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## Book Review

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MARTIN BARTLIK: THE IMPACT OF EU LAW ON THE REGULATION OF INTERNATIONAL AIR TRANSPORTATION (2007 Ashgate; ISBN 978-0-7546-4951-9)

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IN 1979, the United States of America began to negotiate Open Skies agreements on bilateral bases worldwide, mainly with smaller nations.<sup>1</sup> This gave both countries unrestricted landing rights on each others' soil.<sup>2</sup> In spite of objections by the European Union authorities, the Netherlands became the first European State to sign an open skies agreement with the United States ("U.S.") in 1992.<sup>3</sup>

The European Commission was not amused by that, as it claimed to be the only (supranational) body to have power to negotiate with the United States government on a community Air Service Agreement.<sup>4</sup> The European Commission then negotiated an open skies agreement with the U.S.<sup>5</sup>

Although much has been written on the 'open-skies' judgment of the European Court of Justice, the book reviewed here provides for the first comprehensive study on the judgment's various possible direct and indirect long-term effects. Martin

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<sup>1</sup> See Rafael Leal-Arcas, *Is EC Trade Policy up to Par?: A Legal Analysis Over Time-Rome, Marrakesh, Amsterdam, Nice, and the Constitutional Treaty*, 13 COLUM. J. EUR. L. 305, 344 (2007); Bruce Stockfish, *Opening Closed Skies: The Prospects for Further Liberalization of Trade in International Air Transport Services*, 57 J. AIR L. & COM. 599, 615-17 (1992); see also Jeffrey N. Shane, Under Sec'y for Policy, U.S. Dep't of Transp., Address at the ICAO Global Symposium on Air Transport Liberalization: Air Transport Liberalization: The U.S. Experience (Sept. 18, 2006), <http://www.dot.gov/affairs/jeffshane091806.htm>.

<sup>2</sup> See Daniel C. Hedlund, Note, *Toward Open Skies: Liberalizing Trade in International Airline Services*, 3 MINN. J. GLOBAL TRADE 259, 270 n.72 (1994).

<sup>3</sup> See Leal-Arcas, *supra* note 1, at 344-45.

<sup>4</sup> See *id.*

<sup>5</sup> John Crawley, *U.S./EU Sign Agreement Easing Air Travel*, REUTERS, Apr. 30, 2007, available at <http://www.reuters.com/article/topNews/idUSN3023348720070430>.

Bartlik has taken the European Court of Justice's 'open-skies' judgment as the starting point to conduct a deep analysis on the possible impact of EU law on the future regulation of international public air law (and vice versa).

Part one contains a very detailed presentation of the ECJ's ruling. The focus is set on the relation of the EU and the Member States, and the division of external powers under EU law. Interestingly, Bartlik comes to the conclusion that the European Court of Justice could have delivered a ruling that would have shifted even more competences from the Member States to the EU, but was precluded from doing so based on technicalities resulting from its procedural rules. Because the cases brought to the Court were part of an infringement procedure, the Court's examination of the cases was limited to the infringements argued by the Commission. According to Bartlik, the Commission failed to bring forward a specific possible infringement of secondary EC law caused by air service agreements. Based on its ERTA doctrine, this possible infringement would have allowed the European Court of Justice to deliver a verdict that would have been much more in favor of the EU. Under certain conditions it would have even allowed the EU to attain the exclusive external power to conclude air service agreements independent of the Member States. Instead, as a result of the Commission's failure, air service agreements presently must be concluded as mixed agreements jointly by the EU and its Member States. Bartlik considers this to be an unsatisfying situation and proposes an approach where a clearer division of external powers between the EU and the Member States is made.

In this context, Bartlik also examines the past negotiations between the EU and the U.S. on the conclusion of an air service agreement. He particularly scrutinizes the U.S. arguments brought forward during the first round of negotiations and shows how the U.S. 'open-skies' policy, repeatedly labeled by U.S. officials as serving passengers and fostering competition, in fact mainly serves to protect the U.S. airline industry from competition.

The second part of the book is built upon the results found in part one. Having previously reached the conclusion that in the long run the EU will, and shall, be involved in the conclusion of comprehensive air service agreements partially even independent of the Member States, Bartlik deals with the administrative difficulties arising after such an agreement is concluded. The focus is set on the distribution of air traffic rights. While the

Commission has long fought to attain the external power to conclude air service agreements, it seems to have not yet dealt with the question of how to move on once the EU has concluded a comprehensive air service agreement. Although the EU is currently limited to conclude primarily horizontal agreements, it has only recently concluded, albeit together with the Member States, its first comprehensive air service agreement with the U.S. Should the EU one day conclude a comprehensive air service agreement that provides for a limited number of air traffic rights, the Commission, along with the Member States, would have to deal with the problem of how these rights would have to be distributed among the EU air carriers. In this respect, many problems will arise and they are all dealt with by Bartlik.

He first discusses the question of whether air traffic rights should be distributed by the EU or the Member States. He concludes that due to EU law, and in particular the Principle of Subsidiarity, different degrees of participation of the EU and the Member States will be necessary, depending on the content of the respective air service agreement. Sometimes the EU and the Member States would be exclusively competent and sometimes they would have to cooperate. Having recourse to the allocation of import quotas within the common market for bananas and the distribution of fishery rights under the common fishery policy, Bartlik develops a scheme for the allocation of air traffic rights among the Member States and the EU air carriers, taking into account the particularities of international public air law.

Next Bartlik discusses the methods available for the distribution of air traffic rights. Defining air traffic rights as a scarce public resource, the author shows the different schemes that are generally used to distribute such public resources. For this purpose, Bartlik undertakes a sectoral comparison with the distribution of frequency licenses in the telecommunication sector. As a result of the experience made hereby, auctions were found to present the most efficient way to allocate frequency licenses. Bartlik shows that, in fact, many similarities exist between the telecommunication and the air transportation sectors—for example, both industries are part of a nation's infrastructure, play a crucial role for a states economy, and were originally very often dominated by state companies, which in some countries have been privatized. Bartlik then asks himself whether auctions could be also applied to distribute air traffic rights. Due to the strong international link of aviation, he refuses such an idea and

concludes that the best methods to allocate air traffic rights are "beauty contests."

This result is further confirmed in a following comparative study of the distribution methods for air traffic rights applied in five different countries (Australia, Canada, Germany, Great-Britain, and the U.S.). Although the countries examined had different airline industry structures (and partially still have such structures) and their governments pursued different policies and strategies in the field of aviation, they all used beauty contest to allocate air traffic rights. Very often, they even applied similar criteria when conducting their beauty contests to find the most appropriate air carrier for a specific route. However, in this analysis Bartlik also shows the disadvantage of the beauty contest approach, namely the subjective preferences of the respective government employees responsible for the decision-making as well as the failure of the method when all applicants seem equally suitable.

Finally, Bartlik takes on the task to present his own scheme for the distribution of air traffic rights. Favoring beauty contests as the distribution method for air traffic rights and taking into account the flaws of this approach experienced by the countries previously examined, Bartlik presents his ideal method that shall ensure a fair and fast allocation of air traffic rights.

Although the book's title gives the impression that it only deals with EU law, this is not the case. Its focus is set on the development of aviation law in the European Union but nevertheless it includes many studies that are independent of the situation in the EU. Especially in part two it provides for the first comprehensive study ever published on the distribution of air traffic rights. Hereby, the author does not limit himself to a single country, but shows the development and the approach in five different countries with very diverse geographical conditions as well as different approaches when it comes to air transportation politics. This study is of great value and should be very helpful to all officials involved in the regulation of air transportation. At the same time, it can serve airline managers by providing the necessary background information on the distribution of the resources they need for their business.

Where Bartlik deals with EU matters, the information provided should help those dealing with the EU to understand how it works and what political and structural difficulties it encounters. After reading the book, one may understand why the EU sometimes has to adopt certain positions and pursue certain

goals. It may do so in some cases for economic reasons, in other cases for political reasons to avoid later internal problems with the Member States, and sometimes for legal reasons based on EU law. In a nutshell, the European Union is a very complex supranational organization that now has entered the stage of international air transportation regulation, which itself is a very complex subject matter. The combination of both will surely result in many difficulties in the future. Bartlik identifies some of these problems and offers the necessary solutions.

The author presented this book as his thesis at Frankfurt University, which was accepted. Dr. Bartlik also has a LL.M. degree from the Institute of Air and Space Law of McGill University and works now as an attorney-at-law in Frankfurt/Germany.



# Case Notes

