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Prospects for European Air Deregulation

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CASENOTE

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The Paris Police Court requested the Court of Justice of the European Communities[1] for a preliminary ruling[2] to determine the compatibility of France's mandatory airfare approval procedure[3] with the Community's competitive policies.[4] Defendants, New Frontier Airlines,[5] Air France,[6] and KLM[7] had been charged with violating France's concerted airfare policy.[8] After frustrating attempts by the defendants to deny its jurisdic-

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1. Treaty of Rome, Mar. 25, 1957, arts. 164-68, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter EEC Treaty].

2. This is requested by a national court for an authoritative interpretation of Community law. Its analogue in U.S. civil procedure is an interlocutory appeal. The preliminary ruling interrupts the proceedings in the national court. EEC Treaty, *supra* note 1, art. 177; *see also* L. Brown & F. Jacobs, the Court of Justice of the European Communities 152-73 (2d ed. 1983).

3. *See* French Civil Aviation Code, C. Civ. Av., arts L 330-3, R 330-9, R 330-15. Article L 330-3 requires that airlines submit their fares as a requisite for approval by the Civil Aviation Minister. Article 330-9(2) extends this requirement to foreign companies. Article R 330-15 establishes a criminal penalty against operators who fail to comply with these provisions. For full texts of these statutes, see Annex to the Opinion of Adv. Gen. Lenz (Sept. 24, 1985), [1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,287, at 16,801 (1986) [hereinafter Lenz Opinion].

4. EEC Treaty, *supra* note 1, art. 85. Among the prohibited practices enumerated in art. 85, para. 1, are those having the effect of preventing, restricting, or distorting competition within the Common Market, by "(a) direct[ly] or indirect[ly] fixing of purchase or selling prices or any other trading conditions; . . . (c) shar[ing] markets or sources of supply." *Id.*

5. Docketed in case 211/84 (Aug. 17, 1984).

6. Docketed in case 212/84 (Aug. 17, 1984).

7. *See* case 209/84 (*docketed* Aug. 17, 1984). All these cases were combined as per E. Comm. Ct. J. R. 43.

8. As a practical matter, only New Frontier Airlines and KLM were offering fares below that established by the Ministry. Air France joined the action only to participate in arguing *for* the continuation of the restrictive policy. The governments of France, Italy, the Netherlands, and the United Kingdom also participated in the written procedure before the European Court.

tion in the case,[9] the Court of Justice, sitting in plenary session,[10] held that a Member State's enforcement of mandatory air fares violates EEC Treaty articles 5, 3(f), and 85(1), in the absence of Council regulations adopted under article 87, only when the concerted practice has been recorded by the Commission under article 88 or by a national authority under article 89(2). *Establishment of Air Fares: Applicability of the Rules on Competition in the EEC Treaty,* 1986 E. Comm. Ct. J. Rep. ——, [1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,287 (1986) (Preliminary Ruling).

The common transport policy originally contemplated for the Community in the Treaty of Rome[11] was primarily intended for road, rail, and inland waterway networks.[12] Formation of an integrated policy for sea and air transport that would allow for free movement of goods and persons, consumer choice, and equality of treatment in the Community[13] was considered a distant goal in 1957. Article 84(2) of the EEC Treaty places the airline and shipping industries outside the framework of a common transport policy until such time as the Council of the Community[14] by unanimous vote, decides "whether, to what extent, and by what procedure appropriate provisions may be adopted."[15] Although this provision did not explicitly give the Commission[16] the right to make proposals to the Council on this subject,[17] the Commission has, in fact, done so.[18] To

9. The Court first denied the arguments of Air France, KLM, and the French Republic, that the trial judge was not competent to request a preliminary ruling. *See* Judgment of the Court, Apr. 30, 1986, Cases 209-13/84, Establishment of Air Fares: Applicability of the Rules on Competition in the EEC Treaty (Preliminary Ruling) ¶¶ 9-10 [hereinafter Air Fares Case]; *see also,* ONPTS v. Damiani, 1980 E. Comm. Ct. J. Rep. 273. Likewise, the Court rejected the idea that the trial court's reference did not sufficiently specify the precise provisions of French and Community law to be used in the decision. *See* Air Fares Case, ¶¶ 11-16.

10. EEC Treaty, *supra* note 1, art. 165, para. 1.

11. *Id.* arts. 74-84.

12. *Id.* art. 84, para. 1.

13. *Id.* art. 75; *see also* 1 Common Mkt. Rep. (CCH) ¶ 1812 (1985).

14. The authority for which is described in the EEC Treaty, *supra* note 1, art. 145.

15. *Id.* art. 84, para. 2.

16. For a description of the rights and duties of the Commission, see *id.* arts. 155-63.

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

18. *See* EEC Comm., Eighth General Report No. 239 (1965); EUR. PARL. RES., 5 J.O. COMM. EUR. 70 (1961); 8 J.O. COMM. EUR. 1702 (1965); E.E.C. Comm. Seventh General Report No. 410 (1973); Memorandum, *Air Transport: A Community Approach,* 1979 E.C. Bull. Supp. No. 5 (proposing easier access to markets, more transparent and rational tariffs, and applying Treaty competition rules to this sector); 1981 E.C. Bull. No. 7/8, ¶ 1.3.1 (1979) (suggestions formally submitted to Council). For the Commission's most recent proposals, particularly focusing on capacity, pooling, and fare agreements, *see* 4 Common Mkt. Rep. (CCH) ¶¶ 10726, 10762-63 (1985-1986); Civil Aviation Memorandum No. 2, *Progress Towards the Development of a Community Air Transport Policy,* COM (84) 72 final; Commission White Paper, Completing the Internal Market, June 14, 1983, COM (85) 310 final. *See also,* Thaine, *The Way Ahead from Memo 2: The Need for More Competition and a Better Deal for Europe,* 10 Air Law 90 (1985) (describing the EC's 1984 initiatives in this area).

date, the Council has taken only cursory action.[19] Aside from directives on consultation procedures, noise emissions, and accident investigations,[20] no binding regulations have been issued under the authority of article 84(2).

European commercial air services are characterized by high fares, poor scheduling, and restrictive practices. One member of the European Commission has recently noted that "air transport is currently imprisoned in a straitjacket of excessive national regulation governing bilateral airline fare agreements. . . ."[21] In practice, air fares are established by the national air carriers[22] and are then enforced by the governments. When an airline has attempted to cut fares or improve service on a route, the other foreign government has often intervened to force the competitive airline to align its policies with its own airline. The result is that the less efficient airline on a given route can dictate the level of fares and services and in effect can bring its more efficient rivals down to its own level.[23] This system has been legitimized internationally by a number of instruments.[24]

Despairing of the Council's lack of progress in deregulating the airline industry, the Commission, and certain Member States, most notably the United Kingdom, have pressed for other legal measures. The Commission

19. The Council's and Commission's relative inactivity in this area of regulation has already drawn one suit before the European Court. Lord Bethell, a British member of the European Parliament, sought to force the Commission to propose measures to end airline price-fixing. The Court dismissed this case on procedural grounds, holding that Lord Bethell lacked standing. Lord Bethell v. Comm., 1982 E. Comm. Ct. J. Rep. 2277, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8858 (1982). *See infra* note 61 and accompanying text.

20. *See* 2 LAW OF THE EEC 836 (Supp. 1984).

21. *See* Peter Sutherland's Remarks, Jan. 30, 1986, *reprinted in* 4 Common Mkt. Rep. (CCH) ¶ 10762 (1986).

22. Agreement is often reached with the collaboration of the International Air Transport Association (IATA). *See* Air Fares Case, *supra* note 9, ¶ 21, 22.

23. *Id.*

24. There are four distinct regulatory overlays for commercial air transport: (1) The Chicago Convention, Dec. 7, 1944, art. 6, T.I.A.S. No. 6605, 15 U.N.T.S. 295, which provides that "no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization"; (2) This provision necessitated the conclusion of bilateral air services agreements, the current prototype for which is the Air Services Agreement, July 23, 1977, United States—United Kingdom, 28 U.S.T. 5367, T.I.A.S. No. 8641 [hereinafter Bermuda II], which deals with the establishment of fares at art. 11; (3) Regional and industry associations also set fares. These would include, for Europe, the International Air Transport Association, and the regime created by the International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services, July 10, 1967, 696 U.N.T.S. 31, the governing authority for which is the European Civil Aviation Conference. For its position on European air deregulation, see 11 AIR LAW 48 (1985) (ECAC Communique). (4) Finally, there is the system of competition regulation, governed by the EEC, which is the subject of this casenote. *See* discussion in Lenz Opinion, *supra* note 3, at 16,782.

has also rejected substantive proposals that would exempt IATA-sponsored route-pooling and fare agreements from the scope of EEC article 85's prohibition of concerted practices.[25] While the Commission would be willing to grant a certain degree of antitrust immunity to these concerted agreements for a transitional period,[26] it has warned that airlines can expect a direct challenge to their current practices.[27] Even though legal recourse is not as desirable as a Council directive,[28] the Commission has proceeded with actions to win free and fair competition in this vital sector of the European economy.

The *Air Fares Case,* although arising without the direct intervention of the Commission or those nations seeking airline deregulation, is the first salvo in this campaign. In one sense, however, an earlier decision of the Court had overcome a key stumbling block now facing those arguing that air transport is subject to article 85's antitrust provisions. In *Commission v. French Republic*[29] the Court acknowledged that article 84(2)'s exclusion of sea and air transport from the realm of a common transportation policy did not invalidate the application of other treaty provisions, including those on freedom of movement and work.[30] Denying the principle of this case, the French Government contended that article 84(2) only subjects sea and air transport to Part Two of the Treaty (Foundations of the Community) and not to the policy provisions of Part Three.[31] The court replied that the "Treaty's rules on competition . . . apply to the transport sector independently of the institution of a common transport policy."[32] Moreover, when the drafters of the Treaty of Rome wished to exclude certain activities from the antitrust rules, they made a specific exception.[33] Consequently, the Court ruled that air transport is subject to article 85's prohibition of concerted activities.[34]

Being subject to Community competition rules was not sufficient, however, to find France's enforcement of air fare agreements a violation of

25. *See* 2 Common Mkt. Rep. (CCH) ¶ 2760 (1983). Were regulations to be adopted, they would essentially follow those already set for other sectors of the economy. *See* Regs. No. 17 & No. 1017/68, *reprinted in* 2 Common Mkt. Rep. (CCH) ¶ 2401 (1985).

26. One accepted principle is that the regulations would allow a Member State to intervene in enforcing capacity agreements when the market share of its national airline falls below 25 percent. *See* 4 Common Mkt. Rep. (CCH) ¶ 10726 (1985).

27. 4 Common Mkt. Rep. (CCH) ¶ 10762 (1986).

28. 4 Common Mkt. Rep. (CCH) ¶ 10726 (1985) (remarks by Commissioner Clinton Davis).

29. 1974 E. Comm. Ct. J. Rep. 359, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8270 (1974).

30. At stake in this case was France's Employment at Sea Code, which required a certain number of French nationals manning French vessels. The court ruled this practice inconsistent with Community policy. *Id.*

31. *See* Air Fares Case, *supra* note 9, ¶ 34.

32. *Id.* ¶ 39.

33. *See* EEC Treaty, *supra* note 1, art. 42 (exemption of common agricultural policy).

34. Air Fares Case, *supra* note 9, ¶ 42.

article 85. Without a Council directive issued under article 87,[35] jurisdiction over matters of competitive policy is shared by the Commission[36] and by the "national authorities" of Member States.[37] The French and Italian Governments accordingly argued that since the air transport sector was under the jurisdiction of national authorities, and that such agencies could grant exemptions from articles 85(1)'s antitrust prohibition,[38] the practice of fare agreements could not violate Community law.

In adopting this view, the Court first had to deny that a "national authority," namely the Paris Police Court, had ruled on the admissibility of these agreements. The concept of "authorities in Member States" means either "the administrative authorities responsible in most Member States for enforcing national laws on competition . . ., or the courts to which the same responsibility has been assigned. . . ."[39] This definition did *not* include criminal courts charged with punishing violations of the law.[40]

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35. This provision notes that if regulations implementing the antitrust prohibition of article 85 are not adopted within three years of the EEC Treaty's entry into force, the Council may act on a qualified majority on a proposal from the Commission and after consulting the Assembly (now the European Parliament). *See* EEC Treaty, *supra* note 1, art. 87, para. 1. The adoption of these directives would be necessary to "establish a system ensuring that competition is not distorted in the Common Market, and to provide for the balanced application of Articles 85 and 86 uniformly within the Member States." *See* Council Regulation No. 17, 5 J.O. EUR. COMM. 204 (1962).

36. Article 89 of the EEC Treaty reads as follows:

> 1. Without prejudice to the provisions of Article 88, the Commission shall, upon taking up its duties, ensure the application of the principles laid down in Articles 85 and 86. It shall, at the request of a Member State or *ex officio*, investigate, in conjunction with the competent authorities of the Member States which shall lend it their assistance, any alleged infringement of the above-mentioned principles. If it finds that such infringement has taken place, it shall propose appropriate means for bringing it to an end.
> 2. If such infringement continues, the Commission shall, by means of a reasoned decision, confirm the existence of such infringement of the principles. The Commission may publish its decision and may authorize Member States to take the necessary measures, of which it shall determine the conditions and particulars, to remedy the situation.

EEC Treaty, *supra* note 1, art. 89. No such "reasoned decision" concerning air fare agreements has been recorded. *See* Air Fares Case, *supra* note 9, ¶ 59. The terms of Regulation No. 17, *supra* note 35, which renders all concerted practices unlawful, "no prior decision to that effect being required," does *not* apply to the air transport sector owing to the exemption of art. 84(2).

37. Article 88 of the EEC treaty reads, in part, as follows:

> "Until the date of the entry into force of the provisions adopted in application of Article 87, the authorities of Member States shall . . . rule upon the admissibility of any understanding and upon any improper advantage taken of a dominant position in the Common Market."

EEC Treaty, *supra* note 1, art. 88.

38. *See* EEC Treaty, *supra* note 1, art. 85, para. 3.

39. Air Fares Case, *supra* note 9, ¶ 55; *see also* Preliminary Ruling, 1974 E. Comm. Ct. J. Rep. 51.

40. Air Fares Case, *supra* note 9, ¶ 56. The Court seemed to be distinguishing admin-

The Commission then advanced the suspect notion that even without the implementing measures of article 87, national judges may find specific practices incompatible with Community competition rules.[41] This argument would suggest that articles 88 and 89 are self-executing, a view which, if accepted, would vastly expand the competence of the Commission into areas the Council has yet to regulate. It is not surprising, therefore, that this principle has been consistently rejected as disruptive of the basic order of the Community. The Court here reasserted that "Articles 88 and 89 do not by nature guarantee full and complete application of Article 85 and do not, merely by virtue of their existence, ensure that Article 85 was fully effective upon the entry into force of the Treaty."[42] Therefore, to void automatically an agreement that falls under the scope of article 85's prohibition, "would be contrary to the general principles of legal security."[43] Since articles 88 and 89 are not directly applicable, and the Commission has not yet issued a reasoned statement of opposition, the Paris Police Court is not competent as a national authority to assert the incompatibility of the air fare agreements with article 85(1).[44] The Paris Police Court can thus proceed with the prosecution.

The European Court of Justice could well have ended the decision with that holding. Instead, it proceeded to a rather different, and theoretical, question. The Court asked, in effect, whether government enforcement of fare agreements would violate Community policy if there were an enabling Commission recording or a finding by a national authority. The Member States appearing before the Court had earnestly hoped that it would not detour in this direction.[45] In response, the Court noted that Member States violate article 85 when they take or maintain in force any measures that would reinforce an anticompetitive practice.[46] Air France and the French Government contended that concerted air fares "are not

istrative policy-making from executive enforcement. It seems that the terms of the French C. Civ. Av., *supra* note 3, art. R 330-15, only delegated to the Police Court, a local criminal tribunal, the authority to punish established violations, and not to determine the policy itself.

41. Air Fares Case, *supra* note 9, ¶ 49.

42. *Id.* ¶ 61; *see also* De Geus v. Bosch, 1962 Recueil 89, 91, [1961-1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8003 (1962). The Commission further argued that *Bosch's* holding, relating as it did to cartels concluded before the Treaty, should not be applied to air transport agreements. The Court rejected this by simply noting that the rule in *Bosch* is valid in all cases. *See* Air Fares Case, *supra* note 9, ¶ 67.

43. Air Fares Case, *supra* note 9, ¶¶ 63-64.

44. *Id.* ¶ 68.

45. *See* Air Fares Case, *supra* note 9, ¶ 48 for remarks by the Netherlands, where the Dutch Government also asserts the impossibility, within the context of a preliminary ruling such as this, of determining the existence of infringements.

46. *See* Air Fares Case, *supra* note 9, ¶ 71; *see also* Preliminary Ruling, 1977 E. Comm. Ct. J. Rep. 2115.

the result of a mandatory fare approval mechanism such as exists in France," but, rather, are the product of independent industry decisions.[47] Here the Court adopted the suggestion of the United Kingdom and the Commission that "while national fare-approval rules are not in themselves a measure requiring [airlines] to release themselves from the obligations of Article 85, such would not be the case if the national authorities required the airlines to submit only fares agreed to among themselves . . . and refused approval to fares submitted independently."[48] This opinion means that these practices will be found anticompetitive when there is a Commission recording (taking effect on a Community-wide basis) or a ruling of a national authority.

While the decision in the *Air Fares Case* only will have oblique legal effect, it should have profound consequences in promoting deregulation of air travel in Europe. For the Paris tribunal the European Court's interpretation of Community law is binding in this case. Like those that questioned the Oracle of Delphi, a judge referring an issue must submit to the ruling of the Court.[49] As already noted, the European Court's decision simply permits the Paris Police Court to consider the prosecution. No revision or interpretation may be given for the ruling, although the Paris Court could conceivably apply for a new decision.[50] Except in the United Kingdom, where preliminary rulings of the European Court are given binding force by statute,[51] the decision in the *Air Fares Case* is neither enforceable[52] nor acts as res judicata.[53] The ruling, moreover, leaves the Court *functus officio,* without further jurisdiction in the matter.[54]

Nevertheless, a preliminary ruling is declaratory of Community law and may be relied on in later proceedings.[55] As a result, "in a case raising a question on which the Court has already ruled, the national court has a

47. Air Fares Case, *supra* note 9, ¶ 73.

48. *Id.* ¶ 74.

49. *See* Milch-, Fett-, und Eierkontor v. Hauptzollamt Saarbrucken, 1969 Recueil 165, 166, [1967-1970 Transfer Binder] Common Mkt. Rep. ¶ 8096 (1967) ("An interpretation given by the Court of Justice binds the national court in question but it is for the latter to decide whether it is sufficiently enlightened by the preliminary ruling given or whether it is necessary to make a further reference to the Court").

50. *See* Sirena S.r.l. v. Eda GmbH, 1971 Recueil 69, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8101 (1971).

51. *See* European Communities Act, ch. 42 (1972).

52. *See, e.g.,* Benedetti v. Munari, 1977 E. Comm. Ct. J. Rep. 163, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8406 (1977).

53. *See* Manzoni v. FNROM, 1977 E. Comm. Ct. J. Rep. 1647, 1662 (Warner, Adv. G.).

54. *See* K. LASOK, THE EUROPEAN COURT OF JUSTICE: PRACTICE AND PROCEDURE 291 (1984).

55. *See* Da Costa en Schaake N.V. v. Netherlands Fiscal Administration, 1963 Recueil 31, 38, [1961-1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8010 (1983); Amministrazione v. Denkavit, 1980 E. Comm. Ct. J. Rep. 1205, 1232, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8665 (1980).

choice: it can either apply the ruling or seek a new ruling. But it is bound by the ruling in the sense that it cannot simply disregard it."[56] The Court's decision declaring air fare agreements anticompetitive will thus be enforced in those Member States whose competent "national authorities" likewise declare the practice violative of Treaty article 85.

Unilateral national action of this sort, even by the United Kingdom, is, however, unlikely. For one Member State to declare capacity and fare agreements uncompetitive would likely result in that country's national air carrier being denied landing rights in other Community states.[57] Such a unilateral declaration, premised on the application of Community law as interpreted in the *Air Fares Case,* could only affect air routes with other EEC members. Bilateral air transport agreements with third states (particularly those with the United States for trans-Atlantic routes) would continue to be governed by standing Air Services Agreements.[58]

The European Court's decision has already emboldened the Commission to threaten the issuance of a reasoned decision declaring, under article 89(2), that air fare agreements are an infringement of article 85.[59] Member States would be barred from enforcing concerted practices in the air industry. This policy might compel the Council to adopt the directives needed under article 87 to bring this area entirely within the orbit of Community regulation.[60] A further possibility is that the Council's hand might be forced were a Member State to go before the Court and claim that the Council had failed to act on this matter.[61]

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56. L. BROWN & F. JACOBS, *supra* note 2, at 283.

57. It would undoubtedly be argued by a Member State seeking deregulation that a termination of landing rights in countries wishing to perpetuate the regime would violate other portions of the EEC Treaty, most notably arts. 9-11 (establishing a customs union), and art. 61 (elimination of restrictions on services).

58. *See, e.g.,* Bermuda II, *supra* note 24. It is unlikely that the Commission would suggest that fare agreements for "continuing services" from overseas (for example, the New York-London-Paris route) would impact intra-Community transport and so also should be deregulated. The Commission may just be concerned to enforce exclusively intra-Community air deregulation. Moreover, trans-Atlantic traffic has been substantially deregulated by the operation of U.S. antitrust law. *See, e.g.,* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 916-20 (D.C. Cir. 1984) (for background on Laker's antitrust action).

59. *See* Commission Release, June 20, 1986, COM (86) 338 final, *reprinted in* 4 Common Mkt. Rep. (CCH) ¶¶ 10,798 and 10,804 (1986).

60. In Commission White Paper, *supra* note 18, ¶ 111, the Commission declared that "If the Council fails to make progress towards the adoption of proposed Regulations concerning the application of the competition rules to air transport, the Commission intends to take decisions regarding existing infringements . . . according to Article 89 of the Treaty." If the Council does not act, the Commission will bring suit against offending airlines under art. 89(2). *See* Commission Release, *supra* note 59.

61. Suits against a Community institution for inaction are permitted under art. 175. This was the sort of suit brought by Lord Bethell against the Commission, *see supra* note 19. Were it brought by a Member State (probably the United Kingdom) it would not be dismissed for lack of standing. Nevertheless, it must be shown that the Council has been called upon

The result, at any rate, of the Court's decision will be to accelerate the tempo of air deregulation in Europe. The final results of this process, whether initiated by Member States, the Commission, or the Council, will not likely mirror the United States' experience in this area.[62] European reform in this vital sector will be slow and incremental.[63] Nonetheless, the European air passenger will welcome any measure of change.

to act in this matter, and that it has the authority to act. The grant of discretion under art. 84(2) might, however, preclude the contention that the Council is under any *obligation* to act. Also, as the plenipotentiary organ of the Community, *see* art. 145, it is arguable whether the Council is obliged to do anything. *See also* European Parliament v. Council, 1986 E. Comm. Ct. J. Rep. _____, [1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,191 (1986) (holding that the Council acted contrary to the Treaty of Rome by failing to ensure freedom in providing services in the sphere of international transport and in not establishing conditions under which nonresident carriers may operate in the Community; in all other respects of a common transport policy, the Council acts at its own descretion).

62. *See* Remarks of Commissioner Davis, Sept. 11, 1985, *reprinted in* 4 Common Mkt. Rep. (CCH) ¶ 10726 (1985), where he stated:

> We refuse to bring about this [an American] 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.

63. The most probable features of European air deregulation will be: (1) application to the Community alone; (2) prohibition of predatory fares; (3) allowing government intervention in capacity agreements when a national airline's market share drops below 25 percent and in cases of a precipitous reduction below 45 percent; (4) revenue-sharing and fare consultation between airlines for another seven years; (5) extensive group exemptions under article 85(3); and (6) Community-sponsored, binding, and unilateral arbitration procedures. This system will have a trial period of four years, with Commission review after three. *See* Commission Release, January 1986, *reprinted in* 4 Common Mkt. Rep. (CCH) ¶ 10763 (1986); Commission Release, *supra* note 59, ¶¶ 4, 11, 13, 14, 29, 31, and annex II.