

1967

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### Recommended Citation

Wolfgang Stabenow, *International Factors in Air Transport under the Treaty Establishing the European Economic Community*, 33 J. Air L. & Com. 117 (1967)  
<https://scholar.smu.edu/jalc/vol33/iss1/8>

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# THE INTERNATIONAL FACTORS IN AIR TRANSPORT UNDER THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY

BY DR. WOLFGANG STABENOW

## I. AIR TRANSPORT UNDER THE EEC TREATY

THE TREATIES SETTING UP the European Economic Community (EEC), the European Coal and Steel Community (ECSC), and the European Atomic Energy Community (EAEC) have as their aim the merging into one common market of the national economies of Western Germany, Belgium, France, Italy, Luxembourg, and the Netherlands. In addition, special agreements have been concluded to associate Greece and Turkey with the EEC in order to prepare these countries for membership in the EEC. Because of the advanced degree of integration envisaged, it was impossible to begin by excluding certain sectors from the merging of markets, and special arrangements had to be made for their incorporation.

What, then, is the position of air transport under these treaties? The reply can be found in the Treaty establishing the European Economic Community. Transport is one of the few economic branches which is explicitly mentioned in the Treaty and for which special provisions are laid down in the title on Transport (Articles 74 to 84). However, according to Article 84(1),<sup>1</sup> the provisions of that title apply only to transport by rail, road, and inland waterway. Article 84(2) stipulates that the Council, acting by means of a unanimous vote, may decide whether and to what extent and by what procedure appropriate provisions might be adopted for sea<sup>2</sup> and air<sup>3</sup> transport. The contracting parties made this special provision to ensure that the Community, should the need arise, can give full consideration to the exceptional extent to which the operations of this mode of transportation interlock at world level.

Before examining the position of air transport under the EEC Treaty it would be advisable to get a clear view of the position of rail, road, and

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<sup>1</sup> Treaty Establishing the European Economic Community (with annexes and Protocols), 25 March 1957, art. 84, No. 4300, 298 U.N.T.S. 11 (English), 294 U.N.T.S. 17 (French) [hereinafter EEC Treaty].

1. The provisions of the Title [Title IV Transport] shall apply to transport by rail, road, and inland waterway.

2. The Council, acting by means of a unanimous vote, may decide whether, to what extent and by what procedure appropriate provisions might be adopted for sea and air transport.

<sup>3</sup> Under the EEC Treaty, maritime transport is in the same position as air transport. However, since it is not the subject of the present article, it will not be discussed here.

<sup>4</sup> Article 84(2) is one of the few provisions of the EEC Treaty which does not give the Commission the right to initiate action. But this need not prevent the Commission, under the general rights conferred on it by Article 155, from submitting a recommendation or opinion to the Council (Article 189) concerning the application of Article 84.

inland waterway transport because later arguments and conclusions depend largely on the way in which we view this prior question. There are two divergent legal opinions:

(1) One view is that Articles 74 to 84 contain all the regulations applicable to transport under the Treaty. In support of this view, it has been argued that the common market does not include the transport sector.<sup>4</sup>

(2) The other view maintains that the EEC Treaty is generally applicable to transport in the same way as to the other economic sectors. All that the special provisions on transport accomplish is to set aside, modify, or supplement the general rules. This, its supporters argue, is primarily a consequence which stems from the universality of the EEC Treaty, *i.e.*, from the principle of its applicability to all branches of the economy. Derogation from this can be made<sup>5</sup> through specific provisions<sup>6</sup> and in exceptional cases only.<sup>7</sup>

The question of the extent to which air transport is covered by the EEC Treaty can also be answered in the light of the following legal controversy:

(1) According to one view, the provisions of the EEC Treaty are not applicable to air transport. They could be made applicable, but only through action by the Council under Article 84(2). This opinion is a logical consequence of the contention that Articles 74 to 84 contain all the regulations applicable to the transport sector under the Treaty.<sup>8</sup>

(2) Others contend that the EEC Treaty is generally applicable *de lege lata* to air transport. Exceptions valid for this mode of transport are expressly laid down in the Treaty, or they can lawfully be made in pursuance of and within the limits of the powers conferred by the Treaty. According to Article 84, the provisions on transport set out in Articles 74 to 83 do not apply to air transport. And according to Article 61(1), the provisions of Articles 59 to 66 on the free movement of services do not apply either. Article 84(2) empowers the Council to make special arrangements for air transport. This may mean that it can extend to aviation wholly or in part the scope of the provisions for transport in Articles 74 to 83. But the Council is also authorized to make special arrangements better adapted to the special features of this mode of transport than the arrangements of the Transport title. This legal opinion is also based on the idea of the Treaty's universality. Article 84 contains no exception that is generally applicable.<sup>9</sup>

(3) A third opinion recognizes that implementation of the common

<sup>4</sup> See WOLFARTH, EVERLING, GLAESNER & SPRUNG, *DIE EUROPÄISCHE WIRTSCHAFTSGEMEINSCHAFT art. 74 n.4* (1960); ERDMENGER, *DIE ANWENDUNG DES EWV-VERTRAGES AUF SEESCHIFFFAHRT UND LUFTFAHRT 1* (1962). The disputes have chiefly centered around the applicability to transport of the Treaty's rules of competition.

<sup>5</sup> See the reservations in favor of the ECSC and EAEC Treaties in Article 232 of the EEC Treaty. Specific exceptions concerning transport are contained in Articles 61(1) and 77.

<sup>6</sup> See, *e.g.*, Pinay, *ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL* 781 (1962).

<sup>7</sup> The author agrees with the latter opinion.

<sup>8</sup> Cartou, *REVUE FRANCAISE DE DROIT AERIEN* 128 (1958); Meyer, *ZEITSCHRIFT FÜR LUFTRECHT UND WELTRAUMRECHTSFRAGEN* 169 (1962); Schwenk, *Europäische Wirtschaft* 256 (1962).

<sup>9</sup> Rinck, *FESTSCHRIFT FÜR RIESE* 508 (1965); Sand, *ZEITSCHRIFT FÜR LUFTRECHT UND WELTRAUMRECHTSFRAGEN* 11 (1960); Schaus, *Die Bundesbahn* 7 (1965).

policy for transport by rail, road, and inland waterway has already been given its basis in that the special provisions for transport are superimposed on the general rules of the Treaty. Article 84(2), on the other hand, is intended to unify national policies for air transport by bringing these two within the scope of the Treaty. So long as the Council does not apply Article 84(2), other provisions of the Treaty concerning air transport will be applicable only in subsidiary fashion, that is, only to the extent that they do not affect the powers which each country still exercises in the field of air policy. This view proceeds from the idea that Article 84(2) is a complete legal rule which does not depend on other rules.<sup>10</sup>

Of these three positions, the author prefers the second of these opinions, and the legal arguments given below are based upon it.

The EEC Commission has stated several times that it considers the EEC treaty to be already applicable, without further legislation, to air transport.<sup>11</sup> This view is shared by the European Parliament.<sup>12</sup> However, in the Council of Ministers, opinions differ. Statements made at various times by the representatives of the Netherlands and Italy show that the governments of those countries agreed with the Commission and the European Parliament. The governments of Germany, Belgium, France, and Luxembourg, on the other hand, believe that the provisions of the EEC Treaty do not apply to air transport. In their view the scope of the Treaty would have to be extended to cover this mode of transport, and that could only be done by the Council acting under Article 84(2).<sup>13</sup> This debatable point has not yet come before the Court of Justice of the European Communities.

## II. VIEWS OF THE COMMUNITY INSTITUTIONS ON AIR TRANSPORT POLICY

To date, the Council has not laid down a Community policy for air transport. It has mentioned air transport specifically only in the General Program for the removal of restrictions on freedom of establishment<sup>14</sup> and in Regulation No. 141, making Regulation No. 17 inapplicable to transport.<sup>15</sup> But these decisions were purely intended to delay the formulation of a decision. We shall revert to the matter later. However, both the Commission and the European Parliament have several times called for an active Community policy dealing with air transport.

In its memorandum of 12 November 1960, the Commission not only gave its opinion on the applicability of the general rules of the EEC Treaty to air transport, but also indicated the economic consequences of this view. It emphasized the advantages which the airlines of the Member

<sup>10</sup> ERDMENGER, *op. cit. supra* note 4, at 112.

<sup>11</sup> Memorandum on the General Lines of a Common Transport Policy 38-39 (10 April 1961); Council Memorandum on the Applicability to Transport of the Rules of Competition Set Out in the EEC Treaty and on the Interpretation and Application of the Treaty in Relation to Sea and Air Transport (12 Nov. 1960).

<sup>12</sup> OFFICIAL GAZETTE OF THE EUROPEAN COMMUNITIES 70 (1962) [hereinafter cited as GAZETTE].

<sup>13</sup> ERDMENGER, *op. cit. supra* note 4, at 1.

<sup>14</sup> 18 Dec. 1961. GAZETTE 36 (1962).

<sup>15</sup> 26 Nov. 1962. GAZETTE 204, 2751 (1962).

States could derive from implementation of the provisions for free movement of workers, freedom of establishment, approximation of legislative and administrative provisions, the common commercial policy, and the harmonization of social measures. It made reservations only with regard to the rules of competition—the pattern of the air transport markets shows that it would be undesirable to dissociate the Community's air transport enterprises from the system of the International Air Transport Association (IATA). Such a step might weaken the competitiveness of these enterprises and seriously disturb economic relations with non-member countries. We should therefore see whether the Council, until such time as general provisions have been worked out by which the Treaty can be adapted to the requirements of aviation, is able to suspend application of the Treaty's rules of competition to this mode of transport.

Since 1957 the major airlines of the Member States have been negotiating the merger of their enterprises into a single company called "Air-Union," but so far the negotiations have been unsuccessful.<sup>16</sup> These negotiations led the Commission to put a statement on air transport policy before the Council on 20 October 1964.<sup>17</sup> This statement was influenced particularly by the fact that the governments of the six Member States had agreed on a draft international convention on Air-Union between themselves, and not within the institutional framework of the Community. The Commission showed that further delay in making suitable Community arrangements for air transport could be detrimental to the harmonious development of economic union provided for by the EEC Treaty. The Commission recognized that, at the world and at the European level, substantial efforts have been made to achieve cooperation in the sphere of air transport. But so far, except as regards purely technical measures, no satisfactory results have been obtained on the European plane. These efforts must be continued within the institutional framework offered by the EEC Treaty. The results will lead to an improvement in the competitiveness of EEC enterprises on the world market. A common attitude on air transport is also proving necessary in connection with implementation of the Community's common commercial policy. Consequently, the Commission has stated that, in its opinion, the negotiations by the governments of the Member States for a common air transport policy must be carried on within the Institutions of the Community in conformity with the EEC Treaty.<sup>18</sup>

The European Parliament has always given particular attention to the problems of air transport. In 1961 and 1965 detailed reports were submitted by its Transport Committee. In its resolutions of 20 December 1961<sup>19</sup> and 14 May 1965,<sup>20</sup> the Parliament called for Community action

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<sup>16</sup> Report by the Transport Committee of the European Parliament (Drouot-l'Herminie Report), 24 DOCUMENTS DE SEANCE 5-6 (1965-1966).

<sup>17</sup> To date, neither the draft convention nor the draft articles of association of Air-Union have been published.

<sup>18</sup> Schaus, *supra* note 9, at 7.

<sup>19</sup> GAZETTE 70 (1962).

<sup>20</sup> GAZETTE 1702 (1965).

on air transport. It energetically supported the Commission's point of view and reiterated certain of the Commission's arguments. In its resolution of 20 December 1961, it emphasized that a common air transport policy must be based on the following principles: expansion of traffic through low tariffs, gradual abolition of subsidies to the airlines, price formation on the basis of costs, ordered competition between the airlines, minimum freedom of action for the airlines, absolute neutrality in dealings with the various companies; absolute neutrality between the various modes of transport, preference for a world-wide solution over a Community solution to the question. This last principle implies, in particular, that the efforts toward cooperation at the European level must in no way be detrimental to the present forms of cooperation at world level, e.g., within IATA.

### III. AIR TRANSPORT UNDER THE GENERAL RULES OF THE EEC TREATY

#### A. *Free Movement Of Workers*

Articles 48 and 49 of the EEC Treaty lay down the principles of freedom of movement for wage-earners within the Community. This freedom implies the abolition of all discrimination based on nationality between workers of the Member States as regards employment, remuneration, and other working conditions. It also includes the right to accept offers of employment actually made. Implementation is assured by Council Regulation No. 38/64/CEE of 25 March 1964 on freedom of movement for workers within the Community. According to Article 1 of this regulation, any national of a Member State is entitled to take up, within the territory of another Member State and on the conditions laid down in the regulation, any paid post which has been notified to the competent labor exchange as vacant.

In the Community, only French law does not comply with the requirements of Articles 48 and 49 of the Treaty and Regulation No. 38/64/CEE. Under Article 150 of the French Civil Aviation Act,<sup>21</sup> anyone wishing to become a member of the flight crew of a public transport aircraft must be entered in a register; but Article 151 of the act requires that applicants shall be either of French nationality or subjects of the French overseas territories. Article 152 lists exceptions to this nationality clause, but in such a way that incompatibility still exists between French law and the non-discrimination principle of the Community provisions. The French Government has prepared a bill designed to revise the rules in question, but the precise contents of this bill are not yet public.

#### B. *Freedom Of Establishment*

Articles 52 and 58 of the EEC Treaty provide for progressive abolition of restrictions on freedom of establishment for nationals of the Member States. Freedom of establishment guarantees to natural and legal persons

<sup>21</sup> Codified by Decree No. 55-1590 (30 Nov. 1955) on the basis of Law No. 53-515 (28 May 1953) published in *Journal Officiel*, 29 May 1953.

working on their own account the right to follow their calling in another country of the Community under the same conditions as the nationals of that country. The legislative and administrative provisions on access to and exercise of self-employed activities must be coordinated. This coordination must be such as to facilitate freedom of establishment and prevent competition from being distorted by differences in the conditions of admission to employment in the countries of the Common Market. Freedom of establishment gives nationals of the Member States the right to go to another Community country, make it their domicile, and start a business there. It also assures them the right to establish agencies and branches there.<sup>23</sup>

On 18 December 1961 the Council, on a proposal by the Commission, adopted the General Program for the removal of restrictions on freedom of establishment.<sup>23</sup> The Program contains a time-table for the elimination of all restrictions on the establishment of nationals of one Member State who wish to work on their own account in other Community countries. It makes provision for the elimination of restrictions on transport enterprises not later than the end of 1967, but it is not yet applicable to the airlines. Although airlines appear in the time-table along with the other enterprises, the Council has not yet reached unanimity on them, and without this the Program cannot be finally adopted. This incomplete solution has been adopted because some governments do not share the view that the provisions of the EEC Treaty on freedom of establishment are applicable to air transport enterprises without the need for a special decision of the Council in implementation of Article 84(2) of the Treaty. Consequently, freedom of establishment in air transport is still not being implemented.

#### *C. Financial Participation By Nationals Of Other Member States In The Capital Of Companies*

Article 221 of the EEC Treaty stipulates that within three years after the date of the entry into force of the Treaty Member States shall treat nationals of other Member States in the same manner as they treat their own nationals with regard to financial participation in the capital of companies. In the field of air transport, only Belgium law still fails to meet this directly binding obligation. Article 9 of the Law of 26 April 1923, authorizing the Belgian Government to participate in establishment of the Société Belge d'Exploitation de la Navigation Aérienne (SABENA), specifies that holders of registered shares in this company must be Belgian or Congolese legal persons or individuals of Belgian nationality.<sup>24</sup>

#### *D. Rules Of Competition For Enterprises*

Article 85 of the EEC Treaty declares as incompatible and prohibited any agreement between enterprises, any decisions by associations of enterprises, and any concerted practices which are likely to affect trade be-

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<sup>23</sup> Stabenow, *Raccolta delle lezioni*, Trieste 193 (1962).

<sup>23</sup> GAZETTE 36 (1962).

<sup>24</sup> 137 *Moniteur Belge*, 17 May 1923.

tween the Member States and which have as their object or result the restriction or distortion of competition within the Common Market. Article 86 declares as incompatible and prohibited, to the extent to which trade between any Member States may be affected thereby, any 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.

Council Regulation No. 17 of 6 February 1962<sup>25</sup> implements the principles laid down in Articles 85 and 86 of the Treaty. In particular, it defines the competence of the Commission and that of the authorities in the Member States. It also grants the Commission clearly defined powers of ascertaining, prohibiting, and terminating infringements of the bans on practices which restrict competition. More particularly, it guarantees a number of rights to enterprises and associations of enterprises.<sup>26</sup>

At its session of 14 June 1962, the Council unanimously requested the Commission to submit a proposal concerning the applicability of Regulation No. 17 to transport undertakings. On 16 July 1962 the Commission gave its opinion to the Council. It contained a proposed regulation for suspending until 31 December 1964 the application to sea and air transport of Articles 74 to 94 of the Treaty. The application of Article 85, however, was being suspended only with regard to agreements, decisions, and concerted practice by sea and air transport enterprises, the object or result of which was to fix prices and conditions of transport, limit or regulate the supply of transport, or share transport markets. The Commission was to examine the actual position of affairs in sea and air transport and then to propose to the Council, before 1 January 1964, appropriate measures regarding competition in these fields.

On 26 November 1962 the Council adopted Regulation No. 141, which provided that Council Regulation No. 17<sup>27</sup> should not apply to the transport sector but which did not specify a time-limit for its non-applicability to air transport.<sup>28</sup> Under Article 1 of Regulation No. 141, Regulation No. 17 is not applicable to agreements, decisions, and concerted practices in the transport sector whose purpose or effect is to fix prices and conditions of transport, to limit or regulate the supply of transport, or to share transport markets. Furthermore, Regulation No. 17 is not applicable to dominant positions in the transport market within the meaning of Article 86 of the Treaty.

However, this same Article 1 does not exclude all restrictions of competition by transport enterprises, within the meaning of Article 85 of the EEC Treaty, from the scope of Regulation No. 17, but refers only to those agreements, decisions, and concerted practices which affect rail, road, and inland waterway transport. Consequently, it excludes from the application of Regulation No. 17 such matters as freight agreements,

<sup>25</sup> GAZETTE 204, 2751 (1962).

<sup>26</sup> For the contents of the regulation see SCHLIEDER, *BETRIEBS-BERATERS* 305 (1962).

<sup>27</sup> GAZETTE 204, 2751 (1962).

<sup>28</sup> For transport by rail, road, and inland waterway, such a time limit is laid down by Article 4 of Regulation No. 141 and by Council Regulation No. 165/65/CEE of 9 Dec. 1965, published in GAZETTE 3141 (1965).

agreements on limitations of capacity, and agreements to share consignor or consignee areas, but it does not exclude restrictions on competition inactivities serving transport or in the field of supplies to transport enterprises. This applies, for example, to the establishment of prices of goods supplied to their passengers by the sea and air transport firms. Agreements between transport enterprises concerning the purchase of equipment are an outstanding example of an area where Regulation No. 17 does apply.

The legal rules applicable to the restriction of competition covered by Article 1 of Regulation No. 141 are in line with the rules applicable to all other economic sectors before 13 March 1962. It follows that Article 85 of the Treaty will have to be applied, in principle, to agreements, decisions, and concerted practices in the transport sector, and Article 86 to the abuse of dominant positions in the transport market. In these areas neither the authorities nor the enterprises and associations of enterprises can claim any advantages, powers, or duties under Regulation No. 17. Under Article 88 of the Treaty, the authorities of the Member States continue to make all decisions, in accordance with their respective municipal law and with the provisions of Articles 85 and 86, on the admissibility of agreements, decisions, and concerted practices in the transport sector which have as object or result the fixing of prices and conditions of transport, the limitation or regulation of supply of transport, the sharing of market, or the abuse of a dominant position thereon. At the same time it is the Commission's duty, under Article 89 of the Treaty, to ensure application in the transport sector of the principles laid down by Articles 85 and 86.<sup>29</sup>

The judgment by the Court of Justice in Case 13/61 on 6 April 1962<sup>30</sup> is particularly important for assessment of the legal situation after the issuance of Regulation No. 141. According to Article 4 of Regulation No. 141, Regulation No. 17 does not apply to the restrictions of competition in transport covered by Article 1 of Regulation No. 141.

The court in the above-mentioned case ruled that, pending the issue of a regulation in application of Article 87 of the Treaty, agreements and decisions are only null and void under Article 85 (2) of the Treaty if the authorities of the Member States decided in pursuance of Article 88 that they come under Article 85 (1) and that this provision cannot be declared inapplicable under Article 85 (3). The same holds good for agreements and decisions which the Commission, acting under Article 89 (2), declares to be contrary to Article 85 of the Treaty.

This situation makes it possible to prepare a common air transport policy and to formulate, if necessary, a Community system of rules of competition. It also enables the Member States to intervene at any moment

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<sup>29</sup> GLEISS & HIRSCH, *AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS* 34 (1963); STABENOW, *SOCIAAL-ECONOMISCHE WETGEVING* 388 (1963). The author's views are criticized by Rinck who believes that Regulation No. 141 renders Regulation No. 17 and Articles 85 and 86 of the Treaty inapplicable to transport.

<sup>30</sup> 8 RECUEIL DE LA JURISPRUDENCE DE LA COUR 97 (1962).

in the air transport market via Community law should practices arise in that market which are likely to hinder the free play of competition.

#### *E. Aids Granted By Member States*

Article 92 of the Treaty stipulates that any aid obtained from a Member State or through State resources in any form whatsoever and which distorts or threatens to distort competition by favoring certain enterprises shall, to the extent to which it adversely affects trade between Member States, be deemed incompatible with the common market. A number of exceptions may be made to this prohibition including that of Article 92(3)(b), which may have particular importance for the sector concerned in the present report, *e.g.*, aids intended to promote the execution of important projects of common European interest may be considered compatible with the common market. A Community procedure has not yet been introduced to deal with aids to air transport, partly because the Council has not reacted to the Commission's proposal that the provisions of the Treaty on aid as regards this mode of transport be suspended and the state of affairs in the sector be examined.<sup>31</sup>

#### *F. Fiscal Harmonization*

According to Article 99 the Council, on a proposal by the Commission, can harmonize indirect taxes. This provision also opens the door to harmonization of the specific charges affecting air transport services.

#### *G. Approximation Of Laws*

Under Article 100, and on a proposal by the Commission, the Council can issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the common market. These measures could be extended, for instance, to private law and to the technical arrangements governing air transport.

#### *H. The Common Commercial Policy*

The provisions on the common commercial policy in Articles 110 to 116 apply to transport insofar as they are in fact applicable to the supply of services. The implications are that:

(1) Under Article 111(4), the Member States are bound to coordinate their relations with non-member countries so that, at the end of the transitional period for achievement of the common market, the necessary conditions shall exist for implementation of a common external economic policy for air transport. In this context, the following provisions are applicable to air transport:

- (a) Council decisions of 19 and 20 July 1960<sup>32</sup> concerning an "EEC clause" in the bilateral agreements of the Member States;

<sup>31</sup> See also in this context Article 9(2) of Council Decision No. 65/271/CEE (13 May 1965) on the harmonization of certain provisions affecting competition in rail, road, and inland waterway transport, published in GAZETTE 1500 (1965).

<sup>32</sup> Recueil d'Actes des Communautés Européennes (Councils' Secretariat), Relations extérieures, RELEX/CEE Gén. d 0.

- (b) Council decision of 9 October 1961<sup>33</sup> concerning a consultation procedure applicable to the negotiation by Member States of agreements with non-member countries concerning their trade relations and to any changes in the arrangements for liberalization of trade with non-member countries;
- (c) Council decisions of 9 October and 29 December 1965<sup>34</sup> concerning standardization of the periods for which trade agreements are concluded with non-member countries.

(2) Under Article 113, Member States' external economic policy in the air transport field as in others will, on the expiry of the transitional period, have to be based on principles that are uniform. Generally speaking, the task of concluding the necessary agreements with non-member countries will then fall to the Community which will be able to act in defense of trade in this field as elsewhere.

As regards contacts between the Community and the international organizations, mention should be made of Article 116 of the Treaty. This article states that when any matter of special concern to the common market is being dealt with in an international organization of economic character the Member States shall, from the end of the transitional period, adopt a joint line of action. Pending the end of the transitional period, they already have to consult each other in order to coordinate their lines of action and to adopt, as far as is possible, a uniform attitude.<sup>35</sup>

#### IV. THE COUNCIL'S POWER, UNDER ARTICLE 84(2), TO ENACT PROVISIONS FOR AIR TRANSPORT

##### A. *The Substance Of The Special Provisions For Air Transport*

In the context of this espoused legal opinion, the power to make appropriate provisions for air transport is to be used with restraint. If the idea is accepted that the general rules of the Treaty are as fully applicable to this branch of the economy as to others, then it follows that the beginnings of a Community legal system for air transport already exist, and that this system will be progressively developed by the issue of regulations, directives, and decisions with a bearing on the economy as a whole. In consequence, appropriate provisions within the meaning of Article 84(2) must be regarded as special rules which set aside, derogate from, or supplement the general rules just as Articles 75 to 83 do in respect to transport by rail, road, and inland waterway. In this connection, it should be noted that the general rules themselves provide for the possibility of certain exceptions.<sup>36</sup>

Any special arrangements for air transport must be in conformity with the general principles of the Treaty. We are aware that the rules established under the Treaty do not bear the same relation to the Treaty as

<sup>33</sup> GAZETTE 1273 (1961).

<sup>34</sup> GAZETTE 1274 (1961); GAZETTE 3275 (1965).

<sup>35</sup> For all the problems raised by the EEC Treaty with regard to external transport relations see Stabenow, *Raccolta delle lezioni*, Trieste (1965).

<sup>36</sup> See in particular Articles 55, para. 2, and 87(2)(c) of the EEC Treaty.

an implementing regulation bears to a domestic law; but the system of the EEC Treaty, and its constituent elements, require the application of uniform and concerted principles in all fields of economic policy. This means above all that for air transport, too, economic frontiers between the Member States must be abolished and the Community's Institutions must pursue an economic policy based on the idea of fair competition.<sup>37</sup> These requirements should not be interpreted too literally. The Institutions have certain powers of discretion regarding procedure and timing; but they can and must also take account of the special economic and technical characteristics of air transport, and of the norms of international law under which it operates. It would seem that the content of the special provisions for transport by rail, road, and inland waterways gives certain indications of the scope and nature of the special provisions for air transport.

However, the considerations set out above do not imply that the Council is bound to extend to air transport all the provisions of Articles 75 to 83. Some provisions have no connection with the actual situation in air transport in the Community. This is notably the case with the prohibition of discriminations in rates under Article 79 and the prohibition of support rates under Article 80. It also seems to be the case with Article 77, which relates to aids meeting the needs of transport coordination or constituting reimbursements for certain obligations inherent in the concept of public service.

Nevertheless, the Council could extend the provisions of Articles 74 to 76 to cover air transport; in fact, certain of the articles would have to be extended in this manner if the gaps left by Article 84(2) are to be filled. Article 74 concerns the obligation to pursue a common transport policy. Article 75 supplies a procedural framework for that policy. Article 76 contains a standstill clause to ensure that the initial situation is not aggravated, and this standstill clause applies especially to freedom to supply services.<sup>38</sup> Consideration could also be given to extending Article 78 to air transport. This article states that "Any measure in the sphere of transport rates and conditions, adopted within the framework of this Treaty, shall take due account of the economic situation of carriers." This provision can have particular importance for the rules of competition, especially those of Article 85. Finally, the tasks of the Consultative Committee established under Article 83 could conceivably be extended to cover aviation.

One particular duty of the Community's Institutions in connection with air transport is the implementation of the freedom to supply services. Here, as in rail, road, and inland waterway transport, this freedom is, under Article 61(1), subject to a Council decision taken in conformity with Article 84(2).<sup>39</sup> Supply of services within the meaning of the EEC Treaty signifies temporary exercise of an economic activity by a national

<sup>37</sup> Stabenow, *Raccolta delle lezioni*, Trieste 83 (1963).

<sup>38</sup> Stabenow, *supra* note 22, at 205.

<sup>39</sup> *Id.* at 199.

of one Member State in the territory of another. For air transport, therefore, this means flight over the territory of other Member States and particularly the right to land in those States, and it applies both to international transport and to cabotage. In this connection it can be helpful to recapitulate the principles laid down in Articles 59 to 66—discriminations and other restrictions on grounds of nationality must be abolished, and conditions of access to and exercise of air transport must be harmonized. The object of this harmonization is to prevent new distortions of competition and to facilitate elimination of restrictions on grounds of nationality.<sup>40</sup>

Liberalization of services in air transport will take a long time owing to an initial situation which is very complex both *de jure* and *de facto*. Allowance is made for this in Article 84(2), which does not impose any time-limit on the Community's Institutions. Closer cooperation between the airlines would undoubtedly make the task easier; but such cooperation should not lead to a risk of dominant positions being abused. Moreover, in the special case of free movement of services, the conditions of access should be harmonized before restrictions on grounds of nationality are completely removed.<sup>41</sup>

Another important question which may arise for the Community's Institutions is that of supervision of air transport enterprises by the public authorities. It might be raised in connection with harmonization of laws and regulations to protect competition within the Community even if the national companies preserved their independence; but it cannot fail to be raised if there is a merger of airlines which cuts across the frontiers of the Member States.

The problem of supervision appears to have played a particularly important part in the governmental negotiations to establish an international convention on Air-Union.<sup>42</sup> Although it is primarily a political problem, it is nevertheless important to mention, from the legal point of view, the overall concept of the EEC Treaty, which is geared to competition and prevents too much control by the public authorities. Should there be a merger of airlines, the question would arise whether the indispensable supervision should be transferred to one or more Community Institutions or to a special authority attached to them.<sup>43</sup> From the standpoint of a common policy, the reply should be in favor of such a Community solution since supervision is in itself, irrespective of its degree of intensity, an essential instrument of economic policy in this field.

#### B. Procedure For Adopting Special Provisions On Air Transport

From what has been said above it follows that the Council will have to take two kinds of special measures for air transport:

- (1) Rules similar to those in the special provisions for rail, road, and in-

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<sup>40</sup> *Ibid.*

<sup>41</sup> For this problem of establishment in rail, road, and inland waterway transport, see Title IV(1) of the General Program.

<sup>42</sup> Drouot-l'Hermine Report, *supra* note 16, at 6.

<sup>43</sup> Creation of an independent authority would require a revision of the Treaty, and would involve additional political and institutional problems.

land waterway transport will have to be established, in particular an outline provision corresponding to Article 75;

(2) The special steps needed to implement this outline provision.

Adoption of the outline provision will raise the questions of institutional procedure under Article 84(2). The Council will need to follow the general scheme of the Treaty, *i.e.*, provide for the Commission to have a right to initiate action, and for consultation of the European Parliament and the Economic and Social Committee. To establish its own voting procedure, the Council will need to base its decisions on the procedural rules found elsewhere in the Treaty.<sup>44</sup> Finally, the Council, in issuing special rules for air transport, will need to take into account the political importance of the European Parliament even if consultation of this Institution is only optional under Article 84(2).

### *C. Inter-State Treaty Or Community Rules For Integration Of Air Transport Systems Of The Member Countries*

In another context, the existence of political differences as to whether or not the Member States can integrate air transport systems on the basis of a special treaty has been indicated.<sup>45</sup> Such a treaty would encounter the following legal objections:

(1) In the context that the general rules of the EEC Treaty are applicable to aviation, it should be pointed out that the Member States have already given up a large part of their powers to make economic policy in this sector. Consequently, they can no longer intervene in spheres subject to Community law by making a treaty on a particular matter.

(2) It is true that Article 84(2) gives the Council the right to decide whether "appropriate provisions might be adopted for . . . air transport." But these would only be special provisions adopted in the light of the general rules.<sup>46</sup> It is difficult to see how, within the framework of a union of States as close and as institutionalized as the EEC, such provisions could be embodied in a treaty between those States. Furthermore, the Council's discretionary powers in the implementation of the free movement of services will be increasingly reduced by the reality of the economic situation to the point where the only matter left for decision is that of the appropriate deadlines.<sup>47</sup>

(3) The Member States, under the second paragraph of Article 5, are obliged to abstain from any measures likely to jeopardize attainment of the objectives of the Treaty. One of the chief objectives is the creation of an economic union of Member States which shall be coherent from both the economic and the legal and institutional points of view. Once the Treaty setting up a single Council and a single Commission for the European Communities comes into effect, political concepts favoring an

<sup>44</sup> ERDMENGER, *op. cit. supra* note 4, at 131.

<sup>45</sup> See Part II of text, *supra*.

<sup>46</sup> See Part IV, A of text, *supra*.

<sup>47</sup> ERDMENGER, *op. cit. supra* note 4, at 130.

institutionally close-knit Community will also have more influence on legislation concerning air transport.<sup>48</sup>

## V. AIR TRANSPORT<sup>a</sup> AND ASSOCIATION BETWEEN THE COMMUNITY AND NON-MEMBER COUNTRIES

### A. *General Remarks*

Article 238 of the EEC Treaty specifies that the Community may conclude with a non-member country, a union of States, or an international organization agreements creating an association embodying reciprocal rights and obligations, joint actions, and special procedures. The wording of this provision shows that association may take many varied forms, and the point is clearly borne out by political practice. The agreements creating associations between the Community and Greece<sup>49</sup> and the Community and Turkey<sup>50</sup> have a wide field of application. Moreover, their object is to enable these States to join the Community as full members later. On the other hand, the Yaoundé Convention, associating seventeen African States and Madagascar,<sup>51</sup> provides for the establishment of a free-trade area between the Community and each of these States.

In the cases mentioned, association is intended to regulate most if not all of the economic relations between the Contracting Parties. However, Article 238 does not exclude the possibility of association in a specific field. Such a solution could be applied if there were institutional problems or if there were other requirements going beyond the limits of a commercial agreement. It would therefore be possible, in the present case, to conceive of an air union which would also include airlines of countries other than the Member States.

### B. *Association Of The Community And Greece*

Article 50 of the Athens Agreement, creating an association between the EEC and Greece, contains special provisions for transport. For transport by rail, road, and inland waterway, the special rules of the EEC Treaty regulating these areas must be extended to Greece. But for air transport, Article 50 provides only one simple option—if the Community Council should make provisions for this mode of transport under Article 84(2), the Association Council will decide whether, or to what extent and by what procedure, provisions can be made for the Greek air transport system. Otherwise, the general rules of the Athens Agreement are equally applicable to air transport. This is particularly the case with the provisions of Article 47 on freedom of establishment and Articles 51 and 52 on the rules of competition. This interpretation is based on arguments similar to those developed for the EEC Treaty itself.<sup>52</sup>

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<sup>48</sup> Schaus, *supra* note 9, at 7.

<sup>49</sup> GAZETTE 294 (1963).

<sup>50</sup> GAZETTE 3687 (1964).

<sup>51</sup> GAZETTE 1431 (1964).

<sup>52</sup> See Part I of text, *supra*.

### *C. Association Of The Community And Turkey*

Article 15 of the Ankara Agreement, creating an association between the Community and Turkey, stipulates that the conditions and methods of extending the provisions of the EEC Treaty to Turkey in the matter of transport will be established by the Association Council, taking due regard of the country's geographical position. This obligation is binding on the Association Council in respect of all the modes of transport. However, like the provision laid down in Article 50 of the Athens Agreement, no time limit is given for execution of this provision.

## VI. CONCLUSION

This article has not only dealt with the international relations of states in the field of air transport, but an attempt has also been made to describe the internal and external relations of a union or states. The European Economic Community expressly enjoins respect for the international conventions concluded by its Member States.<sup>53</sup> It is also entitled and required to participate as a Community in relations governed by international law, and to help constructively in the development of that law. In the field of air law, it is an "open Community."

In the analysis of legal principles, this article has necessarily been restricted, and the direct effects of the rules referred to are not always discussed. This arises from the nature of the complete though gradual establishment of economic union among the countries of the Common Market. It was from that particular point of view that precipitated both the discussion of international relations in air transport and the juridical position of this mode of transport against the broad background of the economy.

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<sup>53</sup> Article 234 of the EEC Treaty.