

1990

1992 European Unification: Effects in the Air Transport Industry, The

Monica L. Luebker

Recommended Citation

Monica L. Luebker, *1992 European Unification: Effects in the Air Transport Industry, The*, 56 J. AIR L. & COM. 589 (1990)

<https://scholar.smu.edu/jalc/vol56/iss2/6>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

THE 1992 EUROPEAN UNIFICATION: EFFECTS IN THE AIR TRANSPORT INDUSTRY

MONICA L. LUEBKER

I. INTRODUCTION

We must build a kind of United States of Europe.

Winston Churchill, 1945

BY DECEMBER 31, 1992, the Member States of the European Economic Community (EC) will create a unified internal market composed of 323 million people, the largest commercial market in the industrial world.¹ All artificial barriers are to be eliminated in order to allow goods to circulate freely among the Member States.² The economic community concept was established in 1957 between six European countries under the Treaty Establishing the European Economic Community (Treaty).³ After thirty years of negotiation and compromise, the concept will soon become a reality.

Market unification encompasses all areas of commerce affecting the twelve Member States. Some of the activities used by the EC to promote harmonious economic devel-

¹ M. EMERSON, M. AJUJEAN, M. CATINAT, P. GOYBET & A. JACQUEMIN, *THE ECONOMICS OF 1992*, at 11 (1988) [hereinafter M. EMERSON].

² Thieffry, Van Doorn & Lowe, *The Single European Market: A Practitioner's Guide to 1992*, 12 B.C. INT'L & COMP. L. REV. 357 (1989).

³ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 14 (entered into force Jan. 1, 1958) [hereinafter Treaty]. Member States include Belgium (1958), France (1958), Luxembourg (1958), Germany (1958), The Netherlands (1958), Italy (1958), Denmark (1973), Ireland (1973), The United Kingdom (1973), Greece (1981), Spain (1986), and Portugal (1986). D. LEONARD, *POCKET GUIDE TO THE EUROPEAN COMMUNITY* xii (1988); see also *Europe 1992: A Basic Guide*, BARRISTER, Fall 1989, at 41 [hereinafter *Europe 1992*].

opment include: (1) the elimination of customs duties; (2) the creation of a common policy toward third countries; (3) the removal of obstacles to allow the free movement of persons, services and capital; (4) the creation of a common fund to promote social welfare throughout the EC; (5) the prohibition of anticompetitive conduct in the business sector; and (6) the creation of a common policy to facilitate transportation by road, rail and air.⁴

Air transport, a rapidly growing industry in Europe, is particularly dependent on mutual international cooperation. The effect of the internal market on transportation is important both for the consumer and for businesses operating within the Member States.⁵ In the past, air transportation has been a luxury in Europe as a result of exorbitant ticket prices. Yet, there is renewed hope that this mode of travel will become available to a larger number of individuals with the advent of airline liberalization and the recent trend toward privatization of government owned carriers.

This comment will address the effect of the common market scheme on the air transport sector in both Member and non-member states. First, it will explain the general concepts behind 1992 European unification.⁶ Second, it will show how airlines fit within the purview of the Treaty's transportation policy⁷ and outline resistance to a common policy exhibited by some Member States.⁸ Third, it will illustrate arguments both for and against a deregulated airline system in Europe.⁹ Finally, it will analyze concerns about deregulation held by the United

⁴ *EEC Competition Rules—Guides for Small and Medium Sized Enterprises*, EUR. DOC. SERIES 11 (1983) [hereinafter *EEC Competition Rules*].

⁵ See M. EMERSON, *supra* note 1, at 115. "The economic interests of the geographically peripheral regions of the Community are particularly concerned, since uncompetitive air transport aggravates their locational disadvantages, and competition from other modes of transport is less intense." *Id.*

⁶ See *infra* notes 11-67 and accompanying text.

⁷ See *infra* notes 68-151 and accompanying text.

⁸ See *infra* notes 152-175 and accompanying text.

⁹ See *infra* notes 176-251 and accompanying text.

States airline industry.¹⁰

II. DEVELOPING THE INTERNAL MARKET CONCEPT

A. *Treaty Establishing the European Economic Community*

Before going into a detailed inspection of the EC's air transport policies, it is important to understand the background of the concepts involved, beginning with the EC's establishment. In 1957, many different economic and physical barriers existed between the Member States. These barriers included customs duties, import and export quotas, as well as controls on the movement of citizens and capital.¹¹ The recognition of the need for an economically and politically sound Europe arose from widespread devastation existing in the aftermath of World War II.¹²

The signing of the European Coal and Steel Treaty of 1951 marked the first step toward economic integration.¹³ The success of this pilot project in the coal and steel industry encouraged the formation of the Treaty Establishing the European Economic Community, signed on March 25, 1957.¹⁴ The Treaty's function was the progres-

¹⁰ See *infra* notes 252-267 and accompanying text.

¹¹ CLIFFORD CHANCE, 1992 AN INTRODUCTORY GUIDE, Nov. 1988, at 1 (publication of the merged firm of Coward Chance and Clifford-Turner to provide a summary of the European Community).

¹² The Effects of Greater Economic Integration Within the European Community on the United States, USITC Pub. 2204, Inv. No. 332-267 (July 1989) (Report to the Committee on Ways and Means of the U.S. House of Representatives and the Committee on Finance of the U.S. Senate) [hereinafter Report]. The "concerns over preserving and strengthening peace, combined with the devastation from World War II, motivated many Europeans to seek a united Europe, in the military and political sphere as well as for economic reasons." *Id.* at 1-5.

¹³ *The European Community at a Glance*, Delegation of the Comm'n of Eur. Communities Pub. 4 (1982) (economic unification began by pooling the Member State's coal and steel resources).

¹⁴ Treaty, *supra* note 3. On this same date the European Atomic Energy Community (EURATOM) was created to coordinate the EC in developing a powerful nuclear industry. Report, *supra* note 12, at 1-5. In addition, Member States belong to the Organization for Economic Cooperation and Development (OECD), the General Agreement on Tariffs and Trade (GATT), and the Council of Europe, and also maintain close relationships with international bodies such as the United Nations. *The European Community at a Glance*, *supra* note 13, at 12.

sive eradication of internal barriers over a twelve year period in order to further peace, unity, equality, freedom, solidarity, and economic and social security.¹⁵

The common market achieved rapid progress in the early years. The abolition of industrial tariffs and the establishment of a common external tariff between the then six Member States was accomplished eighteen months earlier than planned.¹⁶ Unfortunately, the recession of the 1970s as well as inaction caused by budget quarrels among the Member States resulted in the advent of protectionist measures and a general decline in EC cooperation.¹⁷ Member States introduced nontariff barriers and requested public aid to protect and maintain uncompetitive businesses.¹⁸ By the early 1980s, most Europeans had lost all confidence in the EC and the term "Eurosclerosis" was coined to explain the indifferent performance of the common economy.¹⁹

B. *Statement of Goals and Setting a Date for Progress*

By 1985, the EC recognized the increasing need to operate as a large scale unified market in order to effectively face its economic competitors—most significantly the United States and Japan.²⁰ A producer within a unified market can maximize profits to a much greater degree than a producer operating in one of twelve individual markets each having distinctive rules and characteristics.²¹ Recognizing the value of the unified market, the EC Com-

¹⁵ *The ABC's of Community Law*, EUR. DOC. SERIES 10 (1984).

¹⁶ Report, *supra* note 12, at 1-5. The abolition of industrial tariffs was completed on July 1, 1968. *Id.*

¹⁷ *Id.* at 1-6.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Thieffry, Van Doorn & Lowe, *supra* note 2, at 357-58. The EC maintains a higher unemployment rate and lower per capita Gross Domestic Product than the U.S. and Japan. "Between 1979 and 1985, the share of EC exports of industrial goods . . . declined by 1.4 percent, compared with an increase of 0.7 percent for the United States and 5.4 percent for Japan." Report, *supra* note 12, at 1-6.

²¹ Thieffry, Van Doorn & Lowe, *supra* note 2, at 358 n.5. "The single market implies scale economies, more competition and mutual stimulation within the Community, and increased cooperation between European companies." *Id.*

mission set out a comprehensive program for the completion of the internal market in the "White Paper" of June 1985.²² In this paper, the Commission outlined 300 measures defining the goals that must be satisfied in order to complete the internal market.²³ Furthermore, it set a specific completion date, December 31, 1992.²⁴ The three goals outlined in the White Paper concern: (1) the removal of physical barriers through elimination of border controls; (2) the removal of technical barriers through the free movement of labor and capital; and (3) the removal of fiscal barriers through such measures as harmonization of social security and value-added taxes.²⁵ The objectives of the White Paper were then formally adopted by the Single European Act (SEA) as an amendment to the original Treaty.²⁶

The measures adopted under the White Paper are merely directives. The directives must be incorporated into the laws of each Member State before they become binding.²⁷ Difficulties have been encountered in some states, such as Germany and Ireland, where constitutional

²² Report, *supra* note 12, at 1-5. The White Paper is officially entitled "Completing the Internal Market." *Id.*

²³ *Id.* at 1-6.

²⁴ *Id.* The selection of this date was intended to coincide with the end of the next EC Commission's term. *Id.* For a discussion of the institutions governing the EC see *infra* notes 31-46 and accompanying text.

²⁵ M. EMERSON, *supra* note 1, at 21. The projected macroeconomic effect of removing these economic barriers is as follows:

Gross domestic product — Increase ranging from 4.5% to 7%

Consumer prices — Reduction ranging from 6% to 4.5%

Employment — Increase ranging from 1.75 to 5 million employed

Public sector balance — Improvement ranging from 2.25% to 0.5% as a percentage of GDP

External trade balance — Ranges from an improvement of 1% of GDP to a deterioration of .25%.

CLIFFORD CHANCE, *supra* note 11, at 13.

²⁶ *The Single Act: A New Frontier for Europe*, BULL. EUR. COMMUNITIES (Supp. Jan. 1987). The orientation of the 1957 Treaty has been changed significantly. Originally, the focus was one of "harmonization of laws" which now only remains effective as far as taxation and customs procedures are concerned. The focus after the SEA is on deregulation and mutual recognition which would liberalize the free movement of products, people and financial services. *Europe 1992*, *supra* note 3, at 43.

²⁷ CLIFFORD CHANCE, *supra* note 11, at 16.

problems must be resolved before a ratification of the SEA can be perfected.²⁸ Other Member States have experienced similar difficulties in implementation because of internal political barriers.²⁹ If a Member State does not adopt implementing legislation in furtherance of the directives, the EC doctrine of "mutual recognition" subjects that Member State to the possibility of forced recognition of the directives as adopted by others.³⁰

C. *The Four Governing Institutions of the EC*

The bureaucratic system implementing and interpreting EC law is made up of four principal institutions: the EC Commission, the Council of Ministers, the European Parliament, and the European Court of Justice. The intertwining of the administrative bodies of the EC makes adoption of new policies affecting any sector, including transport, difficult.

The EC Commission, a seventeen member body chosen by agreement of the EC governments, is responsible for Treaty implementation and also for initiating EC policy, proposals and directives.³¹ The Commission, as the en-

²⁸ Report, *supra* note 12, at 1-18, 19.

²⁹ *Id.* at 1-19 n.154. Italy and Greece maintain the poorest record for implementation of directives:

<u>Member State</u>	<u>Directives Applicable</u>	<u>Directives Implemented</u>
Belgium	795	637
Germany	795	663
Denmark	779	649
France	790	652
United Kingdom	784	636
Greece	782	567
Italy	794	567
Ireland	781	607
Luxembourg	789	631
Netherlands	783	631

Id.

³⁰ *Europe 1992*, *supra* note 3, at 43.

³¹ Report, *supra* note 12, at 1-11 to 1-12; see also *The ABC's of Community Law*, *supra* note 15, at 16-20. Of the 17 commissioners, two are sent from the five larger states (Germany, U.K., Italy, France, Spain) and one from each of the other remaining Member States. *Demystifying the Working of the E.C.*, EUROPE, Nov. 1989, at 38.

forcement body of the EC, pursues violations of the Treaty by issuing reasoned opinions against the violators³² or by instituting proceedings in the European Court of Justice.³³

The second governing institution is the Council of Ministers, the EC's principal decision making body.³⁴ The Council, being the legislative and executive body combined, coordinates the economic aspects of the Community through its administrative and financial decisions. The position of president in the Council rotates among the Member States' delegates on a six month basis.³⁵

The judicial branch of the EC, the European Court of Justice (ECJ), was established to ensure that the interpretation and application of Treaty law is observed.³⁶ The thirteen judges of the ECJ sit for six year terms and are eligible for reappointment.³⁷ The ECJ looks to several

³² Treaty, *supra* note 3, art. 169; *see also* 3 Common Mkt. Rep. (CCH) ¶ 4402.04 (1978).

³³ Treaty, *supra* note 3, arts. 169, 173, 175. For other methods of enforcement in particular circumstances *see id.*, arts. 93, 255.

³⁴ The SEA changed the voting procedure from requiring unanimous decisions to one of qualified majority. Member States' votes are weighed as follows:

Member	Number of Votes
France	10
Germany	10
Italy	10
U.K.	10
Spain	8
Portugal	5
Belgium	5
Greece	5
Netherlands	5
Denmark	3
Ireland	3
Luxembourg	2

Treaty, *supra* note 3, art. 148(2); *see also* Report, *supra* note 12, at 1-13 n.87.

³⁵ The rotation cycle for Member States is as follows:

(1) for a first cycle of 6 years, Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, U.K.; (2) for a second cycle of 6 years, Denmark, Belgium, Greece, Germany, France, Spain, Italy, Ireland, Netherlands, Luxembourg, U.K., Portugal.

Report, *supra* note 12, at 1-12 n.73.

³⁶ Treaty, *supra* note 3, art. 164.

³⁷ Treaty, *supra* note 3, art. 167.

sources when defining the "law" of the EC, including treaties of the Member States, amendments to those treaties, common law, and general principles of international and national law.³⁸ Community law, as recognized by the ECJ, enjoys primacy over each Member States' national law.³⁹ This premise can create certain "jurisprudential obstacles,"⁴⁰ however, a willingness to cooperate rather than to thwart the progress of the EC has been the trend within the Community.

The ECJ has been assuming a more prominent role in Europe as 1992 looms ever closer. The Commission has begun to institute numerous cases in the ECJ against Member States under Article 169 of the Treaty for failure to implement EC directives.⁴¹ To alleviate a portion of this overcrowded docket the EC has created a "Court of First Instance."⁴² Yet, in the near future both courts may be unable to deal with the ever increasing demands, especially if other European countries are allowed to join the EC.

The fourth institution, the European Parliament, serves as a political check on the other three EC institutions. The Parliament consists of 518 members elected directly by the citizens of the EC for five year terms.⁴³ Through formal questions the Parliament oversees the institutions' activities, forces them to delineate their positions, encour-

³⁸ See, e.g., *Alvis v. Commission*, 2 COMMON MKT. L.R. 396 (1963) (applying administrative law of the Member States); *Commission v. Italian Republic*, Common Mkt. Rep. (CCH) ¶ 8802 (1962) (applying principles of international law); *Stauder v. City Ulm*, Common Mkt Rep. (CCH) ¶ 8077 (1970) (stating that general principles of law include rights derived from the Member States' constitutions); see also Report, *supra* note 12, at 1-2.

³⁹ Thieffry, Van Doorn & Lowe, *supra* note 2, at 359. Yet Member States are reluctant to cede too much sovereignty to the Community. Report, *supra* note 12, at 1-8.

⁴⁰ Specifically, obstacles such as the possibility of community law conflicting with national law may be created. See Thieffry, Van Doorn & Lowe, *supra* note 2, at 359.

⁴¹ *E.C. News*, EUROPE, Aug. 1990, at 52.

⁴² *Id.*

⁴³ 3 Common Mkt. Rep. (CCH) ¶ 4306 (1987). The representatives are to act for the benefit of the entire Community and not solely for the Member State they represent. *Demystifying the Working of the E.C.*, *supra* note 31, at 38. This is evi-

ages new policy initiatives, and gathers information for future policy developments.⁴⁴ In addition, Parliament may bring suit against the Commission for the failure to act in enforcing the Treaty.⁴⁵ Finally, the Parliament has the ultimate power of the purse by holding a legislative veto over the Community budget.⁴⁶

D. *The Future of the EC*

The 1992 target date places none of the Member States under a formal time constraint.⁴⁷ It is just that—a target date. The market unification concept is not a rigid structure but a concerted effort of cooperation.⁴⁸ EC leaders are doubtful that the common market will be completed by the 1992 unification date, due to many sensitive issues yet unresolved.⁴⁹ This date, however, creates a united

denced by the fact that members sit by party affiliation and not by nationality. Report, *supra* note 12, at 1-14.

Even though nationality is not a problem, there has been some dispute over the designated meeting place of Parliament. A recent compromise allows the sessions to be held in both Strasbourg and Brussels. See *Parliament Compromise*, EUROPE, May 1990, at 47.

⁴⁴ Report, *supra* note 12, at 1-14. Parliament issued an average of 600 questions per year in the early 1970s, which increased to approximately 500 oral questions and 2000 written questions in the 1980s. *Id.* at n.109.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1-14.

⁴⁷ *Id.* at 1-8 n.27.

⁴⁸ *Id.* (stating that failure to meet the 1992 deadline will not result in any legal repercussions).

⁴⁹ Monetary union and tax harmonization are two of the most hotly contested issues. *Id.* at 1-8, 1-9. "In a speech presented in Bruges, Belgium . . . British Prime Minister Margaret Thatcher confirmed her opposition to European political and monetary union and her concern over ceding national sovereignty to Brussels." *Id.* at 1-8.

The ECU, worth a little more than one dollar, was created in 1979 as a unit of account for measuring the budget of the EC. Recently it has become increasingly popular in international transactions. The ECU, however, does not exist in the form of coins or paper and is therefore difficult to use in daily transactions. Claveloux, *Use the ECU*, EUROPE, Nov. 1989, at 11. The ECU is an amalgamation of the Member States' currency weighted as follows:

<u>Currency</u>	<u>Weight</u>
German mark	30.1%
French franc	19.0%
Pound sterling	13.0%
Italian lira	10.15%

front for European countries and shows a willingness to cooperate to achieve specified goals of economic harmony.

Non-member states have also gradually accepted the concept. The Council for Mutual Economic Assistance (COMECON), which rejected the EC's legitimacy for over thirty years, signed an agreement in June of 1988 establishing official ties.⁵⁰ Also in 1988, the Soviet Union, along with five other Eastern European countries, requested formal diplomatic relations with the EC.⁵¹ Other non-member states such as Norway, Austria, Malta and Turkey have expressed "official" interest in EC membership.⁵² Some analysts predict that the EC membership could increase to as many as twenty-seven states at some point in the future.⁵³ The Commission has expressed concern, however, that future additions to the community will delay the implementation of the 1992 scheme.⁵⁴

Dutch guilder	9.4%
Belgian franc	7.6%
Luxembourg franc	0.3%
Spanish peseta	5.3%
Danish krone	2.45%
Irish pound	1.1%
Greek drachma	0.8%
Portuguese escudo	0.8%

New ECU Fixed, EUROPE, Nov. 1989, at 45.

⁵⁰ Report, *supra* note 12, at 1-10. Also, in 1963 at Yaounde, Cameroon, the first Association Convention was signed between the EC and 18 African states. These types of agreements have been renewed and expanded continually to include up to 60 African, Caribbean and Pacific countries. *The European Community at a Glance*, *supra* note 13, at 11.

⁵¹ *Id.*

⁵² Report, *supra* note 12, at 1-10. Norway and Austria are a part of the European Free Trade Association (EFTA) which was established for many of the same reasons as the EC. The member states of EFTA, however, favor a looser intergovernmental cooperation for economic unity which does not infringe upon national sovereignty. Other members of EFTA include Sweden, Finland, Iceland, and Switzerland. By agreement EFTA members are allowed duty free trade with the EC. See also Dale, *The Changing Map of Europe*, EUROPE, Aug. 1990, at 9. In addition to the four countries discussed above, Cyprus is also expected to officially apply for membership soon. *Id.* at 9.

⁵³ Dale, *supra* note 52, at 9. In order to arrive at this number analysts include, in addition to those countries discussed above, Finland, Iceland, Bulgaria, Romania, Albania and the Soviet Union. *Id.*

⁵⁴ Report, *supra* note 12 at 1-10. Further, it is unlikely that Turkey will be wel-

One answer to this potential stumbling block would be to admit all states wishing to become members through "associate status," increasing to full membership after the 1992 changes have been implemented.⁵⁵ As currently organized, however, the community and its institutions could not withstand this type of growth. An EC with twenty official languages and numerous social backgrounds could not be as easily integrated as the present Member States—all of which, except Ireland, are members of NATO and possess close Western ties.⁵⁶

Yet as recent developments have shown, East-West philosophies are no longer polarized. With the fall of communism and the Warsaw Pact, Member and non-member states have more in common than ever before.⁵⁷ With this obstacle removed, some sort of integration between Member and non-member states seems inevitable, whether it be through associate status, full membership or otherwise.

The reunification of West and East Germany will also have a profound effect on the current structure of the EC. With the demolition of the Berlin Wall and the sound of "Wir Sind das Volk"—"We are the people"—in the air, reunification is a popular concept.⁵⁸ In fact, even the Member States of the EC welcome German reunification and are of the view that its effects will be favorable.⁵⁹

At first, commentators expressed fear that Germany's preoccupation with internal battles would halt the EC's

came with open arms into the EC due to political tensions existing between the Turks and the Germans.

⁵⁵ Dale, *supra* note 52, at 9.

⁵⁶ *Neutral Status No Obstacle*, EUROPE, Mar. 1990, at 46.

⁵⁷ Dale, *Europe's New Architecture*, EUROPE, Aug. 1990, at 7.

⁵⁸ Edgar, *Germany After the Wall*, 7 THE WORLD POL'Y J. 190 (1990). Edgar states that the reunification was triggered by the popular frustration of the East German people, the realization that the Soviet Union had no intention of saving Erich Honecker's regime and the opening of Hungary's borders. *Id.* at 189.

⁵⁹ Dale, *supra* note 52, at 8; Roth & Mossberg, *Berlin Shake Up: Purge of Hard Liners in East Germany Stirs Unification Hope*, WALL ST. J., Nov. 9, 1989, at A12, col. b. (stating that the EC had great concern over a New Germany with one foot in the door of NATO and the other foot firmly entrenched in the Warsaw Pact).

progress.⁶⁰ German officials have repeatedly expressed their desire, though, to accelerate the EC's integration and to remain firmly entrenched in the Western Alliance.⁶¹ Many EC members are not as concerned with German allegiance to Western ideals as with preventing a powerful Germany from dominating Central and Eastern Europe.⁶² EC officials point out that one of the key reasons for forming the European Community was to rebuild a desecrated Europe after World War II and to place a check on further exploitation.⁶³ In response to these fears Chancellor Helmut Kohl has advocated the granting of increased authority to the European Parliament, in order to legitimize its existence.⁶⁴ He further emphasized that before any of the Member States agree to hand over sovereign rights, a proper system of checks and balances must be instituted and properly controlled by the European Parliament.⁶⁵ It would appear from these actions that Germany intends to put checks upon its own power through the EC.⁶⁶

It is difficult to predict Europe's future political structure due to the rapid changes constantly taking place; but one thing is known: a united Germany will play a key role in this scheme due to the country's expansive labor force, monetary stability and political power. The German question and other potential internal conflicts⁶⁷ within the EC will play an important part in whether or not the 1992 internal market integration actually is successful.

⁶⁰ Kaps, *A United Germany in the New Europe*, EUROPE, Aug. 1990, at 20.

⁶¹ *Id.* On April 28, 1990, at the European Council in Dublin, German Chancellor Helmut Kohl presented, in conjunction with French President Mitterrand, a proposal to commit to political union by 1993. *Id.*

⁶² Dale, *supra* note 52, at 8.

⁶³ Roth & Mossberg, *supra* note 59.

⁶⁴ Kaps, *supra* note 60, at 20-21.

⁶⁵ *Id.* at 21.

⁶⁶ Most Germans actually welcome the fact that the EC is being redesigned to "contain" Germany. Dale, *supra* note 52, at 10.

⁶⁷ See *supra* note 49 and accompanying text.

III. THE TRANSPORTATION POLICY WITHIN THE INTERNAL MARKET

Assuming a smooth transition into 1992, transportation services will play a fundamental role in the EC's development.⁶⁸ The free movement of goods and passengers is necessary to establish an economy of scale. Physical and technical barriers may be eliminated, yet a market cannot be considered fully integrated if transportation costs remain so high that businesses cannot afford to ship commodities across Member States' borders. Unless transportation costs decrease, deregulation of the transport industry will remain a mere theoretical prospect.

In the past, transportation has been highly regulated. Surface and air transport in Europe are considered public services and are controlled for the most part by either the local or the central government.⁶⁹ Control is exercised through dependence on government subsidies due to the fact that fares account for only 50% of the revenues required to cover transport service costs.⁷⁰ This type of regulation fosters a fragmented economy since exportation and importation of goods depend upon efficient methods of transportation. Estimates indicate that this type of economic fragmentation increases the cost of consumer goods by 10% and decreases business profits by \$30 billion per year.⁷¹

Border controls on transport create delays at customs stations and greatly increase the cost of trade within Europe.⁷² Some estimates show that it takes up to sixty-

⁶⁸ See Report, *supra* note 12, at 8-5. Transport represents more than 7% of the EC's gross domestic product. *Id.*

⁶⁹ *Id.* "Government control is exercised through fare-setting mechanisms, the number of routes served, and the quality of services provided." *Id.*

⁷⁰ *Id.* These physical barriers cost from 7.9-8.3 billion ECUs to maintain. This figure is attributable to the use of outside transport services, customs clearing, transport delays, and employment. The estimated loss of business trade due to these physical barriers ranges from 1%-3%. CLIFFORD CHANCE, *supra* note 11, at 11.

⁷¹ *Europe 1992*, *supra* note 3, at 42.

⁷² M. EMERSON, *supra* note 1, at 256.

three hours to transport goods by truck over 750 miles.⁷³ Delays at border crossings amount to 40% of truck delivery schedules. The time-consuming requirement of paying value-added taxes and receiving credits for previously paid taxes, which must be repeated at each border crossing, causes these delays.⁷⁴ Furthermore, between 25% and 30% of all trucks on EC roads carry no cargo because of national quota and license systems which prevent carriers from seeking loads on return journeys.⁷⁵ Finally, removal of frontier controls could reduce intra-EC import prices by 1.7%.⁷⁶

A. Air Transport Policies Before 1992

Air carriers in the EC combine a higher traveling speed with avoidance of frontier border controls.⁷⁷ Yet, these two benefits alone do not offset the high prices charged for airline travel and shipping. The airlines face stiff competition for passengers on the shorter routes within the EC from other modes of transport.⁷⁸ Intercity rail transportation is highly developed and inexpensive; air transport is only competitive for routes over 300 kilometers or where natural barriers, such as mountain ranges, exist.⁷⁹ For freight, road transport is the most efficient method because official procedures cause delays in air freight operations.⁸⁰

Member States regulate air transport landing rights and cabotage⁸¹ through either bilateral agreements between

⁷³ Report, *supra* note 12, at 8-5.

⁷⁴ *Id.*

⁷⁵ Black, *Traveling in 21st Century Europe*, EUROPE, Dec. 1989, at 25.

⁷⁶ *Id.* "[T]hese price reductions would be partly offset by a loss of jobs, estimated for the whole Community at about 17,500 in exporting firms (employees dealing with the formalities of customs clearance), and around 40,000 in the case of private sector customs agents." M. EMERSON, *supra* note 1, at 256.

⁷⁷ Dagoglou, *Air Transport and the European Community*, 6 EUR. L. REV. 335, 342 (1981).

⁷⁸ *Air Transport: A Community Approach*, BULL. EUR. COMMUNITIES (Supp. May 1979), at 31 (Memorandum of the Commission) [hereinafter *Air Transport*].

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ "Cabotage" is defined as trade between two points within a country as op-

Member States relating to fares, capacity and access, or through concerted practices between air carriers.⁸² Bilateral agreements typically include the following provisions:

1. a listing of the freedom of the air which the parties intend to exchange;
2. the authorized routes and gateways which may be utilized by the parties to the agreement;
3. a designation of the airline carriers authorized to carry out the traffic rights agreed upon;
4. a clause on tariffs;
5. a clause on capacity;
6. a clause outlining the legal relationships of the parties, such as rules of arbitration.⁸³

These bilateral agreements restrict the freedom of providing air transport services and disallow competitive pricing regimes. Typically, the agreements fix capacity sharing rates on a fifty-fifty basis. Each country is allowed to carry 50% of the traffic on the routes governed by the agreement.⁸⁴ In essence, this means that only a certain number of passenger seats may be offered on each route so as not to exceed that Member State's allotted percentage of traffic.⁸⁵ To compensate for violations of these capacity rights, many bilateral agreements include a clause introducing revenue pooling if a carrier crosses the 50%

posed to trade between countries. Report, *supra* note 12, at 8-5; see generally Wasenberg, *EEC-Cabotage After 1992*, 13 AIR LAW 282 (1988).

⁸² See M. EMERSON *supra* note 1, at 115 (a system of around 200 separate bilateral agreements exist between 22 countries within Europe).

⁸³ *Air Transport*, *supra* note 78, at 25. For a discussion of bilateral air transport agreements, see Gertler, *Bilateral Air Transport Agreements*, 42 J. AIR L. & COM. 779 (1976); Lissitzyn, *Bilateral Agreements on Air Transport*, 30 J. AIR L. & COM. 248 (1964). The first major post-World War II bilateral agreement was signed in 1946 between the United States and the United Kingdom. It included many of the clauses outlined above and served as a model for subsequent agreements between other countries.

⁸⁴ Diamond, *The Bermuda Agreement Revisited*, 41 J. AIR L. & COM. 419, 427 (1975); see also Dempsey, *Aerial Dogfights Over Europe: The Liberalization of EEC Air Transport*, 53 J. AIR L. & COM. 615, 627 (1988).

⁸⁵ See Comment, *Introducing Competition to the European Economic Community Airline Industry*, 15 CAL. W. INT'L J. 364, 377 (1985). If the availability of seats is limited, the type of aircraft used for the particular flight is also limited since it would be impracticable to fly a large aircraft with only a few passengers. *Id.* at 377 n.107.

mark.⁸⁶ In other words, if one carrier attracts more than 50% of the passengers or traffic in a given market, that carrier must then share its revenue by making payment to the designated carrier of the other Member State. These payments include profits received in excess of their allocated share.⁸⁷ Not only is revenue pooling anti-competitive, it also eliminates the incentive to increase the quality of the air services provided, because no matter how many passengers the airline attracts, it may only receive revenue from its *allocated* share.⁸⁸

Market access is also severely limited for those carriers who are not *designated* carriers pursuant to the agreements. Designation requires that an airline or airlines be specifically named for the operation of agreed-upon services.⁸⁹ The Member States, and not the airline carriers, have the exclusive responsibility for the policy principles of the agreements.⁹⁰ The governments of the Member States "adopt the policy of their choice as to the designation of the carriers which will exercise national rights."⁹¹ Those carriers who are not designated are denied access and are not allowed to fly scheduled routes.

Take-off and landing slot allocation may also be viewed as discriminatory. Smaller European carriers and newly established carriers often complain of the allocation system among European airports.⁹² Basically, the carrier is awarded a slot within the airport if it had a slot in the previous season. With airport overcrowding on the rise, this type of "grandfather right" typically keeps out new airlines or less established carriers.⁹³

Member States impose further restrictions through li-

⁸⁶ Argyris, *The EEC Rules of Competition and the Air Transport Sector*, 26 COMMON MKT. L. REV. 5, 9 (1989).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Gertler, *supra* note 83, at 796.

⁹⁰ J. NAVEAU, INTERNATIONAL AIR TRANSPORTATION IN A CHANGING WORLD 94 (1989).

⁹¹ *Id.* at 95.

⁹² Argyris, *supra* note 86, at 29.

⁹³ *Id.*

censing requirements. To obtain a license to transport passengers and freight by air, an air carrier must receive the approval of a specified national agency. In this way a Member State government may further restrict nondesignated carriers from operating within their airspace.⁹⁴ These national agencies tend to reserve the licenses for "national airlines" only.⁹⁵

The policies of governmental protectionism, restrictive licensing, market access, slot allocation and capacity control have all led to high fares. Air transport is therefore available to only a small percentage of the European population.⁹⁶ As a result, the airline industry has been characterized in recent decades as a "regulatory oligopoly" because of the limited access of new entrants or expansions under governmental regulations.⁹⁷

To the contrary, recent bilateral agreements do recognize "four freedoms of the air": (1) the right to fly across the territory of a foreign country without landing; (2) the right to land for noncommercial traffic purposes (technical operations or refueling); (3) the right to put down passengers, freight or mail in a foreign country which is a party to the bilateral agreement; (4) the right to take on passengers, freight or mail from a foreign country which is a party to the bilateral agreement.⁹⁸ On the other hand, the "fifth freedom," or the right to undertake the commercial air transport of passengers, freight and mail to a third country not a party to the bilateral agreement, is not universally recognized between Member States.⁹⁹

⁹⁴ Gertler, *supra* note 83, at 796.

⁹⁵ *Air Transport*, *supra* note 78, at 35.

⁹⁶ *Id.* "[H]igh fares (excepting domestic flights in the United States of America, where uninterrupted competition has kept fares comparatively low), have kept this sophisticated network only accessible to a relatively small (albeit increasing) number of people." Dagtoglou, *supra* note 77, at 337.

⁹⁷ Haanappel, *Air Transport Deregulation in Jurisdictions Other than the United States*, 8 ANNALS OF AIR & SPACE L. 79, 80 (1988).

⁹⁸ *Air Transport*, *supra* note 78, at 35.

⁹⁹ M. EMERSON, *supra* note 1, at 115; see *infra* note 4 and accompanying text.

B. *The Changes After 1992*

Although the Treaty establishing the EC contains numerous provisions relating to transport,¹⁰⁰ Article 84, paragraph 1, states that these provisions are applicable only to transport by rail, road, and inland waterways.¹⁰¹ No

¹⁰⁰ Treaty, *supra* note 3, arts. 74-86. Articles 85 and 86 specifically relate to transportation competition. Article 85 states in part:

1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:

- (a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;
- (b) the limitation or control of production, markets, technical development or investment;
- (c) market-sharing or the sharing of sources of supply;
- (d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
- (e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

2. Any agreements or decisions prohibited pursuant to this Article shall be null and void.

Id.

Article 86 provides:

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited. Such improper practices may, in particular, consist of:

- (a) the direct or indirect imposition of any, inequitable purchase or selling prices or of any other inequitable trading conditions;
- (b) the limitation of production, markets, or technical development to the prejudice of consumers;
- (c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
- (d) the subjecting of the conclusion of a contract to the acceptance by a party, of additional supplies which either by their nature or according to commercial usage, have no connection with the subject of such contract.

Id.

¹⁰¹ Treaty, *supra* note 3, art. 84.

rules for air transportation are specifically given.

In 1977 the European Council established a working group to discuss air transportation rights under the Treaty.¹⁰² By 1979, the EC Commission had adopted a Memorandum entitled "Air Transport: A Community Approach."¹⁰³ The Commission suggested applying Treaty competition rules to air fares and also proposed that new airlines should be allowed to operate in the European market.¹⁰⁴ The Council took no official action at this time, due in part to the fear held by Member State governments that national airlines would be weakened by these proposals.¹⁰⁵ Further proposals attempting to apply the Treaty competition rules were illustrated in the Commission's second Memorandum on air transport in 1984 entitled "Progress Towards the Development of a Community Air Transport Policy."¹⁰⁶ In this attempt, the Commission recommended three measures on air transport: (1) an advocacy of the need for specific Community regulations of the air industry; (2) a proposal to amend machinery for the settlement of air tariffs; and (3) a proposal to limit non-competitive bilateral agreements.¹⁰⁷

The major European carriers responded to these attempts with bitter resistance stating, "the present European network satisfies the vast majority of the potential demands under present conditions."¹⁰⁸ Accordingly, the Council took no action at that time to adopt these recom-

¹⁰² Dagtoglou, *supra* note 77, at 335. Pressure on the Council was initiated by the introduction in 1977 of President Carter's deregulation of civil aviation in the United States. *Id.* at 338.

¹⁰³ *Air Transport*, *supra* note 78.

¹⁰⁴ *Id.* at 17, 19.

¹⁰⁵ *Id.* at 19; see also Note, *New Frontiers in EEC Air Transport Competition*, 8 NW. J. OF INT'L L. & BUS. 455, 461 (1987).

¹⁰⁶ *Progress Towards the Development of a Community Air Transport Policy*, BULL. EUR. COMM. (Supp. March 1984) (Memorandum of the Commission).

¹⁰⁷ Stanbrook, *Progress Towards a Community Policy on Air Transport*, 10 EUR. L. REV. 52, 53 (1985).

¹⁰⁸ Dagtoglou, *supra* note 77, at 347-48 (citing response printed in The House of Lords, European Air Fares at 193-99).

mendations into regulations.¹⁰⁹

In the early 1980s there were many highly vocal advocates of deregulation. One famous proponent, Sir Freddie Laker, sought permission from the British Civil Aviation Authority to open several scheduled air routes in Europe utilizing discount rates.¹¹⁰ He pursued the resulting denial all the way to the High Court of London, arguing that the Treaty competition laws superseded any authority in the United Kingdom. Laker expected the London court to refer the case to the European Court of Justice for a decision that would either apply the Treaty competition laws to air transport or reject the contention once and for all. Before a transfer could be perfected, however, Laker Airlines collapsed.¹¹¹

The confrontation Laker sought to provoke eventually occurred in 1986. Air France and KLM, along with Nouvelles Frontières and several tour operators and travel agencies, were accused of applying tariffs other than those approved by the civil aviation authorities in violation of the French Civil Aviation Code.¹¹² The French court requested a clarification from the ECJ to determine whether the Treaty competition rules were compatible

¹⁰⁹ A regulation is a rule promulgated by the Council which becomes directly binding on all Member States. Treaty, *supra* note 3, art. 189; see also Thieffry, Van Doorn & Lowe, *supra* note 2, at 359.

¹¹⁰ Dagtoglou, *supra* note 77, at 339; see also Comment, *supra* note 85, at 383; Weber, *Laker Airways v. The Ten Governments of the EEC—Comments on a Pending Case*, 6 ANNALS OF AIR & SPACE L. 257 (1981).

¹¹¹ See Note, *supra*, note 105, at 456. A further attempt to curb price fixing was made in 1982 by Lord Bethell, a British Member of Parliament. Bethell brought suit against the European Commission for allowing violations of Article 85 of the Treaty to continue in the airline industry. The Queen's Bench Division dismissed the case, stating that Lord Bethell lacked standing to bring the suit. Lord Bethell v. Commission, Common Mkt. Rep. (CCH) ¶ 8858 (1982). Had the suit been brought by a Member State instead of an individual, standing may have been satisfied since suits against EC institutions for inaction are permitted under Article 175 of the Treaty. See Treaty, *supra* note 3, art. 175.

¹¹² *Ministere Public v. Asjes*, 3 COMMON MKT. L.R. 173 (1986) [commonly known as *Nouvelles Frontières*, hereinafter as *New Frontiers*]. It was alleged that the airlines were offering lower unapproved fares, thereby undercutting airlines which complied with French law and charged fares approved by the French Minister for Civil Aviation. *Id.*

with French law.¹¹³

The 1986 decision of the ECJ in *Ministere Public v. Asjes* laid the foundation for the deregulation of the air transport industry.¹¹⁴ The Court unequivocally stated that the competition rules in Articles 85 and 86 were applicable to the Treaty which had existed since 1957.¹¹⁵ Approval of air fares by a Member State was found to be a direct contradiction of its obligation to prohibit concerted practices under Article 85 of the Treaty.¹¹⁶

Yet one question remained: whether or not the ECJ possessed the proper authority to render judgment in this instance. Article 84(2) states that the Council of Ministers, acting unanimously, may decide whether, and to what extent, provisions are to be laid down for sea and air transport.¹¹⁷ Since the Council of Ministers is the only institution authorized to decide EC policy for air transport, it was arguable that the ECJ had no authority to render a decision applying the Treaty rules in this area. The premise of this argument arose in an earlier case, *Cullet v. LeClerc Books*,¹¹⁸ in which the ECJ stated that if no Community policy existed by way of directive or regulation, the Member States maintained jurisdiction to enact domestic law on the subject. By analogy, since no policy had been enacted by the Council, which is specifically granted such authority in Article 84 of the Treaty, the airlines should

¹¹³ The Paris Police Court, a national court of France with criminal jurisdiction, sought a preliminary ruling for an authoritative interpretation of the Treaty. This type of ruling is comparable to an interlocutory appeal in the United States where the proceedings are stayed pending determination of the issue. Note, *Prospects for European Air Deregulation*, 21 INT'L LAW. 561 (1988).

¹¹⁴ The court began by outlining the international legal framework in which airlines operate, starting with the Chicago Convention and ending with an explanation of the modern bilateral system. *New Frontiers*, *supra* note 112, at 180-81.

¹¹⁵ *Id.* at 173.

¹¹⁶ *Id.*; see also *supra* note 100 for the text of Article 85.

¹¹⁷ Treaty, *supra* note 3, art. 84(2). "The Council may, acting by means of unanimous vote, decide whether, to what extent and by what procedure appropriate provisions might be adopted for sea and air transport." *Id.*

¹¹⁸ 2 COMMON MKT L.R. 286 (1985). The court allowed the French government to enact domestic legislation in order to maintain the resale price for books published in France so long as no Community policy related to the pricing of books existed. *Id.*

not have been bound by the Treaty competition rules and should have been free to enact domestic legislation on point.

Notwithstanding the jurisdictional issue, the ECJ started the ball rolling. By December of 1987, the *LeClerc Books* analysis became moot when the EC Council took action by issuing a series of directives applying the Treaty's competition rules to areas such as pricing, access to routes, and capacity sharing.¹¹⁹

Directives issued by the Council, in contrast to regulations promulgated by the Council, are not directly binding. The directives are treated as Council recommendations to the Member States which must be adopted within a stated period.¹²⁰ In order to implement the directives, the Member States must either introduce new domestic law, or recast or repeal their existing administrative rules. The method of implementation is to be chosen by the Member States, who are in the best position to determine domestic policy and to judge how the EC requirements can be reconciled with their own sovereignty.¹²¹

The Council directives on Air Transport include the lib-

¹¹⁹ Report, *supra* note 12, at 8-5.

¹²⁰ *EEC Competition Rules*, *supra* note 4, at 12; see also *The ABC's of Community Law*, *supra* note 15, at 24-26. Directives are issued at the end of a legislative process involving both the Commission and the Council. The machinery is set into motion by a proposal stating the Commission's view of the future Community law. A proposal is prepared by the particular department within the field; for example, the transport department. The department report then goes before the Commission as a whole and can be adopted by a mere majority vote. From here the proposal is sent to the Council with a detailed explanation of the grounds for the decision. The European Parliament is then consulted for an advisory opinion. In this opinion the Parliament will often suggest potential amendments to the original proposal. After Parliament makes its suggestions, the Council may enact the directives. *Id.*

¹²¹ *The ABC's of Community Law*, *supra* note 15, at 24-26. Further, non-application of the directives due to domestic difficulties is impermissible even if the difficulty is a question of national constitutionality. Thieffry, Van Doorn, & Lowe, *supra* note 2, at 360. After the time for incorporation into the national laws has expired and the Member States have not taken effective measures, Community citizens will be allowed to invoke the directive or recommendation directly through the ECJ. *The ABC's of Community Law*, *supra* note 15, at 26.

eralization of access to routes.¹²² Capacity sharing between national carriers of the Member States may now range from a 45%-55% basis in the first year of the agreement to a 40%-60% basis in the second year.¹²³ Furthermore, airline passenger rates will receive automatic approval by the government if the prices are set within the agreed-upon limits.¹²⁴ Carriers who prove that fully allocated costs justify a fare below the governmental limit can force a Member State's government into arbitration for the refusal to allow the lower fare.¹²⁵

Anticompetitive behavior by formal or informal agreement resulting in the prevention, restriction or distortion of competition is now prohibited within the Community.¹²⁶ This restriction does not, however, include parallel price increases because such increases may also be the result of independent business decisions or unknown factors.¹²⁷ The Treaty competition rules are not intended to nullify cooperative undertakings. Articles 85 and 86 permit various other joint ventures in the areas of advertising and credit rating, and research and development.¹²⁸

¹²² Report, *supra* note 12, at 8-5. "[M]ultiple carriers [may] serve a market in the first year of the agreement, when the number of passengers reaches 250,000 per year. In the second year, this threshold will decrease to 200,000 or 1,500 flights; in the third year, to 180,000 passengers, or 1,000 flights. The access provision also provides for the right to serve more than one point on the same route, such as Rome to London to Frankfurt." *Id.*

¹²³ Formerly, capacity sharing between national carriers had to be maintained on a 50-50% basis. *Id.*

¹²⁴ *Id.* See also D. GOYDER, EEC COMPETITION LAW 360 (1988).

For example, Article 3 of the Directive sets out the criteria which [civil aviation] authorities are to apply in approving fares, including the interests of consumers: consultation on fares, tariffs and condition of carriage (of both passengers and baggage) between airlines are only allowed so long as they do not lead to binding agreements, and are open to attendance by both the Commission and relevant Member States.

Id.

¹²⁵ *Id.*; see also Sorensen, *Air Deregulation Means Lower Fares and More Competition*, Europe, May 1988, at 25.

¹²⁶ Treaty, *supra* note 3, art. 85.

¹²⁷ Dempsey, *supra* note 84, at 643.

¹²⁸ Treaty, *supra* note 3, art. 86. The Commission has further stated that EC policy recognizes 18 types of agreements that do not violate the competition rules:

The directives do not entirely remove the Member States' jurisdiction to regulate competition. Deregulation is to take place under a "phasing plan" in which member states will maintain some degree of control until 1992.¹²⁹ The intent of the Council is to eliminate this phasing situation by the end of 1992 and replace it with a liberalized regime under which the Member State's control will be substantially curtailed.¹³⁰

The first liberalization package utilized temporary exemptions to constrain the applications of the competition rules.¹³¹ These exemptions are issued by the European Commission in order to alleviate the harshness of an extreme and sudden deregulation. Exemptions are allowed

-
- [1] an exchange of opinion or experience;
 - [2] joint comparative studies of enterprises or industries;
 - [3] joint preparation of statistics and calculation models;
 - [4] joint market research;
 - [5] cooperation in accounting matters;
 - [6] joint provisions of credit guarantees;
 - [7] joint debt-collecting associations;
 - [8] joint business or tax consultant agencies;
 - [9] joint implementation of research and development contracts;
 - [10] joint implementation of research and development projects;
 - [11] joint placing of research and development contracts;
 - [12] sharing out of research and development contracts;
 - [13] joint use of production, storage, and transport equipment;
 - [14] joint execution of orders (but only when the participants do not compete with each other as regard[ing] the work to be done);
 - [15] joint selling arrangements by non-competing firms;
 - [16] joint after-sales and repairs services when the participants are non-competing firms, or, even if they are competitors, when these services are provided by an undertaking independent of them;
 - [17] joint advertising (but no restriction is allowed the participants also to advertise independently);
 - [18] joint quality marks (but only where the label is available to all competitors on the same conditions).

EEC Competition Rules, *supra* note 4, at 22-23.

¹²⁹ *Id.* The concept of "phasing" in competition is due in part to the disfavor of American style deregulation: "We refuse to bring about this sort of market free for all. Conditions in the United States are quite different from those in the Community; the U.S. has different social, economic, and fiscal laws; the U.S. government takes a relaxed view about the fate of any one of its national carriers." Remarks of Commissioner Davis, Sept. 11, 1985, *reprinted in* 4 Common Mkt Rep. (CCH) ¶ 10726 (1985).

¹³⁰ See D. GOYDER, *supra* note 124.

¹³¹ Argyris, *supra* note 86, at 19.

in the areas of slot allocation, computer reservation systems, revenue pooling and capacity.¹³² The issuance of these exemptions is conditional on a number of items such as voluntary participation by airlines, revenue pooling limits of 1%, and the ability to withdraw from capacity agreements upon three months' notice if the carrier desires.¹³³ These temporary exemptions must end by the

¹³² *Id.* at 19-21.

¹³³ See Dempsey, *supra* note 84, at 706, Appendix B. The conditions on exemptions are as follows:

- joint planning and co-ordination of the capacity to be provided on scheduled air services, insofar as it helps to ensure a spread of services at the less busy times of the day or during less busy periods or on less busy routes, so long as any partner may withdraw without penalty from such agreements, decisions or concerted practices, and is not required to give more than three months' notice of its intention not to participate in such joint planning and coordination for future seasons;

- sharing of revenue from scheduled air services, so long as the transfer does not exceed 1% of the poolable revenue earned on a particular route by the transferring partner, no costs are shared or accepted by the transferring partner and the transfer is made in compensation for the loss incurred by the receiving partner in scheduling flights at less busy times of the day or during less busy periods;

- consultants for common preparation of proposals on tariffs, fares and conditions for the carriage of passengers and baggage on scheduled services, on condition that consultations on this matter are voluntary, that air carriers will not be bound by their results and that the Commission and the Member States whose air carriers are concerned may participate as observers in any such consultations;

- slot allocation at airports and airport scheduling, on condition that the air carriers concerned shall be entitled to participate in such arrangements, that the national and multilateral procedures for such arrangements are transparent and that they take into account any constraints and distribution rules defined by national or international authorities and any rights which air carriers may have historically acquired;

- common purchase, development and operation of computer reservation systems relating to timetabling, reservations and ticketing by air transport undertakings, on condition that air carriers of Member States have access to such systems on equal terms, that participating carriers have their services listed on a non-discriminatory basis and also that any participant may withdraw from the system on giving reasonable notice;

- technical and operational ground handling at airports, such as aircraft push back, refuelling, cleaning and security;

- handling of passengers, mail freight and baggage at airports;

- services for the provision of in-flight catering.

end of the phasing period absent any revisions by the Council.¹³⁴

In Luxembourg, on June 18, 1990, the second phase of the liberalization plan was announced.¹³⁵ Under this plan, bilateral revenue and capacity sharing agreements are to be phased out by the end of 1992.¹³⁶ Currently, governments are allowed a 60%-40% share of capacity divided between the national carriers of the two states which are parties to the bilateral agreement. These limits will be reduced through 7-1/2 percentage point stages until a 75%-25% share is reached in 1992.¹³⁷

The package also allows for a more flexible "deep discount" fare, which can be offered by the airlines without recourse to the Member State's government.¹³⁸ In addition, from 1992 on, an airline's request for a cheaper general fare will be blocked only if both governments disapprove,¹³⁹ as opposed to only one government disapproving as it stands today. Further, fifth freedom rights¹⁴⁰ are to be extended to allow 50% of all seats sold on an airline, to contain a "fifth freedom" passenger as compared to 30% at the moment.¹⁴¹

The plan did not, however, address the issue of slot allocation.¹⁴² Increasing competition will be difficult if airlines cannot obtain a landing or take-off slot due to the "grandfather rights" system which is now in place.¹⁴³ In

¹³⁴ Argyris, *supra* note 86, at 19. These temporary exemptions will continue through the second phase of liberalization under the 1990 plan. IATA 1989 ANNUAL REPORT (1990).

¹³⁵ Dickson, *If You Want Cheap Air Travel in the EC, Don't Board Yet*, Fin. Times, June 20, 1990 at 2; *see also*, IATA, *supra* note 133, at 16.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Betts & Dickson, *Why Open Skies Are Under Threat*, Fin. Times, June 18, 1990, at 18.

¹⁴⁰ *Id.*; for a definition of fifth freedom rights see *supra* note 99 and accompanying text.

¹⁴¹ A fifth freedom passenger is one who is picked up or set down at an intermediate airport en route to another destination. Dickson, *supra* note 136, at 2.

¹⁴² *Id.*

¹⁴³ *Opening Skies in Europe*, Fin. Times, June 20, 1990, at 26.

the wake of this silence, the EC Commission is considering a proposal which entails putting airport slots up for "auction" on a rotating basis. Yet the EC recognizes that the larger airlines must be restricted through antitrust laws from monopolizing the slots by "out-bidding" the smaller carriers.¹⁴⁴

This second plan is not radically different from the first deregulation plan implemented in 1987. The most important aspect appears merely to be the EC transport ministers' commitment to a completely deregulated air industry by 1992.¹⁴⁵ If nothing else, the June 18, 1990 meeting in Luxembourg will show the national airlines that the Council means business, so to speak, and has every intention of implementing free competition in the industry.

The previous section of this comment discussed the effects of the deregulation *within* the EC. It is even more uncertain how deregulation will affect countries who are not members of the EC. This new regime of deregulation has led nonmember states to express concern that the common market or unified position will be accompanied by EC protectionism against outsiders in place of the traditional nationalistic protectionism.¹⁴⁶ Effectively, the EC may dissolve the twelve Member States' cartels, while at the same time building a new solidified cartel which would continue to operate under a system of tariffs and restricted access.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Thieffry, Van Doorn & Lowe, *supra* note 2, at 358. For a discussion of the concept of a "Fortress Europe" see *Europe 1992*, *supra* note 3, at 43; see also, Tordijman, 1992: *A Real Opportunity For America*, Com. News, May 1989, at 1 (Newsletter of the Dallas-Ft. Worth Chapter of the French-American Chamber of Commerce in the United States) stating:

[it] would be absurd for the Community to lean towards protectionism. . . . The Community does not intend to increase existing protection. Its internal market will not close in on itself. The E.C. can only expect growth of trade and employment resulting from the single market if it remains open to others. It is committed to do so and will meet its international obligations in that respect.

Id.

Such anticompetitive behavior directed toward non-member states would be considered violative of the Treaty only if it "affects trade" between the Member States.¹⁴⁷ In other words, anticompetitive behavior between Member States and nonmember states is permitted unless an anticompetitive effect can be proven within the EC borders.¹⁴⁸ The EC Commission takes the view that tariff agreements between nonmember states and Member States do affect trade within the EC's borders. The Commission also admits that such an effect will be difficult to establish.¹⁴⁹ Therefore, the question of whether or not the competition rules will be applied against the existing agreements with nonmember states remains unknown.

United States airlines have developed a conservative strategy due to the uncertainty of the non-member states' position in Europe after 1992.¹⁵⁰ Airlines such as American and Northwest are establishing new flights to the EC in order to secure their respective position before 1992.¹⁵¹ The concern of non-member states seems to be that the new EC economic force will cut into the historical profits the nonmember carriers have received in a fragmented economy.

C. *Cooperation by the Member States*

The 1987 directives and the 1990 plan are the first steps in achieving a liberalized international air market. Obtaining Member State cooperation is a more difficult task. The EC has limited enforcement powers. First, if the parties are involved in a lawsuit with respect to an agreement which violates the competition rules of the Treaty, a national court of the Member State can declare the agreement null and void.¹⁵² Second, the Commission

¹⁴⁷ Treaty, *supra* note 3, art. 86.

¹⁴⁸ *Id.*; see also Dempsey, *supra* note 84, at 643.

¹⁴⁹ *New Frontiers*, *supra* note 112, at 189.

¹⁵⁰ McKenna, *U.S. Airlines Establish New European Flights Before 1992 Marketing Restructuring*, *AV. WEEK & SPACE TECH.*, Nov. 20, 1989, at 79-80.

¹⁵¹ *Id.*

¹⁵² *EEC Competition Rules*, *supra* note 4, at 17.

has the power to order the parties to terminate the illegal conduct and the Commission may impose a fine.¹⁵³ Realistically, there is little threat of punitive action since the Commission is made up of delegates from each Member State whose government generally owns a significant portion of the airline subject to the fine.¹⁵⁴

The adoption of these directives by the Member States creates a peculiar problem due to the foundations of civil aviation law in national sovereignty dating back to the Chicago Convention of 1944.¹⁵⁵ The European air industry has been further shaped by the International Air Transport Association (IATA), which represents over one-hundred countries including all of the EC Member States except Luxembourg.¹⁵⁶ Principally, the IATA coordinates air tariffs between international airlines, subject of course, to approval by the participating governments. This keeps competition at a minimum and fares exorbitant.¹⁵⁷ The IATA also performs a consulting function and its recommendations are regularly adopted by its members.¹⁵⁸

The implementation of the EC directives is further complicated since most Member States operate a national airline which dominates the market within their country.¹⁵⁹ A national airline has been characterized as the

¹⁵³ *Id.* The fine may be up to one million ECUs or 10% of the annual turnover of the undertakings concerned. These fines are paid to the treasury for the Commission's budget and not to the party injured by the anticompetitive behavior. *Id.*

¹⁵⁴ See *infra* note 159 and accompanying text.

¹⁵⁵ Chicago Convention, Dec. 7, 1944, T.I.A.S. No. 6605, 15 U.N.T.S. 295 [hereinafter Chicago Convention]; see also *Air Transport*, *supra* note 78, at 24.

¹⁵⁶ *Id.* at 25. The IATA maintains 158 active members and 33 associate members. Only some of these members participate in tariff coordination. For a listing of airlines who do not participate, see *IATA Membership*, REVIEW, Feb. 1990, at 31.

¹⁵⁷ *Id.*; see also Note, *supra* note 105, at 459.

¹⁵⁸ Dagtoglou, *supra* note 77, at 343. For a more detailed discussion of European air transport organizations such as the IATA, the European Civil Aviation Conference, and Association of European Airlines, see Dempsey, *supra* note 84, at 623-29.

¹⁵⁹ Capital held by Member State's government

Air France	98.80%
Air Inter	49.90%
Alitalia	99.00%

"flag carrier that can lend wings to national feelings."¹⁶⁰ When a government is setting policies in the areas of taxation or the availability of credit, it distinguishes between carriers on the basis of nationality and not upon performance-related factors such as economic efficiency, quality or services provided.¹⁶¹ The nationality of airlines is an important part of international air services,¹⁶² so much so, that Member States will often maintain an unprofitable carrier as a symbol of the flag.¹⁶³ Further, the national carriers are frequently overstaffed by national union workers¹⁶⁴ who might look with political disfavor upon a governmental regime which reduces their jobs. The success or failure of deregulation may turn upon the Member States' willingness to curb their own governmental interest in maintaining the current system.

The collective response of airline carriers to date has been one of resistance and fear.¹⁶⁵ The public authorities may be reluctant to "whole-heartedly accept the competition-concept for transport."¹⁶⁶ Business enterprises may resist putting their faith and finances into a competitive regime based on EC policy which has yet to be implemented by the public authorities of the Member States.¹⁶⁷

British Airways	[privatized]
KLM	78.00%
Aer Lingus	100.00%
Lufthansa	82.16%
Luxair	25.57%
Sabena	100.00%

Air Transport, *supra* note 78, at 35. In contrast, United States airlines have always been privately owned. Haanappel, *supra* note 97, at 96.

¹⁶⁰ Dagtoglou, *supra* note 77, at 343 (the progress of the national airline is often projected as a symbol for the entire country).

¹⁶¹ Gertler, *Nationality of Air Lines: A Hidden Force in the International Air Regulation Equation*, 48 J. AIR L. & COM. 51, 77 (1982).

¹⁶² *Id.* at 54.

¹⁶³ H. WASSENBERGH, PUBLIC INTERNATIONAL AIR TRANSPORTATION LAW IN A NEW ERA 140 (1976).

¹⁶⁴ Dagtoglou, *supra* note 77, at 340.

¹⁶⁵ *European Airlines Discuss Joining Forces*, Wall St. J., June 10, 1987, at 24, col. 2.

¹⁶⁶ P. SLOT & M. VAN DER WOUDE, EXPLOITING THE INTERNAL MARKET: CO-OPERATION AND COMPETITION TOWARD 1992, at 17 (1988).

¹⁶⁷ *Id.*

To put it bluntly, it frequently is more rewarding in competition terms to have the ear of the transport-ministry than to cut prices (supposing the latter is allowed at all). . . . [E]nterprises in that sector [transport] may not be expected to support implementation of an EEC competition law the actual impact of which in practice is very uncertain indeed.

168

Germany and France are the focal points of resistance to the EC air transport policy.¹⁶⁹ Sitting at the geographic heart of the EC, these two Member States have the least to gain from reduced air rates since surface transport such as road and railway carriage provide an adequate mode for passengers and freight.¹⁷⁰

A recent example of French resistance involved the United Kingdom charter airline, Air Europe. The airline was told by the French government, attempting to protect Air France, that the British charter airline would have to charge a one way fare from London to Paris of eighty-five francs instead of the offered fifty-nine francs. Air Europe refused. The airline's chairman, Harry C. Goodman, announced that he would be on board the first scheduled flight to personally hand out cash refunds to the passengers after landing in Paris. The French government then retorted that if Mr. Goodman acted in such a bold manner, Air Europe would be denied landing rights in Paris. Air Europe replied that it was free to give money away to whomever it wanted—whenever it wanted. On this occasion, however, the airline was willing to abandon the idea for fear of incurring the further wrath of the French government.¹⁷¹

Airline resistance may come under the guise of the Treaty itself. A total exemption, in contrast to the temporary exemptions mentioned earlier, may exist for national

¹⁶⁸ *Id.*

¹⁶⁹ Barrett, *Dogfight over Europe*, MGMT. TODAY, April 1988, at 93, 101.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 93.

carriers under Article 90(2) of the Treaty.¹⁷² This article is the so-called "public enterprise" exemption under which Treaty competition rules are applied to government undertakings only if they do not impair the public duties of that enterprise.¹⁷³ Because of the public nature of the national carriers,¹⁷⁴ these airlines could argue that the competition rules will impair their public duties. This argument could be based upon the premise that airlines were never intended to serve the majority of the public. More specifically, mass passenger transportation can be, and is, effectively done by the rail industry. Furthermore, by forcing this new passenger oriented system upon the airlines their traditional function has been changed. For example, the interposition of competition affects the Member States' ability to determine which mode of transport is best suited for the movement of their population, although to date no major European carrier has urged this position. As it stands, the ECJ has left open a possible exemption under Article 90(2) but stated that the Treaty provisions would be "interpreted strictly," therefore making the exemption's success unlikely.¹⁷⁵

D. *The Problems of Congestion and Air Traffic Control*

In addition to governmental resistance, the increasing problem of congested airports and the outdated Euro-

¹⁷² Treaty, *supra* note 3, art. 90(2). Article 90(2) provides:

Any enterprise charged with the management of services of general economic interest or having the character of a fiscal monopoly shall be subject to the rules contained in this Treaty, in particular to those governing competition, to the extent that the application of such rules does not obstruct the *de jure* or *de facto* fulfillment of the specific tasks entrusted to such enterprise. The development of trade may not be affected to such a degree as would be contrary to the interests of the Community.

Id.

¹⁷³ Note, *supra* note 105, at 472.

¹⁷⁴ See *supra* note 159 and accompanying text discussing the degree of government ownership in airline carriers.

¹⁷⁵ See *New Frontiers*, *supra* note 112, at 187. Whether "Article 90(2) of the Treaty allows the airline to be given special treatment is a question which can be left open. . . ." *Id.* For the view that the European national airlines are a public undertaking, see Dagtoglou, *supra* note 77, at 346.

pean air traffic control system could halt deregulation before it gets started.¹⁷⁶ The number of annual airline passengers in Europe is expected to double to approximately 800 million by the year 2000.¹⁷⁷ An increase in the number of passengers will most certainly necessitate an increase in the number of flights available in Europe. This increase will particularly limit the number of take off and landing slots available at European airports and may effectively preclude many carriers from obtaining such slots.

The national airlines, being the only ones that can obtain slots, will effectively control the Member States' airports as "hubs." The practical effect of this dominance will be decreased competition and higher fares. A United States Department of Transportation study published in February 1990, for example, showed that when one airline commanded more than 75% of the traffic in an airport, fares were 18.7% higher.¹⁷⁸ Unless the national airlines are willing to share airport capacity, deregulation may have no chance of success.

The problem of airport congestion is exacerbated by the significant amount of airspace dedicated to military operations.¹⁷⁹ As it stands, designated airspace cannot be used by civilian aircraft. One solution to the congestion problem would be to free up some of this airspace for private aircraft. Yet, if political tensions in the Middle East and Southwest Asia continue to increase, this seems unlikely.

According to an IATA-commissioned report, France, Germany, Greece, Spain and the United Kingdom will suffer most from air congestion problems.¹⁸⁰ In response to the congestion problems and this report, the IATA has

¹⁷⁶ *Will Europe's Crowded Airports Strangle Competition at Birth?*, THE ECONOMIST, Apr. 14, 1990, at 69 [hereinafter *Crowded Airports*].

¹⁷⁷ *Delays Across Europe*, THE ECONOMIST, May 12, 1990, at 20.

¹⁷⁸ *See Crowded Airports*, *supra* note 176, at 69.

¹⁷⁹ Young, *What Will Be the Effects of the EC Market Unification on Intercontinental Air Services after 1992?*, ICAO J., Jan. 1990, at 27.

¹⁸⁰ *Congestion—IATA Seeks Public Support*, REVIEW, Feb. 1990, at 4.

launched an international campaign to publicize the effect of congestion in the hope that it will foster greater airline cooperation. This report warns that by the year 2000 the restrictions on airspace will cost Western European countries as much as ten billion dollars.¹⁸¹

Moreover, the air traffic control system in Europe is inefficient and outdated.¹⁸² European computers and radar systems work on different standards and therefore information can not be automatically transmitted. To date, all communications between European airports is done by telephone.¹⁸³

The purpose of any air traffic control system is to keep air carriers from bumping into one another. Without an efficient control system all aircraft must be kept eighty miles apart.¹⁸⁴ This adds to congestion and causes increased delays. Furthermore, a single air traffic control system is unlikely if the Member State governments insist on continuing to control traffic through their own national public utilities.¹⁸⁵ As discussed earlier, Member States may be as reluctant to give up their national public utilities as to give up their airlines.

IV. IS DEREGULATION SUCH A GOOD IDEA AFTER ALL?

A. *Arguments Against Deregulation*

First, deregulation opponents have stated that a freely competitive system may decrease safety in the aviation industry.¹⁸⁶ The argument is premised on the view that competition will place airlines under pressure to economize, resulting in lower safety standards. As long as fares are kept high, it is arguable that airlines will be able to maintain requisite safety levels because the airlines will

¹⁸¹ *Id.* at 3.

¹⁸² *Id.*

¹⁸³ See *Delays Across Europe*, *supra* note 177, at 20.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Dagoglou, *supra* note 77, at 343; see also Weber, *Air Transport in the Common Market and the Public Air Transport Enterprises*, 5 ANNALS OF AIR & SPACE L. 283, 299 (1980).

still possess the cash flow to make repairs. Further, as small operators take over the routes traditionally reserved for the larger airlines, the increased traffic, coupled with the limited technical capacity of the smaller airplanes, could increase flying risks considerably.¹⁸⁷

The United States experience with deregulation is often used to refute this argument.¹⁸⁸ For example, the required level of safety is maintained by government control on the *technical* side, instead of the pricing side, through the use of organizations such as the National Transportation Safety Board.¹⁸⁹ In fact, this system is already partly in place in Europe. The IATA, as well as coordinating the airline pricing cartel, supervises the national civil aviation agencies' safety regulations in order to coordinate and ensure that safety is maintained in a time of increasing air traffic.¹⁹⁰ After deregulation, the IATA could still play an important role in European air transport by regulating safety on the technical side just as the NTSB supervises air traffic safety in the United States.

Second, deregulation may prove troublesome because open competition does not fit the ideological concepts of air transport in Europe. The air transport policy of Europe often has socialistic undertones, due to the transport sector being viewed as a public commodity.¹⁹¹ This may not be compatible with the open competition, or "survival of the fittest," method of deregulated mass passenger transport. The protection of other methods of mass transportation through cross-subsidy programs may be jeopardized. For example, leisure travel in Europe is generally maintained through the railway system.¹⁹² Open competition in the air transport sector may diminish the

¹⁸⁷ Dagtoglou, *supra* note 77, at 344. These smaller airlines are "commuter airlines" which would take over the routes abandoned by big airlines after those routes became unprofitable. *Id.*

¹⁸⁸ Weber, *supra* note 186, at 300.

¹⁸⁹ *Id.*

¹⁹⁰ Dagtoglou, *supra* note 77, at 343.

¹⁹¹ *Id.* at 344.

¹⁹² *Air Transport*, *supra* note 78, at 31.

traditionally large number of passengers serviced by European trains. Specifically, many of those who would ordinarily travel by train may elect to travel by air. The result would be lower profits for the railroad industry as well as possible loss of jobs for rail employees.

Further problems may arise with regard to the relationship of the Treaty with pre-existing treaties entered into by Member States, such as the Chicago Convention.¹⁹³ Article 234 of the Treaty deals directly with the hierarchy of obligations each Member State has to nonmembers under treaties entered into before 1950. It also details the obligations each Member State has to the European Community. Specifically, Article 234 establishes the general rule that prior treaties between one or more Member States shall not be affected by the Treaty of Rome. A caveat, however, further states that if the prior treaties are incompatible with the Member State's duties under the EC, Community law defeats the pre-existing agreements.¹⁹⁴

If the trend under the new European airline deregulation is away from nationalized sovereign power over airspace, the Chicago Convention may be construed as incompatible. In particular, Article 6 of the Convention strictly preserves national sovereignty: "[N]o scheduled international air service may be operated over or into the territory of a contracting state, except with special permis-

¹⁹³ *Id.*

¹⁹⁴ Treaty, *supra* note 3, art. 234. Art. 234 provides:

The rights and obligations resulting from conventions concluded prior to the entry into force of this Treaty between one or more Member States, on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty.

Insofar as such conventions are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate any incompatibility found to exist. Member States shall, if necessary, assist each other in order to achieve this purpose and shall, where appropriate, adopt a common attitude.

Id.

sion.”¹⁹⁵ Governments, under the theory of sovereignty, gained economic control over air transport pursuant to their own national, not international, interest. Air routes and traffic were originally viewed under the Chicago Convention as a “potential commodity” or natural resource of the state to be granted or exchanged for the countries’ own economic benefit.¹⁹⁶ Strict national control, not freedom of the skies, was the underlying theme of the Convention.¹⁹⁷ In fact, many feel that the lack of early progress in the air transport industry was due to the Treaty’s draftsmen’s inability to design an air transport policy benefiting the EC while maintaining the integrity of the pre-existing treaties.¹⁹⁸

The compatibility of the Chicago Convention and the Treaty of Rome has never been brought before the ECJ,¹⁹⁹ although the court has addressed questions of compatibility between the Treaty of Rome and other pre-existing treaties outside the air transport sector.²⁰⁰ The court has held that “the EEC Treaty takes precedence over the agreements concluded between Member States prior to its coming into force.”²⁰¹ Under this decision and article 234, Member States may only honor their obligations under the Chicago Convention if they are construed as compatible. If they are not, the Member State must attempt to eliminate these incompatibilities;²⁰² the most likely method would be renegotiation of the existing bilat-

¹⁹⁵ Balfour, *Freedom to Provide Air Transport Services in the EEC*, 14 EUR. L. REV. 30, 43 (1989). Chicago Convention, *supra* note 155 at 4.

¹⁹⁶ Gertler, *supra* note 161, at 55.

¹⁹⁷ *Id.* at 54.

¹⁹⁸ Dempsey, *supra* note 84, at 639.

¹⁹⁹ Balfour, *supra* note 195, at 43.

²⁰⁰ EC Commission v. Italy, 1 Common Mkt. L.R. 187, 188 (1962); *see also* A-G v. Burgoa, 2 COMMON MKT. L.R. 193 (1981) (Spanish fisherman was prosecuted for violating the 200 mile exclusive economic zone of Ireland. The fisherman pleaded that the 1964 London Fisheries Convention maintained a 12 mile zone and this right was solidified under article 234 of the Treaty, if it was found to be comparable. The ECJ agreed.); Balfour, *supra* note 195, at 43.

²⁰¹ *New Frontiers*, *supra* note 112, at 189.

²⁰² Balfour, *supra* note 195, at 44.

eral agreements.²⁰³

The French, Italian and Dutch governments have stated that they have not found it necessary to revise their relevant bilateral agreements because the question of compatibility has not yet arisen.²⁰⁴ The air carriers are taking a similar position. Air France and KLM have stated that until it becomes clear that the competition rules are incompatible, Member States are under no obligation to renegotiate the existing agreements.²⁰⁵ Even though Member States are under no obligation to renegotiate, they may if they so desire. For example, the United Kingdom has already taken steps to eliminate potential incompatibilities with existing bilateral agreements.²⁰⁶ In the future, however, it is uncertain if each Member State will be allowed to renegotiate or if in the interest of the community the task will be relegated to the EC Commission.²⁰⁷

Fourth, even if the regulatory oligopoly is broken, deregulation opponents point to the potential for the formation of another type of oligopoly—the natural oligopoly. Through airline mergers, take-overs, acquisitions and bankruptcies, “the world may be ruled by a limited number of mega carriers.”²⁰⁸ In fact, the scenario of widespread business failures coupled with large scale industry mergers came true in less than ten years after the inception of United States deregulation. There are now only eight major carriers remaining in the United

²⁰³ *New Frontiers*, *supra* note 112, at 189.

²⁰⁴ The airlines seem to suggest that the issue should be resolved either by the ECJ or the Commission. In the meantime, the status quo should be maintained. See generally *id.*

²⁰⁵ *Id.*; see also Dempsey, *supra* note 84.

²⁰⁶ Haanappel, *supra* note 97, at 104.

²⁰⁷ *Id.* at 81.

²⁰⁸ *Id.* at 80. Many acquisitions are prompted by business failures due to the fact that it is less expensive to purchase an ailing carrier than to buy new aircraft. Further, the new carrier takes over the ailing carrier's gates, airport slots and possibly the ailing carrier's CRS. One example of an empire largely built on take-overs of business failures in the United States is the former Texas Air Corporation, now Continental Airlines Holdings, Inc. *Id.* at 83.

States.²⁰⁹ This reduction in number creates a type of natural oligopoly formed from "survival of the fittest." What necessarily makes one oligopoly better than the other?

A fifth concern has also been expressed in the area of international terrorism.²¹⁰ In addition to ending border controls and border checks, all EC airtrips will be treated as domestic flights with no controls on arriving passengers. Some authorities fear that international terrorism will increase when only one surveillance check is conducted at the EC external borders instead of periodic checks at internal borders. Robert Kupperman, a senior analyst of International Studies at Georgetown University, stated recently that "it is inevitable that there will be a major terrorist incident" when the European barriers come down.²¹¹

Terrorism, conflicts with pre-existing treaties, the ideological concept of air transport in Europe and the safety factor are all legitimate concerns within a deregulated system. To what extent these factors will be realized is unknown. International terrorism or civil aviation safety, for example, may remain unaffected. Yet, deregulation opponents present a strong "what if" argument which warrants concern within the air transport sector. It is possible that no change may be better than the possibility of a change for the worse.

B. *The Need for a Common Air Transport Policy*

The concerns of deregulation advocates, however, are equally compelling. Aeropolitically, the Member States of the EC are lagging behind the international air market.²¹²

²⁰⁹ The eight major airlines in the United States are: Continental Airlines Holdings Inc., United Air Lines, Inc., American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., USAir, Trans World Airlines, Inc. and Pan American World Airways, Inc. *Id.* at 82 n.7.

²¹⁰ See *A Europe Free of Barriers Also Threatens to Ease Travel by Terrorists, Some Fear*, Wall St. J., Aug. 9, 1988, at 24, col. 4.

²¹¹ *Id.*

²¹² See M. EMERSON, *supra* note 1, at 116. During the period 1978-82 the cost of European based international air services was, on average, 60% higher than international air services in North America. Administrative overheads were 365%

A mutually agreeable common air transport policy would provide a stronger international air carrier position for Europe.²¹³ It would also further the interest of the European traveling and shipping public,²¹⁴ prevent wasteful competition between air carriers,²¹⁵ and expedite the development of the European aircraft manufacturing industry.²¹⁶ Airline deregulation may be the key to "popularizing" the common market scheme by showing a tangible benefit to the citizens of the Member States in the form of less expensive and more convenient air transport.²¹⁷

An example of such a tangible benefit arose out of the implementation of regional liberalization in Ireland. In 1986, the Irish government authorized a new private airline to fly the Dublin/London route. The new airline substantially reduced the fare previously charged by the national carrier. In order to compete, the national carrier also lowered its fare on the route. The competition increased traffic by 29% or 200,000 extra passengers between May and December. According to a survey conducted in late 1986, 30% of passengers on board these flights indicated they were traveling entirely as a result of the lower fare.²¹⁸ This competition has turned the Dublin-London route into one of the best-served European routes in the 1990s.²¹⁹

higher, unadjusted maintenance costs were 119% higher and ground/passenger costs were 315% higher. *Id.*

²¹³ Civil aviation integration may cure the situation of a divided Europe. As it stands, air transport in the Community is at the mercy of power blocs such as the U.S., U.S.S.R., the Arab world, China and Japan. See H. WASSENBERGH, *supra* note 163, at 137.

²¹⁴ *Id.*

²¹⁵ *Id.*; see also M. EMERSON, *supra* note 1, at 116 (showing that almost 50% of the available seats on European airliners have flown empty).

²¹⁶ H. WASSENBERGH, *supra* note 163, at 137.

²¹⁷ Barrett, *supra* note 169, at 96. A recent survey shows Europeans favor deregulation by a margin of five to one. Interestingly, North Americans who have experienced deregulation favor it only 1.8 to one. Haanappel, *supra* note 97, at 99.

²¹⁸ M. EMERSON, *supra* note 1, at 117.

²¹⁹ Betts & Dickson, *supra* note 139, at 18.

The creation of a single EC airline carrier is one potential way of achieving a unified air transport system. Each of the established airlines, by agreement, could distribute established routes equally under the direction of a common civil aviation authority.²²⁰ It has been suggested, however, that a unified airline is hardly an acceptable alternative. Creating one or two designated European carriers leading to a loss of identity of the existing carriers, "politically, economically and psychologically seems undesirable in practice."²²¹

In 1951, several countries attempted a unified air transport system, commonly known as the "Air Union" project.²²² The Federal Republic of Germany, Belgium, Italy and France were to form an association creating a common European airspace and a single airline system, presumably eliminating competition and national images. Capacity was to be allocated among the airlines by agreed quotas. Yet, over the next decade negotiations did not proceed smoothly and the concept began to weaken politically. France formally withdrew from the project when President De Gaulle issued a formal veto of the association. By 1966, the other Member States had lost interest in the idea as well,²²³ although the possibility still remains that the Air Union or a similar project may be resurrected in the future.

A more realistic approach might entail a series of mergers and acquisitions of existing airline carriers to create several strengthened European carriers.²²⁴ It has been predicted that only five or six European carriers will survive the increased competition arising from deregula-

²²⁰ For an "arbitrary" example of a potential labor distribution arrangement between the national carriers, see H. WASSENBERGH, *supra* note 163, at 138.

²²¹ *Id.*

²²² J. NAVEAU, *supra* note 90, at 181-83.

²²³ *Id.*

²²⁴ "No European carrier is large enough to resist the U.S. challenge." Carey, *European Airlines Discuss Joining Forces*, Wall St. J., June 10, 1987, at 24, col. 2 (statement made by a representative of Alitalia).

tion.²²⁵ Deregulation advocates view the natural oligopoly as having a positive effect on the air transport industry.

European carriers have begun discussing mergers to enhance access to continental hubs and increase capital.²²⁶ In addition, some mergers have already taken place. British Airways has acquired British Caledonian, and Scandinavian Airlines System (SAS) has purchased British Midland.²²⁷ On the other hand, Air France, although acknowledging the merger concept, has taken no official steps toward this end.²²⁸

Interestingly, the recent merger trends are directly correlated to the percentage of government ownership in the airline carriers. For example, Air France is over 98% government owned, while SAS is 50% government owned, and British Airways is completely privatized. Those airlines that have a greater proportion of government ownership have been less likely to enter into merger negotiations. The reason for this correlation could be that the governmental mind-set is biased toward public service, while airline carriers tend to be profit oriented.²²⁹ Governments favor cooperation only if it improves the national carrier's share of international traffic or if cooperation improves "public" transportation. To the contrary, air carriers as business enterprises cooperate in hopes of improving their profits by increasing revenues and decreasing costs.²³⁰ Airlines which are not wholly government owned have more shareholders to satisfy. As a result they have more to lose from increased competition and may be more likely to enter into negotiations on the

²²⁵ *Id.* (statement made by Jan Carlson, president of Scandinavian Airlines System).

²²⁶ *Id.*

²²⁷ Young, *supra* note 179 at 28. SAS has already been successful in achieving cooperation between carriers of different nationalities, i.e., Denmark, Norway and Sweden. Dagoglou, *supra* note 77, at 343.

²²⁸ Carey, *supra* note 224, at 24.

²²⁹ H. WASSENBERGH, *supra* note 163, at 135.

²³⁰ *Id.*

matter.²³¹ This fear of competition is one possible explanation for SAS's willingness and Air France's resistance to enter into negotiations for a merger.

The merger proposal, or consolidation of all European carriers, is likely if the major European airline carriers view profit as the incentive. As a part of this process, European countries will have to release a portion of their sovereignty as symbolized by their national carriers. As stated earlier, this relinquishment may be undesirable in practice, in light of the European view of airlines as a "public utility service" instead of an "independent economic activity."²³²

Significant political barriers exist with respect to the merging of airlines in Europe. Leon Brittan, the European Commissioner for Competition, stated that the EC will be vigilant in controlling mergers by strict enforcement of the Community's antitrust rules.²³³ A merger would also be difficult as a result of the prohibitions against foreign ownership of national airline carriers. Most of the Member States require that the national flag carrier be owned in a majority by citizens of the country of incorporation.²³⁴ This majority ownership doctrine arose due to prewar German participation in the ownership of airlines operating in Latin America.²³⁵ The requirements were originally meant to prevent the possibility of selling bilateral rights to third country owners. By prohibiting noncitizens from acquiring a majority share in the airline, third countries (not a party to the agreement) cannot, *de facto*, acquire rights through the acquisition of the agreeing party's airline. Indirectly, a merger between two national carriers is made impossible unless this requirement

²³¹ See *supra* note 107 and accompanying text.

²³² H. WASSENBERGH, *supra* note 163, at 139; see also *supra* note 60 and accompanying text.

²³³ *Airline-Merger Caution Abroad*, N.Y. Times, June 3, 1989, at 46, col. 6.

²³⁴ *Airlines Will Cooperate, Not Merge, after Deregulation of Europe in 1992*, AV. WEEK & SPACE TECH., Sept. 5, 1988, at 133.

²³⁵ Gertler, *supra* note 161, at 62.

is eliminated.²³⁶

The most likely consequence of the 1992 deregulation will be increased cooperation between the national carriers. Guenter Eser, director of the International Air Transport Association, has stated, "I can't see national governments giving up their national airlines, but I do see close cooperation."²³⁷ Evidence of this cooperation can be seen in the development of two international computer reservation systems.²³⁸ The first system to be implemented, commonly referred to as "Amadeus," includes such airlines as Lufthansa (Germany), Air France (France), Iberia (Spain), and SAS (Denmark, Norway and Sweden).²³⁹ The second system, referred to as "Galileo," is to be implemented with the cooperation of British Airways (United Kingdom), Alitalia (Italy), KLM (Royal Dutch Airline), and SwissAir (non-EC member Switzerland).²⁴⁰ The national carriers insist that the listings will not be prejudicial nor will they discriminate against airlines not involved in the project. Smaller airlines such as Raynair (Ireland), however, are fearful that the systems may effectively shut out competition.²⁴¹

Many of the advocates of the deregulation system are airline users.²⁴² Air fares in Europe are dramatically higher than in the United States.²⁴³ Deregulation, or even a unified carrier system, may not result in a decrease in

²³⁶ There is precedent existing within the Treaty of Rome for the abolition of these requirements through the application of the rules on freedom of establishment as laid down in Articles 52-58. These rules have yet to be applied in this context. Haanappel, *supra* note 97, at 103 n.97. Even if these rules are applied to nullify the Member State national laws governing ownership, the problem may not be eradicated due to a standard "substantial ownership and effective control clause" being inserted in many bilateral agreements. *Id.* at 104. This could only be resolved by renegotiations of the existing bilateral agreements.

²³⁷ Gertler, *supra* note 161, at 62.

²³⁸ *New Computerized Reservation Systems Could Squeeze Small European Airlines*, Wall St. J., Aug. 18, 1988, at 16, col. 1.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² See Comment, *supra* note 85, at 383.

²⁴³ See *supra* note 138 and accompanying text.

fares comparable to the fare decreases in the United States. The difference in the fares between the United States and Europe is attributable to higher European operating costs, such as airport and air navigation fees, as well as higher fuel costs.²⁴⁴ Stringent regulations on hiring and firing increase labor costs.²⁴⁵ Further, night flying restrictions cut the European carriers' working period by 24%.²⁴⁶ On average, the cost per passenger for a European carrier ranges up to 20% higher than the cost per passenger for a United States carrier.²⁴⁷ These fixed costs will remain even if deregulation continues.

Even though European firms have recorded profit levels far below the private firms of the United States, the national airlines have been experiencing economic growth in the last few years.²⁴⁸ For example, Air France announced a year of record growth in 1988. Passenger traffic rose 8.8% on a capacity increase of 7.9%,²⁴⁹ and net profits were estimated at 1.2 billion francs or approxi-

²⁴⁴ Comment, *supra* note 85, at 387 n.201.

(1) Fuel is up to 50% more expensive because of higher taxes; (2) labor costs are up to twice as high (although this is partly because the cartel has allowed low-productivity airlines to survive); (3) military and political restrictions make European air routes, on average, 15% (and in extreme cases 47%) longer than the distance a crow would fly; (4) operating aircraft over Europe's short distances has the same effect on fuel efficiency as stopping and starting a car in a traffic jam.

Id.; see also *Air Transport*, *supra* note 78, at 34.

²⁴⁵ *Air Transport*, *supra* note 78, at 34.

²⁴⁶ Comment, *supra* note 85, at 387.

²⁴⁷ M. EMERSON, *supra* note 1, at 117 (showing also that ticket prices were on average 35% to 40% higher). This figure is most likely taking into account the United States discount price, which is a paid-in-advance or special price, and not the "full fare" price which has tripled in the last 10 years, and for the most part is more expensive than European tickets. See Barrett, *Promises of Cheap Fares*, *THE INDEPENDENT*, June 21, 1990, at 16.

²⁴⁸ M. EMERSON, *supra* note 1, at 116.

²⁴⁹ *Tourism in France in 1989*, *Com. News*, May 1989, at 2. Air France's share of international freight traffic among other European airlines reached 20.1%. Further growth has been increased by European airlines introducing promotional features and new travel packages. In 1989, Air France embarked upon an aggressive campaign based on the Bicentennial of the French Revolution. The vacation plans include greater flexibility of design for the passenger by combining Paris with one or more European capitals. *Id.*

mately 190 million dollars for 1987.²⁵⁰

Moreover, Americans enjoy a greater selection of flights than Europeans. On a given day there are more than 100 flights between Los Angeles and San Francisco. There are fewer than 30 flights, on the other hand, from Heathrow to Paris, even with the recent addition of British Midland.²⁵¹ Further, the fare between Los Angeles and San Francisco is 50% less than the fare between Heathrow and Paris. The sheer unavailability of European flights will likely keep prices at a high level.

V. EFFECT ON THE UNITED STATES

The United States has advocated an open skies policy ever since the passage of the Airline Deregulation Act of 1978.²⁵² The Act is evidence that airline deregulation can be achieved, and establishes the United States as an example for other nations.²⁵³ The deregulatory policies of the United States, spawned in the 1970s, have placed pressure on various industries in other nations to conform, the most significant pressure being in the air transport sector.²⁵⁴ Reluctantly, the United States has tolerated coordination of tariffs and pricing by the Member States by exempting United States carriers operating within Europe from domestic antitrust laws.²⁵⁵ This exemption from domestic antitrust laws has tended to keep fares on the upper end of the scale in Europe.

On August 7, 1990, the United States Department of Justice recommended to the Department of Transportation that the antitrust exemption held by the United

²⁵⁰ *Id.*

²⁵¹ Barrett, *supra* note 169, at 26.

²⁵² Pub. L. No. 95-504, 92 Stat. 1705 (1978); *see also*, United States v. FCC, 1978-2 Trade Cas. (CCH) ¶ 62,205 (D.C. Cir. 1978) (reference to the "open skies" policy of the United States).

²⁵³ *Id.* For effects of Canadian and New Zealand air deregulation *see* Haanappel, *supra* note 97, at 89-92.

²⁵⁴ Haanappel, *supra* note 97, at 80.

²⁵⁵ Dagtoglou, *supra* note 77, at 340.

States carriers be curtailed.²⁵⁶ The current immunity under the Federal Aviation Act may be withdrawn altogether. The United States Attorney General's office stated that the immunity should be lifted for "consumer protection."²⁵⁷ Attorney General Dick Thornburgh stated, "[m]any Americans may not realize that the prices of their airline tickets for travel abroad are set by what is in effect a legalized international cartel."²⁵⁸ Removing this immunity will also inject greater competition into the European air industry due to the fact that the United States airlines will be flying at a reduced price.

If the United States actually gets what it has been hoping for, a deregulated international air transport system, the effect upon the United States civil aviation industry may be only minimal. The United States International Trade Commission has stated that "[t]he U.S. air-transport industry will not be immediately or specifically affected" by the EC directives.²⁵⁹ The transport directives apply only to Member States and take no position with respect to existing bilateral agreements. Further, the EC has made no announcement regarding potential renegotiation of such agreements. The United States aircraft manufacturers and trade associations are taking a wait and see approach to the air transport policy of the EC, noting that Member States have been known in the past to take actions directly contrary to existing directives.²⁶⁰ The Commission did recognize the possibility of a unified air traffic system as a result of the EC policy and stated that such a system "could increase its [the EC airline's] bargaining powers with the United States and other countries over existing international air-traffic agreements."²⁶¹

²⁵⁶ *U.S. Seeks to End International Flight Fare Fixing*, AV. LIT. RPTR., Aug. 20, 1990, at 12,188.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Report, *supra* note 12, at 8-6.

²⁶⁰ *Id.*

²⁶¹ *Id.* The commission further stated, "[t]he integration of the European air traffic market could also lead to a single negotiating unit, becoming stronger and more effective than is the case with individual countries. . . ." *Id.*

In the past, United States airlines have experienced numerous problems within the EC in areas such as computer reservation systems, user fees, airport access, and ground handling services.²⁶² First, Member State airline carriers are allowed to freely provide for their own ground handling services while operating within the United States. In contrast, United States carriers have been denied a reciprocal right. The services being denied include aircraft maintenance, ticketing, catering, and cargo loading. Both the United States Department of State and the United States Department of Transportation have been seeking a remedy for this situation.²⁶³

Second, it is unclear whether or not the United States computer reservations systems will be allowed to compete with Galileo and Amadeus.²⁶⁴ It is possible that international travelers will not have access to United States fares through the European computer system. It is also feared that even if the United States is allowed to participate, the system may discriminate in favor of the national carriers. The USITC points out that it is "unclear how foreign carriers will be treated and whether they will have the non-discriminatory and transparency features found in the U.S. systems."²⁶⁵

Third, the United States does not charge a user fee for the privilege of operating within United States air space.²⁶⁶ A reciprocal right does not exist in Europe. The United States carriers incur more than 60 million dollars annually for fees charged for use of European airspace. The EC directives are silent on this and all of the foregoing aspects, but many United States carriers are hopeful that deregulation will eradicate these problems.²⁶⁷

²⁶² Report, *supra* note 12, at 8-11.

²⁶³ *Id.*

²⁶⁴ See *supra* notes 239-40 and accompanying text.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Report, *supra* note 12, at 8-6. Member State carriers similarly have contentions against the United States. Many Europeans are of the opinion that if the United States airlines are allowed free flight between various cities in an inte-

VI. CONCLUSIONS

Air transport problems in the EC were largely ignored until the 1987 directives of the Council. Even though the Member States have agreed that there is a need for liberalization of the present scheme, there is still resistance in letting go of the nationally operated regulatory system. The transitional period of deregulation has improved the current pricing scheme only minimally by way of strictly controlled competition. The Member States intend to continue this phasing period and have explicitly stated disapproval of a "free for all," open skies type policy which exists in the United States. More is at stake than the mere opening up of air routes and the lowering of pricing tariffs. The airlines are a symbol of the member states, much like a national flag. This concept of nationality and public orientation lends itself to regulation more than a capitalistic regime of profit seeking air carriers.

Furthermore, is unlikely that airline ticket prices in Europe will equal fares in the United States, due in part to controlled competition, but also due to the higher secondary cost of flight maintenance, labor, and fuel. The greatest increase in competition arising from the market scheme will probably be between European carriers and other modes of transportation, such as rail, rather than between European carriers and the United States. If governmental cross-subsidies, the equalization process used for the protection of all methods of transport, are eliminated, the market will determine which method of transport is more profitable. Since air transport is a quicker, more convenient method of shipment, a drop in air freight prices could lead to increased competition in the rail industry, but this increase would no longer be offset by a government subsidy.

Several European airlines will likely collapse as a result

grated Europe, then it is only equitable to allow the national airlines a reciprocal right between various United States cities. The United States has made no formal statement on this issue. *Id.*

of increased intrastate and interstate competition. There will be a need for the pooling of resources, capital, and access to routes to enable survival. In order for airline mergers to take place, extensive political barriers such as the national laws concerning ownership and EC antitrust provisions must be overcome. Whether or not the EC laws will be amended to allow for a merged EC airline system remains to be seen. The EC's hope is that the differences in competitive ability will be eradicated by the time the phasing period is over, and every airline will be on equal footing when full deregulation occurs, thereby making a merger unnecessary.

Even though no official policy has been stated, the renegotiation of bilateral agreements will be necessary to maintain a deregulated regime. The filing or establishment of tariff quotas will no longer be predicated on inter-airline consultation, a process which is mandatory in most bilateral agreements. It will be determined largely by market fluctuations. The agreements as they stand may be construed as violative of the Treaty competition rules prohibiting concerted practices in pricing, and have the potential of being null and void if brought before a national court.

At the very least, limited deregulation will result in increased cooperation between European carriers. This is evidenced by the two new computer reservation systems. European airlines recognize that in order to become an effective power bloc in transportation, industry fragmentation must be eliminated. Since the relinquishment of national sovereignty in this area seems too drastic at this point, cooperation between the Member States is likely to be the most visible effect.

The many changes taking place in Europe due to the 1992 unification policies are interrelated and the transportation sector cannot be viewed in a vacuum. The deregulation could be halted, or delayed, if a breakdown in the political scheme of unification should arise between the Member States; the most significant threat being the

position of the new Germany. Yet for the time being, it appears that lower fares and increased competition are on the European horizon. For those seeking lower fares for European travel and shipping, any means which produce this end will be an unqualified success.

In 1944, the Brazilian delegate to the Chicago Conference expressed the view that, "perhaps the time will never be ripe" for the internationalization of civil aviation.²⁶⁸ An optimistic capitalist, however, would retort that "if market forces demand something, and however impossible it seems within an existing legal framework, ways and means are often found."^{269 270}

²⁶⁸ Gertler, *supra* note 161, at 78.

²⁶⁹ Crush, *The Market Place of Cheap International Air Travel in Europe*, 17 INT'L BUS. LAW 21, 22 (1989).

²⁷⁰ For further information regarding developments within the EC, a list of all measures taken in preparation for 1992 and their status is published quarterly by the E.C. Committee of the American Chamber of Commerce in Belgium. Directives are published in the Official Journal of the European Communities and are available in most libraries. The Commission also publishes a monthly magazine, *Europe*, which is available by subscription.

