes for uncertainty in the law, and this is to the disadvantage of shippers, airlines and users.⁸⁸

Concurrently, however, the EC Court had indicated otherwise.⁸⁹ The EC Court maintained that there was no reason why the antitrust provision of the EEC Treaty could not be utilized to regulate the various anti-competitive commercial practices of the operators of the air and sea transportation systems in the EEC. Despite the fact that the EC Court's ruling offered a great deal of encouragement to the EC Commission,⁹⁰ in the EC Commission's efforts at formulating an appropriate proposal for EEC secondary legislation⁹¹ it continued to encounter difficulties in dealing with cases in that area.

This became apparent when, for example, the EC Commission was confronted with ruling in the case of *Sterling Airways*.⁹² The case involved a complaint by a Danish private airline, Sterling Airways, against Scandinavian Airlines System (SAS) and the Danish Government. The

⁸⁷ Cf. Close, *supra* note 85, at 188; Dagoglou, *supra* note 86, at 335.

⁸⁸ EC Commission's Fifth Report on Competition Policy, at 25 (Brussels-Luxembourg, Apr. 1976).

⁸⁹ Case 167/73, *Re French Merchant Seamen*: EC Commission v. The French Republic, [1974] E.C.R. 359, [1974] 14 COMMON MKT. L.R. 216.

⁹⁰ Cf., e.g., EC Commission's Fifth Report on Competition Policy, *supra* note 88, at 24.

⁹¹ It should be noted that the EC Council found its way clear to adopt an EEC secondary legislation for the effective application of the antitrust provisions of the EEC Treaty to control anti-competitive business or commercial activities with respect to rail, road and inland waterway transportation in the EEC in 1968. See EEC Regulation No 1017/68; O.J. EUR. COMM. (No. L 1750) [1968] 7 COMMON MKT. L.R. 2761.

⁹² See EC Commission's Tenth Report on Competition Policy, *supra* note 8, at 20.

complaint was founded principally upon two issues: (1) that the SAS had, by virtue of its monopoly power in the Danish air transportation industry, prevented Sterling Airways from entering the international scheduled flights market in general, and the Copenhagen-London route in particular, as well as from entering certain sectors of the charter market; and (2) that the Danish government, in its position as regulator of Danish airspace, had allowed SAS to abuse its dominant market position by charging excessive fares on the Copenhagen-London route, contrary to the antitrust provisions of article 86 of the EEC Treaty.⁹³

On the question of the abuse of a dominant market position, the EC Commission found that as a result of prorating arrangements,⁹⁴ SAS's average revenue per passenger was below the standard economy fare. Furthermore, the EC Commission took the view that there were numerous obstacles to the establishment of a valid comparison between airline enterprises and the way they operated economically. Consequently, the EC Commission stated that on the basis of the latest available information, the fares involved "were no longer unnecessarily high."⁹⁵ Moreover, the commission ruled that the alleged anti-competitive commercial practices of SAS no longer infringed on the provisions of article 86 of the EEC Treaty. In the end, therefore, the EC Commission formed the opinion that "there were no longer any grounds for it to consider the further action."⁹⁶ However, the EC Commission appears to have been rather unsure of its conclusion in view of the uncertain nature of the relevant EEC law.

On the second issue, concerning the exclusion of Sterling Airways from entering the international scheduled

⁹³ See *id.* at 94-96.

⁹⁴ This is the system by which several airlines share the revenue of a through-travel, non-stop ticket when the passenger completes his journey in stages, traveling on aircraft belonging to different airline companies.

⁹⁵ See EC Commission's Tenth Report on Competition Policy, *supra* note 8, at 95.

⁹⁶ *Id.*

flight market, the Copenhagen-London route, and certain sectors of the charter market, the EC Commission appears to have been even more uncertain of its tasks. The EC Commission stated that "in the prevailing legal situation and in the light of the information it had at its disposal," it would be inappropriate to dispute the legality, in terms of EEC law, "of the grant of special or exclusive rights to SAS or of the refusal to grant them to Sterling Airways."⁹⁷

Moreover, it is noteworthy that the recent EEC case of *Lord Nicholas William Bethell v. EC Commission*,⁹⁸ decided by the EC Court, highlighted the lack of appropriate EEC legal control measures and mechanisms for dealing with alleged anti-competitive commercial practices of airlines in the EEC, with particular reference to the fixing of fares for passenger air transportation. The case itself related to an action brought by Lord Bethell, a member of the EC Parliament and also of the British House of Lords, against the EC Commission. As a regular user of scheduled air passenger services in the EEC, and as Chairman of the Freedom of the Skies Campaign,⁹⁹ Lord Bethell entered into a lengthy exchange of correspondence with the EC Commission with respect to the determination of passenger fares on scheduled flights within the EEC.

In particular, Lord Bethell noted that competition in air fares between the various European airlines was substantially restricted by a network of bilateral and multilateral agreements. In view of this, Lord Bethell requested that the EC Commission take appropriate measures within the general antitrust legal framework of the EEC. The EC Commission conducted preliminary investigations into the complaint, even though Lord Bethell himself appears to have acknowledged the absence of any applicable EEC

⁹⁷ *Id.* at 96.

⁹⁸ Case 246/81, [1982] E.C.R. 2277, [1982] 35 COMMON MKT. L.R. 300.

⁹⁹ Freedom of the Skies is an organization dedicated to a reform of the present system of air transportation regulation within the EEC, especially in relation to the methods and standards by which air fares are determined or fixed. *Nicholas William Bethell v. EC Comm'n*, [1982] E.C.R. 2277, 2280, [1982] 35 COMMON MKT. L.R. 300, 301.

regulations and despite the uncertainty as to relevant EEC law.¹⁰⁰

Subsequently, however, the EC Commission informed Lord Bethell that its investigations had led to the conclusion that "in most cases, the final fixing of air fares was the sole responsibility of the Member States [of the EEC]"¹⁰¹ and that "government participation generally took the form of autonomous price-fixing measures and not consultation between companies."¹⁰² In view of this, the EC Commission stated that "[t]here was no ground, in principle, for scrutinizing the activity of either of the States or the airlines under Article 85 [of the EEC Treaty]."¹⁰³ At the same time, the EC Commission indicated to Lord Bethell its intention to examine the subject in greater detail and, if necessary, take remedial action if it were to find that "the underlying reality of fare-fixing" was in conflict with the antitrust provisions of the EEC Treaty.¹⁰⁴

Obviously, Lord Bethell was not satisfied with the EC Commission's notification. Hence, he proceeded to institute an action before the EC Court against the EC Commission for an alleged failure to adopt appropriate measures to control fare-fixing by airlines in the EEC. It should be noted that the government of the United Kingdom and a number of the principal European airline operators applied to intervene on behalf of the respective parties involved in the proceedings. The United Kingdom stated that it wished to intervene to support the claim of Lord Bethell, and the principal European airlines applied to intervene in support of the EC Commission.

The EC Court, however, ruled that Lord Bethell's claim was inadmissible. The EC Court's ruling was based on the purely technical ground that Lord Bethell lacked legal

¹⁰⁰ 35 COMMON MKT. L.R. at 308.

¹⁰¹ *Id.* at 304.

¹⁰² *Id.* at 302.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

standing to institute the proceedings against the EC Commission.¹⁰⁵ Consequently, the EC Court did not rule on the merits or substantive issues involved in the case. Even if the EC Court had sought to rule on the merits of the case, it may have found it difficult to come up with any worthwhile answers. There appears to be much uncertainty as to the nature and scope of the relevant EEC law. Only an appropriate EEC secondary legislation, which would seek to clarify such law, could ease the task of the EC Commission and the EC Court.

B. Efforts of the EC Commission to Formulate Appropriate EEC Secondary Legislation

The EEC Treaty empowers the EC Council to act on individual proposals from the EC Commission after consulting the EC Parliament for the purpose of adopting and applying appropriate EEC Regulations and Directives effecting the principles set out in articles 85 and 86.¹⁰⁶ In particular, the EC Commission is empowered to submit to the EC Council a proposal to define the scope of application of the provisions of articles 85 and 86 of the EEC Treaty in the "various economic sectors."¹⁰⁷ It is then up to the EC Council to adopt the proposal after it has consulted the EC Parliament. Indeed, it was on the basis of article 87(2)(c) of the EEC Treaty that the EC Commission prepared its draft of the EEC secondary legislation on the application of the antitrust provisions of the EEC Treaty to the anti-competitive commercial practices of airlines.¹⁰⁸

Subsequent to the preparation of the draft EEC second-

¹⁰⁵ *Id.* Articles 173 and 175 of the EEC Treaty allow only individual, natural or juristic persons to bring legal proceedings against the EC Commission or the EC Council in circumstances where such individuals may have been dissatisfied by a decision or action of either of the two EEC organs. *Id.*

¹⁰⁶ EEC Treaty, *supra* note 8, art. 87(1).

¹⁰⁷ EEC Treaty, *supra* note 8, art. 87(2)(c).

¹⁰⁸ See EC Commission's Ninth Report on Competition Policy, at 23 (Brussels-Luxembourg, Apr. 1980); EC Commission's Sixth Report on Competition Policy, at 22 (Brussels-Luxembourg, Apr. 1977); EC Commission's Fifth Report on Competition Policy, *supra* note 88, at 15.

secondary legislation, the EC Commission entered into consultation with the competent authorities of the Member States of the EEC, with a view toward reaching a consensus on the principal elements of it. Thus, the EC Commission began, in close cooperation with the competent authorities of the Member States of the EEC, to examine the most important economic and technical features of the air transportation industry in the EEC.¹⁰⁹ Apparently, difficulties arose with the scope of the envisaged EEC secondary legislation. They included (1) the scope of the regulation, (2) the effect of the prohibition on anti-competitive commercial practices, (3) the granting of exemption from the prohibition, and (4) the formulation of appropriate procedural rules.¹¹⁰

The EC Commission, however, continued its efforts. In the course of its work, the EC Commission exchanged views and information with the individual Member States of the EEC.¹¹¹ Indeed, it presented a questionnaire to the competent authorities of the Member States of the EEC concerning the various features of the operation of the air transportation industry in the EEC. In response to the questionnaire, the member States provided detailed information on the following subjects: (1) laws, regulations, and administrative provisions governing economic competition in the air transportation industry and information concerning their application and enforcement by the competent national bodies, courts, or tribunals; (2) the number, economic size, field of activity, and services of airlines established in the different Member States of the EEC, covering both scheduled and non-scheduled flights; (3) relations between the individual Member States of the EEC, airlines, and the appropriate international organizations; (4) bilateral and multilateral air transportation

¹⁰⁹ See EC Commission's Fifth Report on Competition Policy, *supra* note 88, at 25.

¹¹⁰ *Id.*

¹¹¹ See EC Commission's Sixth Report on Competition Policy, *supra* note 108, at 21.

agreements entered into by the individual Member States of the EEC; (5) agreements for technical and economic cooperation between the different airlines; and (6) relationships between the airlines and transport auxiliaries.¹¹²

From the information provided by the questionnaires, it became apparent that there was one problem which needed to be confronted by the EC Commission if its draft EEC secondary legislation was to be meaningful and practicable.¹¹³ The problem related to the fact that the air transportation industry in the EEC possesses special characteristics or features and that, therefore, the contemplated draft of the EEC secondary legislation should allow for them.¹¹⁴ As has already been noted, direct governmental intervention in the operation of the air transportation industry and its "natural" monopolistic character have rendered it special. However, in analyzing the replies to its questionnaire, the EC Commission formed the opinion that, in taking the special characteristics of the air transportation industry in the EEC into account, it was necessary to ensure that special characteristics would not jeopardize the direct application of the antitrust provisions of the EEC Treaty.¹¹⁵

During the first half of 1978, the EC Commission made available to the competent governmental experts of the Member States of the EEC a preliminary draft of the EEC secondary legislation.¹¹⁶ It is noteworthy that before making the draft available to the various national experts the EC Commission sought to make sure that it had completed its examination of whether and to what extent certain forms of cooperation between airlines might be the subject of a "block" exemption from EEC antitrust

¹¹² *Id.* at 21-22.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See EC Commission's Seventh Report on Competition Policy, at 58 (Brussels-Luxembourg, Apr. 1978).

prohibition.¹¹⁷

However, in the end the EC Commission formed the opinion that pre-existing relationships between airlines in the EEC were not to be tampered with. The EC Commission based its opinion on the then-existing structure of the air transportation industry in the EEC¹¹⁸ and on the extent of governmental intervention in the determination of air routes and fares.¹¹⁹ The EC Commission's investigations into the extent of actual intervention by the governments of the Member States of the EEC in the determination of air fares, and particularly into the extent to which the governments proposed air fares,¹²⁰ appear to have rendered the EC Commission's opinion inevitable.

Indeed, the findings of the EC Commission made certain matters abundantly clear. First of all, it became apparent that most of the governments of the Member States of the EEC formally controlled scheduled air services between their own countries and other countries in the EEC.¹²¹ Second, it became clear that the same governments also controlled landing rights, organization of scheduled air services, the allocation of scheduled routes to air carriers, timetables, capacities, and air fares.¹²² Third, the EC Commission found that bilateral air transportation agreements between individual Member States of the EEC regulated the operation of twenty-seven of the possible thirty-six links between the territories of the Member States of the EEC.¹²³ Finally, it became clear to

¹¹⁷ *Id.* See also EC Commission's Eighth Report on Competition Policy, at 36 (Brussels-Luxembourg, Apr. 1979).

¹¹⁸ EC Commission's Eighth Report on Competition Policy, *supra* note 117, at 36-37.

¹¹⁹ *Id.* at 37.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* One should note that the 17 bilateral agreements do not always state the real content of the decisions reached. Instead, they tend to be supplemented by confidential letters of understanding exchanged between the aeronautical authorities of the EEC Member States involved. Such confidential letters tend to interpret, specify or even modify the terms of the bilateral agreements. To a great extent the confidential letters may relate to the creation of commercial pools or

the EC Commission that air fares were established either in accordance with the procedures embodied in bilateral agreements between the individual Member States of the EEC or in accordance with the procedures of the 1967 International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services.¹²⁴

Apart from making its draft EEC secondary legislation available to the Member States of the EEC, the EC Commission also conducted discussions with the Member States on appropriate EEC measures for improving structural conditions in the field of air transportation in the EEC.¹²⁵ Apparently, the objective of the EC Commission was to ensure the establishment of a fair measure of commercial freedom to airlines operating scheduled air services in the EEC.¹²⁶ Commercial freedom, in turn, was thought likely to enhance competitive economic and commercial conditions between the different airlines in the EEC.¹²⁷ Obviously, the realization of such an objective was expected in the long-term, rather than in the short-term. This expectation results because of the economic and political obstacles to effecting any marked structural changes in the air transportation industry in the EEC.

In view of the direct and extensive governmental involvement in the operation of air transportation in the EEC, it seems inadequate for the EC Commission to concentrate on the resolution of anti-competitive commercial practices of the private sector of the industry. That is, it is an inadequate response for the EC Commission to seek to

underline the need for creating such commercial pools. See *Air Transport*, *supra* note 3, at 27-28.

¹²⁴ EC Commission's Eighth Report on Competition Policy, *supra* note 117, at 37. Namely, this is the "International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services," signed by most of the Member States of the EEC which belong to the European Civil Aviation Conference (ECAC). Indeed, the Federal Republic of Germany and Luxembourg are the only EEC Member States which have failed to ratify this international agreement. *Id.*

¹²⁵ *Id.* at 37.

¹²⁶ See *id.*

¹²⁷ *Id.* See also EC Commission's Ninth Report on Competition Policy, *supra* note 108, at 23.

control the anti-competitive commercial practices of individual airlines in the EEC under articles 85 and 86 of the EEC Treaty without devoting attention to the need for measures to control the practices of the governments of the individual Member States of the EEC. To remedy the inadequacy, the EC Commission needs recourse to the regulatory provisions of the EEC Treaty which control the restrictive business or commercial practices of public enterprises and enterprises to which individual Member States of the EEC have granted special or exclusive rights.¹²⁸

The provisions in article 90(1) of the EEC Treaty prohibit the Member States of the EEC from enacting or maintaining the anti-competitive business or commercial practices of publicly-controlled and state-endowed enterprises.¹²⁹ Consequently, state-owned or state-supported airlines in the EEC, the commercial activities of which tend to be restrictive of economic competition, are subject to the enforcement of the antitrust provisions of the EEC Treaty.

Indeed, the EC Commission has observed that article 90(1) is at least potentially useful in this context, stating:

The Commission does not exclude *a priori* that such a situation exists in air transport and that, as the sector concerned is one where, in the main, those undertakings referred to in Article 90(1) [of the EEC Treaty] (public undertakings or undertakings to which Member States grant special or exclusive rights) operate, action could be taken against the Member States by means of article 90(3) [of the EEC Treaty] for infringement of Articles 90(1), 85 and 86 [of the EEC Treaty].¹³⁰

¹²⁸ These provisions are contained in article 90 of the EEC Treaty, *supra* note 8.

¹²⁹ EEC Treaty, *supra* note 8, art. 90(1).

¹³⁰ See EC Commission's Tenth Report on Competition Policy, *supra* note 8, at 23. See also EC Commission's Eleventh Report on Competition Policy, at 21 (Brussels-Luxembourg, Apr. 1976), where it is observed of particular anticompetitive commercial practices in the air transportation industry in the EEC: "[c]urrent procedures might be caught by Article 90 of the (EEC) Treaty, in conjunction with Articles 85 and 86 (of the same Treaty), insofar as the Member States of the EEC merely delegate responsibility for tariff fixing to airlines." *Id.*

Recognizing the uncertainty of the application of the provisions of article 90(1), the EC Commission stated that "this hypothesis is being tested and no conclusion has yet been reached; it is a complex legal question in view of the significant implications of the hypothesis for other government measures connected with prices."¹³¹

On the other hand, it cannot be overlooked that the EEC Treaty also seeks to exempt from its antitrust provisions the restrictive business or commercial practices of certain publicly-owned or publicly-supported enterprises.¹³² In particular, practices of public enterprises entrusted with the operation of services of general economic interest or having the character of a fiscal monopoly may be exempted from the application of the antitrust legal prohibition of the EEC Treaty.¹³³ Although the EEC Treaty provides that such enterprises generally should be subject to the application of the antitrust law of the EEC, they nonetheless may escape the legal sanctions if the application of an antitrust law to them would tend to "obstruct the performance, in law or in fact, of the particular tasks assigned to them."¹³⁴

The exemption provisions of the EEC Treaty, however, tend to be strictly construed by the EC Court.¹³⁵ Consequently, very few public enterprises are likely to avail themselves of the exemption provisions in question. Although public enterprises must make certain that the development of trade is not affected to such an extent as would be contrary to the interests of the EEC,¹³⁶ all the foregoing EEC Treaty provisions are applicable to the re-

¹³¹ See EC Commission's Tenth Report on Competition Policy, *supra* note 8, at 23.

¹³² EEC Treaty, *supra* note 8, art. 90(2).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See, e.g., *Belgische Radio en Televisie (BrT) v. Societe Belge des Auteurs, Compositeurs et Editeurs (SABAM) and N.V. Fonior*, [1974] E.C.R. 313, [1974] 14 COMMON MKT. L.R. 238; *Gerhard Zuchner v. Bayerische Vereinsbank AG*, [1981] E.C.R. 2021, [1982] 33 COMMON MKT. L.R. 313.

¹³⁶ EEC Treaty, *supra* note 8, art. 90(2).

strictive commercial activities of the various national airlines within the area of the European Common Market.

It was against the general background of the foregoing factors that the EC Commission proceeded on August 10, 1981, to submit to the EC Council a proposal for the adoption of an EEC secondary legislation for the application of the antitrust provisions of articles 85 and 86 of EEC Treaty to control anti-competitive business or commercial activities in the air transportation industry in the EEC.¹³⁷ It should be noted that the EC Commission's proposal was debated in both the EC Parliament and the Economic and Social Committee of the EEC.¹³⁸ Indeed, on June 18, 1982, the EC Parliament adopted a resolution which approved, in principle, the proposal of the EC Commission.¹³⁹

In addition, it cannot be overlooked that during 1982 all the Member States of the EEC were able to reply to the questionnaires which the EC Commission had sent to them in the previous year for the purpose of determining more clearly the applicability of the antitrust provisions of articles 85 and 86 to the tariff-setting procedure.¹⁴⁰ The replies appear to be consistent with the EC Commission's conclusions in its report on scheduled passenger air fares in the EEC;¹⁴¹ that is, evidently the fares tended to result from airline and governmental actions. Predictably, therefore, the first stages of consultation and negotiation tended to involve the airlines — either individually or collectively — while the final responsibility for the adoption of a tariff rested with the governments of the Member States of the EEC.¹⁴² In addition, the EC Commission re-

¹³⁷ 24 O.J. EUR. COMM. (No. L 291) 4 (1981).

¹³⁸ See EC Commission's Twelfth Report on Competition Policy, at 31 (Brussels-Luxembourg, 1982).

¹³⁹ 25 O.J. EUR. COMM. (No. C 182) 120 (1982).

¹⁴⁰ See EC Commission's Twelfth Report on Competition Policy, *supra* note 138, at 32.

¹⁴¹ COM (81) 398 Final, para. 8, of July 23, 1981.

¹⁴² See EC Commission's Twelfth Report on Competition Policy, *supra* note 138, at 32.

ceived questionnaire replies from a number of airline companies concerning its questionnaire with regard to the inquiries into capacity and pooling arrangements and certain other matters in which decisions had intended to be common ones.¹⁴³ Still, the EC Commission found that the replies were rather incomplete in character, thus highlighting the need for appropriate EEC secondary legislative powers which enable the EC Commission to conduct thorough investigations and impose effective sanctions.

IV. ESSENTIAL FEATURES OF THE EEC SECONDARY LEGISLATION PROPOSED BY THE EC COMMISSION

As proposed, the EC Commission's secondary legislation would regulate only the business or commercial operations of the airlines or air transportation companies in the EEC. Consequently, it would not be concerned with measures which are solely the responsibility of the Member States. Thus, business or commercial activities between the Member States would fall outside the purview of the proposed EEC secondary legislation.¹⁴⁴ In addition, state-imposed business or commercial conduct in the air transportation industry in the EEC would fall outside the scope of application of the secondary legislation.¹⁴⁵ As the EC Commission has stated, "[t]he object is to develop conditions giving more scope for competition than at present in the business conduct upon which the companies themselves decide — where the State plays no part."¹⁴⁶

A. *The Scope of Application of the Proposed EEC Secondary Legislation*

The proposed EEC secondary legislation prescribes rules for the application of the antitrust provisions of arti-

¹⁴³ *Id.*

¹⁴⁴ See EC Commission's Eleventh Report on Competition Policy, *supra* note 130, at 20.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

cles 85 and 86 of the EEC Treaty for the regulation of anti-competitive business or commercial activities in the air transportation industry in the EEC.¹⁴⁷ That is, the proposed secondary legislation will regulate only the anti-competitive business or commercial activities of individual airline companies or operators. In other words, similar activities by national governmental authorities in the Member States would not be controlled by the proposed EEC secondary legislation. Therefore, the proposed EEC secondary legislation would "assist the application of [the antitrust provisions of articles 85 and 86 of the EEC Treaty] mainly in those sectors of the air transportation market where the airlines appear to possess such freedom (i.e. charter services)."¹⁴⁸

The limited scope of the proposed EEC secondary legislation may detract from its efficacy. Thus, it is not surprising that the EC Parliament, in approving in principle the EEC proposed secondary legislation,¹⁴⁹ found it necessary to express its reservations about its limited scope and its lack of provisions relating to structural conditions of the air transportation industry.¹⁵⁰ Conversely, the preamble to the proposed EEC secondary legislation does, in very general terms, indicate that "the present Regulation does not prejudice the application of Article 90 of the [EEC] Treaty."¹⁵¹ Implicit is the idea that the EC Commission might attempt to regulate the anti-competitive business or commercial activities of the Member States through the use of the antitrust provisions of the EEC Treaty. Nonetheless this idea needs to be properly addressed rather than vaguely articulated by the preamble of the secondary legislation.

¹⁴⁷ Proposal for a Council Regulation Applying Articles 85 and 86 of the EEC Treaty to Air Transportation, art. 1(1), 24 O. J. EUR. COMM. (No. 291) 4 (1981) [hereinafter cited as EEC Secondary Legislation].

¹⁴⁸ See EC Commission's Tenth Report on Competition Policy, *supra* note 8, at 22.

¹⁴⁹ 25 O.J. EUR. COMM. (No. C 182) 120 (1982).

¹⁵⁰ See EC Commission's Twelfth Report on Competition Policy, *supra* note 138, at 31.

¹⁵¹ 24 O.J. EUR. COMM. (No. C 291) 5 (1981).

The EEC secondary legislation as proposed would be applicable only to international air transportation.¹⁵² In other words, the proposed EEC secondary legislation would be inapplicable to air transportation activities of a purely domestic nature. Arguably, domestic air transportation is unlikely to have an adverse impact on trade between the Member States, and that lack of substantial negative impact may have led to the exclusion of domestic air transportation from the proposed EEC secondary legislation. Furthermore, it seems to be inapplicable to international air transportation between Member States of the EEC and non-EEC countries; presumably, this may be true because this form of commerce is controllable or regulable within the legal framework of IATA or the ECAC. In addition, the proposed EEC secondary legislation excludes restrictive business or commercial practices which result in the application of technical improvements or in achieving technical cooperation from the prohibition of the antitrust provisions of article 85(1) of the EEC Treaty.¹⁵³

Technical cooperation agreements may involve first, the establishment or application of standards or types of aircraft, equipment, supplies, or fixed installation. Second, they may involve the exchange, pooling, or joint maintenance of aircraft, parts, equipment, or fixed installations and the exchange or pooling of personnel. Third, they may involve the organization and execution of successive, complementary, substitute, or combined transport operations and the fixing and application of inclusive rates and conditions for such operations. Fourth, they may involve the coordination of timetables with the aim of meeting the needs of passengers. Fifth, they may involve the grouping of single consignments. Sixth, they may involve the establishment or the application of uniform rules in relation to the structure of transportation tariffs and their conditions of application; however, this would

¹⁵² EEC Secondary Legislation, *supra* note 147, art. 1(2).

¹⁵³ EEC Secondary Legislation, *supra* note 147, art. 2.

fall outside the scope of application of the proposed EEC secondary legislation as long as the rules concerned do not directly or indirectly fix transportation rates and conditions. Finally, they may involve the issue of tickets accepted by different airlines and the provisions of a common refund scheme.¹⁵⁴

B. *Power of the EC Commission Foreshadowed*

For effective regulation of anti-competitive business or commercial practices in the air transportation industry in the EEC to be ensured, the EC Commission must be vested with the appropriate legal and procedural powers. It is not surprising, therefore, that the EC Parliament has on several occasions found it essential to stress "the need for a regulation to confer on the [EC] Commission the powers of investigation and sanction necessary for a proper application of [the antitrust provisions] of Articles 85 and 86 [of the EEC Treaty] to the [air transportation] industry,"¹⁵⁵ although such application should be gradual."¹⁵⁶ The need for vesting the EC Commission with the necessary legal and procedural powers constitutes the *raison d'être* of the proposed EEC secondary legislation. The EC Commission itself has alluded to the secondary legislation as being a "purely procedural Regulation designed to give the [EC] Commission its own powers to investigate and punish infringement, powers which it lacks at present."¹⁵⁷

Three main aspects of the powers proposed by the secondary legislation to be exercised by the EC Commission are noteworthy. First, the EC Commission would be

¹⁵⁴ *Id.*

¹⁵⁵ *See, e.g.,* EEC Restrictions 16 (1980) (restrictions on economic competition in the air transportation industry in the EEC).

¹⁵⁶ *See* EC Commission's Tenth Report on Competition Policy, *supra* note 8, at 21.

¹⁵⁷ *Id.* at 22. *See also* EC Commission's Ninth Report on Competition Policy, *supra* note 108, at 23 ("[a]s the matters stand the Commission has not sufficient powers to apply the rules of competition systematically and effectively to airlines"); EC Commission's Eleventh Report on Competition Policy, *supra* note 130, at 19-20.

given the powers to investigate complaints against individual airline enterprises. It may exercise this power by acting on a complaint submitted by Member States of the EEC or by persons who claim a "legitimate interest."¹⁵⁸ The secondary legislation does not clearly state which individuals would be entitled to claim a "legitimate interest." Presumably, airline users and other airline companies or operators would fall within the category of eligible persons. However, a complaint made by a person to the EC Commission may be rejected as unfounded if the evidence suggests that there are no grounds for intervention either under the antitrust provisions of articles 85 or 86 of the EEC Treaty or under article 8 of the proposed EEC secondary legislation.¹⁵⁹ Alternatively, the EC Commission may act on its own initiative to inquire into and terminate any infringement on the part of individual airline companies of the antitrust provisions of articles 85 and 86 of the EEC Treaty.¹⁶⁰

For the purposes of exercising the commission's investigative powers, EC Commission officials would be able to: (1) examine the books and other business records of individual airline enterprises; (2) obtain copies or extracts from the book and business records of such enterprises; (3) ask for oral explanations of the records; and (4) enter any premises, land, or vehicle of the enterprise.¹⁶¹ The EC Commission may also obtain all necessary information from the governments of the Member States of the EEC and from their competent authorities, as well as from various business or commercial enterprises established in their respective territories for the purpose of discharging its functions and powers.¹⁶²

Moreover, the EC Commission may request the competent authorities of the Member States of the EEC to facili-

¹⁵⁸ EEC Secondary Legislation, *supra* note 147, art. 3.

¹⁵⁹ *Id.* art. 4(2).

¹⁶⁰ *Id.* art. 4(3).

¹⁶¹ *Id.* art. 13(1).

¹⁶² *Id.* art. 11(1).

tate the conduct of appropriate investigations which the EC Commission itself may have ordered.¹⁶³ It becomes apparent, therefore, that the EC Commission must enlist the co-operation of the competent authorities of the Member States of the EEC in the discharge of its functions. This appears to have been fully recognized by the EC Commission itself. Consequently, the proposed EEC secondary legislation provides that the EC Commission "shall carry out the procedures provided for in this Regulation in close and constant liaison with the competent authorities of the Member States [of the EEC]; [and] these authorities shall have the right to express their views on such procedures."¹⁶⁴

The proposed EEC secondary legislation also seeks to vest the EC Commission with power to impose fines¹⁶⁵ or periodic penalty payments¹⁶⁶ on individual airline enterprises. With respect to the EC Commission's power of imposing fines on individual airline enterprises, there would be three main grounds on which it could be exercised.¹⁶⁷ These relate to: (1) where the airline enterprise concerned supplies incorrect or misleading information when applying for an exemption from the antitrust prohibition under article 85(1) of the EEC Treaty; (2) where such companies supply incorrect information in response to the EC Commission's inquiries into some sectors of the air transportation industry in the EEC or in response to the EC Commission's requests for other relevant information; or (3) where such companies provide incomplete books or other business records in the course of antitrust investigations by the EC Commission.¹⁶⁸

Under the proposed secondary legislation the minimum fine assessable by the EC Commission in any of the fore-

¹⁶³ *Id.* art. 12.

¹⁶⁴ *Id.* art. 8(1).

¹⁶⁵ *Id.* art. 14.

¹⁶⁶ *Id.* art. 15.

¹⁶⁷ *Id.* art. 14(1).

¹⁶⁸ *Id.*

going situations would be 100 units of account,¹⁶⁹ and the maximum limit would be 5,000 units of account.¹⁷⁰ Furthermore, the EC Commission would be able to impose fines of from 1,000 to 1,000,000 units of account, or a greater sum not exceeding ten percent of the turnover of each of the companies participating in the infringement of the antitrust provisions of the EEC Treaty in the preceding business year.¹⁷¹ In these circumstances, the companies concerned must have either intentionally or negligently caused an infringement of the antitrust provisions of the EEC Treaty.¹⁷² In imposing fines, the EC Commission should consider the gravity and the duration of the infringement involved.¹⁷³

Periodic penalty payments would, on the other hand, be imposed on airline companies for the purpose of compelling them to: (1) end a violation of the antitrust provisions of the EEC Treaty; (2) refrain from breaches of conditions attached to an exemption granted by the EC Commission; (3) supply complete and correct information requested by the EC Commission during the conduct of its antitrust investigations; or (4) submit to an antitrust investigation ordered by the EC Commission.¹⁷⁴ The amount of periodic penalty payment may range from 50 to 1,000 units of account per day.¹⁷⁵ This contrasts with the payment of a fine which would occur once, rather than on a daily basis.

The EC Commission's power to impose a fine or periodic penalty payment, however, is not an absolute one. The EC Court would have unlimited jurisdiction¹⁷⁶ to review a decision of the EC Commission by which a fine or a periodic penalty payment may have been imposed on an

¹⁶⁹ About 100 U.S. dollars.

¹⁷⁰ About 5,000 U.S. dollars.

¹⁷¹ EEC Secondary Legislation, *supra* note 147, art. 14(2).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* art. 15(1).

¹⁷⁵ *Id.*

¹⁷⁶ EEC Treaty, *supra* note 8, at 75 art. 172.

airline.¹⁷⁷ In that respect, the EC Court would be able to cancel, reduce, or increase any fine or periodic penalty payment already imposed by the EC Commission.¹⁷⁸

It is evident that all the foregoing provisions of the proposed EEC secondary legislation are similar to those contained in the principal EEC antitrust Regulation No. 17.¹⁷⁹ In addition, however, the relevant provisions of the proposed EEC secondary legislation both elaborate and render more precise the scope of the necessary EEC antitrust procedural rules and requirements. Obviously, the jurisprudence developed by the EC Court and the EC Commission thus far would provide a resource which could be tapped when the proposed EEC secondary legislation is adopted and promulgated into EEC law by the EC Council.

C. *Foreshadowed Provisions Governing Applications For Exemption from the Relevant EEC Antitrust Legal Prohibition*

It is apparent that some of the commercial agreements which airline companies in the EEC enter into may be exempted from such legal prohibition under article 85(3) of the EEC Treaty, despite appearances that they might be subsumed within the antitrust prohibition of article 85(1) of the treaty. The EC Commission has recognized this exemption.¹⁸⁰ Moreover, most of the national experts of the Member States of the EEC advocate the granting of "wide-ranging exemptions for scheduled air services in regard to agreements on fares, capacity-sharing, and even revenue."¹⁸¹

¹⁷⁷ EEC Secondary Legislation, *supra* note 147, art. 16.

¹⁷⁸ *Id.*

¹⁷⁹ Moreover, as the EC Commission itself has pointed out, they also repeat the provisions applicable to transport by rail, road, and inland waterway. See EC Commission's Eleventh Report on Competition Policy, *supra* note 130, at 19-20.

¹⁸⁰ EC Commission's Eleventh Report on Competition Policy, *supra* note 130, at 22.

¹⁸¹ See EC Commission's Tenth Report on Competition Policy, *supra* note 8, at 22.

However, in view of the changing environment of the air transportation industry in the EEC and the Commission's need to acquire practical experience, the EC Commission considers that "it would be ill-advised to embark on granting exemptions for particular forms of agreements or practices."¹⁸² In other words, the EC Commission considers the granting of block-exemptions, in such circumstances, premature.¹⁸³ Consequently, the EC Commission considers it advisable to wait "until it has acquired sufficient experience by means of individual decisions before contemplating such measures."¹⁸⁴

The provisions of the proposed EEC secondary legislation governing applications for exemption from the EEC antitrust prohibition reflect the cautious attitude of the EC Commission. Thus, applications for exemption would be allowed by individual airline companies or operators on a case-by-case basis.¹⁸⁵ In these circumstances, the EC Commission would be duty-bound to publish a summary of the application in the Official Journal of the European Communities to invite all interested third parties to submit their comments to it within 30 days.¹⁸⁶ However, the EC Commission would be required to have due regard to the need for protecting the legitimate interests and the business secrets of airline companies or operators.¹⁸⁷

For as long as the EC Commission fails to notify individual applicants within a period of 90 days of any serious doubts as to their claim for exemption, that exemption would be deemed to have been granted.¹⁸⁸ On the other hand, an application for such an exemption would be deemed to have been rejected once the EC Commission

¹⁸² *Id.*

¹⁸³ See EC Commission's Eleventh Report on Competition Policy, *supra* note 130, at 20.

¹⁸⁴ *Id.*

¹⁸⁵ EEC Secondary Legislation, *supra* note 147, art. 5.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

has duly notified individual applicants of its decision.¹⁸⁹ Should the EC Commission grant an exemption, it may attach conditions and obligations to it.¹⁹⁰ An exemption would be renewable should the economic conditions for applying the provisions of article 85(3) of the EEC Treaty continue to be satisfied.¹⁹¹ Conversely, the EC Commission could revoke or amend the grant of an exemption or prohibit specified acts by the airline companies or operators involved if the facts underlying the exemption change or prove to be false, or if the parties breach any obligation attached to its grant, or abuse the exemption.¹⁹²

The exercise of the discretionary powers of the EC Commission, in all the foregoing circumstances, would not be absolute. The EC Court would have review powers over the decisions of the EC Commission.¹⁹³ In other words, individual airline companies or operators which are aggrieved by decisions of the EC Commission would be entitled to apply to the EC Court for review. It is difficult, however, to see how the EC Court would be able to exercise its review powers in these circumstances unless individual applications are also connected with an appeal against a fine or periodic penalty payment imposed by the EC Commission or with an appeal of a cease-and-desist order issued by the Commission.

All of the foregoing provisions of the proposed EEC secondary legislation spell out and clarify the evidentiary and procedural rules for the granting of an exemption from the antitrust prohibition under article 85(1) of the EEC Treaty. In this regard, although the provisions concerned are similar to those of EEC antitrust Regulation No. 17, they could be more specific in nature. No doubt, the jurisprudence developed so far by the EC Court and the EC Commission would be pressed into service when

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* art. 6(1).

¹⁹¹ *Id.* art. 6(2).

¹⁹² *Id.* art. 6(3).

¹⁹³ *Id.* art. 7(1).

the proposed EEC secondary legislation comes to be adopted and promulgated into EEC law by the EC Council.

D. *Envisaged Provisions Relating to the Need for the Conduct of General Inquiries*

There have been a number of occasions on which economic and other factors have motivated airline companies or operators to adopt various forms of restrictive business or commercial practice. Recent developments in the air transportation industry in the EEC and in other developed market-economy countries testify to that. As a result, there is a need for periodic inquiries into the operations of the various sectors of the air transportation industry in the EEC.

Not surprisingly, therefore, the proposed EEC secondary legislation seeks to vest the EC Commission with the power of conducting general inquiries into the operations of the various sectors of the air transportation industry in the EEC.¹⁹⁴ The EC Commission would be able to exercise its power should trends in transportation, fluctuations in or inflexibility of transport rates, or other circumstances, suggest that economic competition in air transportation is being distorted or restricted within the European Common Market.¹⁹⁵ In these circumstances, the EC Commission would be able to request transportation companies or operators to supply any necessary information and documentation for the purpose effecting the antitrust provisions of articles 85 and 86 of the EEC Treaty.¹⁹⁶

Since airline companies or operators of a notable size exert considerable economic and operational influence on the air transportation industry, particular attention needs to be paid them. Such airline companies or operators often to have a great deal of impact on the level of eco-

¹⁹⁴ *Id.* art. 10.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

conomic competition in the air transportation industry. In view of this impact, the proposed EEC secondary legislation seeks to empower the EC Commission to request airline companies or operators whose size suggests that they occupy a dominant position within the European Common Market to provide it with particulars of their structure and behavior as needed for an appraisal of their position.

V. GENERAL EVALUATION AND OVERVIEW

The EC Commission has described its proposed EEC secondary legislation as “[f]lexible enough to allow a body of case-law to develop that reflects both the specific problems of the [air transportation] sector which is characterized by the fact that most of the companies fall within the scope of Article 90 of the [EEC] Treaty and that some of their behaviour is imposed on them by their governments.”¹⁹⁷ However, the limited nature and scope of the proposed EEC secondary legislation would only bring about the regulation of a narrow area of anti-competitive business or commercial practices in the air transportation industry in the EEC.

Without subjecting the anti-competitive business or commercial activities of government-owned or government-controlled airline enterprises to some form of effective and direct overall regulation, the proposed EEC secondary legislation may have only a minimal effect in terms of ensuring effective economic competition.¹⁹⁸ The EC Commission itself has stressed that competition in the air transportation market,¹⁹⁹ including private airlines, has given rise to fewer complaints as to the provisions of the EEC Treaty than the competition among scheduled air services stating: “[T]he competitive situation [among

¹⁹⁷ EC Commission's Ninth Report on Competition Policy, *supra* note 108, at 23.

¹⁹⁸ Cf. Dagtoglou, *supra* note 86, at 352-55.

¹⁹⁹ The complaints have been made by individual air transportation users and, most recently, by the European Bureau of Consumer Unions.

scheduled air services] has given rise to complaints²⁰⁰ as to its compatibility, particularly with regard to fares, with the provisions of Articles 85, 86 and 90 (of the EEC Treaty)."²⁰¹

Consequently, the EC Commission's Memorandum concerning an EEC Approach to Air Transport,²⁰² should assume greater importance if effective business or commercial competition in the EEC's air transportation industry is to be ensured. However, this would depend on the EC Commission adopting and giving legal effect to the economic competition proposals contained in the Memorandum of the EC Commission.²⁰³ So far, this does not appear to have materialized.

Moreover, there are some Member States of the EEC — such as France, the Federal Republic of Germany, and Italy — which oppose the idea of ensuring more economic competition in the EEC air transportation industry.²⁰⁴ Indeed, the United Kingdom seems to be the only Member State of the EEC which is highly in favour of deregulation of the air transportation industry in the EEC.²⁰⁵ In effect, therefore, "vested interests against deregulation . . . are very strong."²⁰⁶ Nevertheless, it appears that the EC Commission has persuaded most of the Member States of the EEC "to accept a first step towards the deregulation of air fares within the [EEC]."²⁰⁷ This acceptance is "some-

²⁰⁰ The private airlines, despite public disapproval, are apparently free of national governmental control or intervention.

²⁰¹ See EC Commission's Tenth Report on Competition Policy, *supra* note 8, at 22.

²⁰² See *Air Transport*, *supra* note 3.

²⁰³ Cf. Dagtoglou, *supra* note 86, at 350.

²⁰⁴ See *How About Larger Lorries and Cheaper Air Fares?*, THE ECONOMIST, at 59 (June 4, 1982). See also Dagtoglou, *supra* note 86, at 339-40.

²⁰⁵ Dagtoglou, *supra* note 86, at 339-40.

²⁰⁶ See *id.* at 340, where it is contended that these vested interests include "management and unions of the established, often overmanned, and, therefore, not necessarily competitive airlines; national Governments concerned with the well-being of their 'national flag carriers' and afraid of losses in currency inflow." Together, they account for the opposition of most of the Member States of the EEC to a deregulation of the air transportation industry in the EEC. *Id.*

²⁰⁷ See *How About Larger Lorries and Cheaper Air Fares?*, *supra* note 204, at 63. Such concessions by the other Member States of the EEC have been made in exchange

thing the British Government has been battling for since 1977."²⁰⁸

Apparently encouraged by the move toward deregulation, the EC Commission has drafted EEC secondary legislation to break the national-airline monopoly for certain flights within the EEC, excluding those that start or end at major international airports.²⁰⁹ This EEC secondary legislation would apply to flights from Manchester to Corfu or from Antwerp to Cannes for example, subject to three requirements.²¹⁰ The flights must be regularly scheduled, the distance covered must exceed 400 kilometers, and the capacity of the aircraft must not exceed 70 seats.²¹¹ Although this falls short of what the British Government has been demanding, the view seems to be that "it would be a step in the right direction."²¹² However, the individual Member States of the EEC may lack the requisite political will to ensure that the draft EEC secondary legislation is adopted and promulgated into EEC law by the EC Council.

At present, the secondary legislation remains under examination by the EC Council's Ad Hoc Working Group on Air Transport Rules of Competition.²¹³ As the deliberations of the Ad Hoc Working Group are merely preliminary and do not yet include an article-by-article review of the proposal,²¹⁴ a rapid ratification by the EC Council is unlikely. The slow progress of the EC Council should not, however, be considered symptomatic of a predestined demise of the proposed EEC secondary legislation.

Public opinion in the EEC concerning the need for effective economic competition in the air transportation in-

for the British Government's being prepared to agree to accept continental European juggernaut lorries on British roads. *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* See also *June in the EEC*, *THE ECONOMIST*, 48, 58 (July 2-8, 1983).

²¹⁰ See *How About Larger Lorries and Cheaper Air Fares?*, *supra* note 204, at 63.

²¹¹ *Id.*

²¹² *Id.*

²¹³ See EC Commission's Twelfth Report on Competition Policy, *supra* note 138, at 31.

²¹⁴ *Id.*

dustry cannot be easily ignored by the national governments of the individual Member States of the EEC.²¹⁵ Traditional arguments advanced against the opening of the air transportation industry to competition are not particularly convincing. The need for aviation safety and the international legal underpinnings of the air transportation industry cannot impede the move to make the air transportation industry economically competitive.²¹⁶ From the standpoint of economic efficiency, national governmental control of or intervention in the air transportation industry cannot be justified. From the perspective of the users of air transportation, effective economic competition in the industry should lead to cheaper air fares without sacrificing aviation safety and the utility of the services provided.²¹⁷

This is another reason why the proposed EEC secondary legislation should be endorsed by the EC Council. Although the EC Commission has suggested that the provisions of article 90 of the EEC Treaty might be invoked to regulate aspects of the business to the commercial operation of the air transportation industry in the EEC under individual national governmental control, this should be expressly stated in the applicable secondary legislation. However, a recent agreement to the adoption of an EEC Directive for allowing modest economic competition in regional air services between the Member States of the EEC by the Transport Ministers of the Member States²¹⁸ may be an important step in that direction.

At the same time, it cannot be taken for granted that adoption and promulgation of the proposed EEC secondary legislation would ensure some form of effective economic competition in the air transportation industry in the EEC. A great deal depends on how the EC Commission approaches its role and the seriousness and impar-

²¹⁵ Cf. Dagoglou, *supra* note 86, at 340-41.

²¹⁶ *Id.*

²¹⁷ Cf. *Free Trade in the Sky*, *supra* note 10, at 14.

²¹⁸ See *June in the EEC*, *supra* note 209, at 58.

ality with which it exercises its legal functions and powers. The EC Commission has frequently succumbed to political pressures from the individual national governments of the Member States of the EEC when strict enforcement of particular EEC laws has been at issue.

VI. CONCLUSION

Undoubtedly, there is a need to render the air transportation industry in the EEC more economically competitive. National governmental ownership or control of most of the operations of the air transportation industry in the EEC creates unnecessary increases in costs and, therefore, militates against lower fares by the various airlines. While the EEC antitrust authorities must be able to control or regulate national governmental practices in the Member States, EEC antitrust authorities must also be able to exercise direct control over the anti-competitive business or commercial activities of private airline companies or operators in the EEC.

The proposed EEC secondary legislation addresses the issue of EEC antitrust authority control; however, the legislation would not ensure effective economic competition in the air transportation industry in the EEC. Yet, despite its inadequacies, the proposed EEC secondary legislation constitutes an important step in the right direction. The EC Commission and EC Council should be strongly encouraged not only to adopt the secondary legislation, but to ensure its consistent and effective application in the individual Member States of the EEC.

Comments

