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Competition and Deregulation: Nouvelles Frontières for the EEC Air Transport Industry?

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Jacqueline O. LiCalzi

Abstract

This comment argues that a coherent approach to the liberalization of air transport in the EEC is desirable; however, despite the impetus of Nouvelles Frontières, liberalization is unlikely in the near future. Part I analyzes the Nouvelles Frontières decision in the context of the international regulatory framework in which EEC air transport functions. Part II evaluates EEC proposals that seek to bring about fairer prices and improved market entry, and concludes that such proposals would not significantly alter the present system. Part III offers proposals that strike a balance between free competition and government intervention, in the interest of liberalizing European air transport. This comment concludes that decisive action by EEC institutions must soon be taken if the goal of a “common market” is to be realized.

COMMENT

COMPETITION AND DEREGULATION: *NOUVELLES FRONTIÈRES* FOR THE EEC AIR TRANSPORT INDUSTRY?

INTRODUCTION

These are turbulent times for the European Economic Community's¹ (EEC or Community) highly regulated air transport industry. European air travel is currently marked by high fares² and inefficient national airlines, grounding free competition and prospective travelers alike. The anticompetitive nature of the present system is a result of two factors. First, while the EEC competition rules prohibit restrictive business practices and abuses of dominant market power,³ air and sea transport are the only areas of Europe's economy in which the European Council (Council) has failed to adopt regulations implementing these rules. Second, European air transport is regulated by bilateral agreements between nations that limit market entry and allow price fixing, revenue sharing and capacity controls that split air traffic equally between national carriers.

Despite increasing political and social pressure to deregulate, efforts to open Europe's skies have so far been unsuccessful.

1. The European Economic Community (EEC or Community) was founded in 1957. Treaty establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English trans.), 298 U.N.T.S. 3 (1958) (unofficial English trans.) [hereinafter EEC Treaty or Treaty]. The EEC is currently comprised of 12 Member States: Belgium, Denmark, Federal Republic of Germany, France, Great Britain, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain. See Treaty between the Member States of the European Communities and the Kingdom of Spain and the Portuguese Republic concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, O.J. L 302/9 (1985). See generally P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (4th ed. 1985).

2. Western European air fares are among the highest in the world, while average American fares are 35 to 40 percent lower than average European fares. *Europe's Air Cartel*, THE ECONOMIST, Nov. 1, 1986, at 31. For example, in November 1986, Europeans paid US\$105 for scheduled flights from London to Paris, *id.* at 26, while Americans flew from New York to Washington, D.C., on their deregulated airlines for US\$75, *id.*, or coast to coast for US\$99. *Id.* at 24.

3. The competition rules of the EEC are embodied in Articles 85 to 94 of the EEC Treaty. See generally V. KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE (2d ed. 1981).

ful. However, the recent European Court of Justice decision in the *Nouvelles Frontières*⁴ case has conclusively held that the competition rules are applicable to air transport and has sparked a new push for liberalization.

This Comment argues that a coherent approach to the liberalization of air transport in the EEC is desirable; however, despite the impetus of *Nouvelles Frontières*, liberalization is unlikely in the near future. Part I analyzes the *Nouvelles Frontières* decision in the context of the international regulatory framework in which EEC air transport functions. Part II evaluates EEC proposals that seek to bring about fairer prices and improved market entry, and concludes that such proposals would not significantly alter the present system. Part III offers proposals that strike a balance between free competition and government intervention, in the interest of liberalizing European air transport. This Comment concludes that decisive action by EEC institutions must soon be taken if the goal of a "common market" is to be realized.

I. NOUVELLES FRONTIÈRES AND IMPLICATIONS FOR EEC AIR TRANSPORT

The European deregulation debate appeared to be coming to a head on April 30, 1986, when the Court of Justice handed down its long awaited judgment in *Nouvelles Frontières*.⁵ The case involved the criminal prosecution of Air France, British Airways, KLM, Air Lanka and several travel agencies, including *Nouvelles Frontières*, France's second largest travel agent, for selling air tickets at prices below those approved by the French government.⁶ The case was referred to the Court

4. Judgment of April 30, 1986, *Ministère Public v. Asjes*, Cases 209-213/84, 1986 E.C.R. —, 4 Comm. Mkt. Rep. (CCH) ¶ 14,287 [hereinafter *Nouvelles Frontières*].

5. *Id.*

6. *Nouvelles Frontières*, a privately held travel company founded to "democratize French travel," has been sued more than one hundred times for illegal discounting of tickets. Martin, *Becoming the Tour De France: Upstart Travel Club Shakes Up Industry*, Wash. Post, Sept. 21, 1986, at D8, col. 6. The attorney for *Nouvelles Frontières* cited the "hypocrisy" of laws banning such ticket dumping because the French government encourages its airline to dump tickets in other countries, while prosecuting airlines and travel agencies that dump tickets in France. Feazel, *Liberalization Policies at Issue in Ruling on French Fare Case*, AVIATION WEEK & SPACE TECH., July 15, 1985, at 29 [hereinafter Feazel, *Liberalization Policies*]. One commentator noted that it is "well documented that established airlines who try to maintain the present system of farefixing almost at any price, at the same time sell seats at cut-throat rates to 'ticket-

of Justice by the Paris Criminal Court—the Tribunal de Police—pursuant to Article 177 of the EEC Treaty, which empowers the Court of Justice to hear matters implicating Community law that arise before national courts.⁷

At issue in *Nouvelles Frontières* was the validity of the French Civil Aviation Code, which sets forth a compulsory procedure for the approval of air fares by the French Minister for Civil Aviation.⁸ The airlines and travel agencies, who allegedly violated the Code by undercutting approved fares for certain routes,⁹ were brought up on criminal charges by the Ministère Public—the French Public Prosecutor's Department.¹⁰ The French Code is best understood in the larger context of a worldwide system regulating scheduled¹¹ air services between

scalpers' and 'bucket-shops.' " Kuyper, *Case Law*, 23 *COMMON MKT. L. REV.* 661, 663 n.8 (1983) [hereinafter Kuyper, *Case Law*].

7. Article 177 provides in part:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon

EEC Treaty, *supra* note 1, art. 177. See generally Dausés, *Practical Considerations Regarding the Preliminary Ruling Procedure Under Article 177 of the EEC Treaty*, 10 *FORDHAM INT'L L.J.* 538 (1987).

8. The relevant articles of the French Code are annexed to the *Nouvelles Frontières* decision. Article L 330-3 provides that airline companies, and the tariffs they charge, must be approved by the Minister for Civil Aviation. Article R 330-9 requires that both French and foreign companies must submit the same data in order to apply for approval of their air fares. Article 330-15 contains the criminal penalties for infringements of these rules. *Nouvelles Frontières*, 1986 E.C.R. — (para. 3 of the judgment), 4 *Comm. Mkt. Rep. (CCH)* ¶ 14,287, at 16,774, 16,801.

9. The fares were charged for routes from Paris to Bangkok, Sri Lanka, Bombay, and the United States via London and Amsterdam. Feazel, *Liberalization Policies*, *supra* note 6, at 28.

10. *Nouvelles Frontières*, 1986 E.C.R. — (opinion of Advocate General Lenz), 4 *Comm. Mkt. Rep. (CCH)* ¶ 14,287, at 16,781-82.

11. "Scheduled" flights, namely, "flights which are listed in published timetables, are available to the general public, and operate at the same time of day over the same general route one or more days each week," make up the greater part of international air service. B. GIDWITZ, *THE POLITICS OF INTERNATIONAL AIR TRANSPORT* 1 (1980). Charter or nonscheduled carriers operate "irregularly scheduled special flights, often for established groups, on high-density routes." *Id.* While the present regulatory regime assumes the predominance of scheduled air services, "international charter operations have expanded markedly since the mid 1960s outside the existing regulatory framework." Jönsson, *Sphere of Flying: the politics of international aviation*, 35 *INT'L ORG.* 273, 290 (1981).

nations, which in most cases requires carriers to consult each other on fares before seeking government approval.

A. *International Legal Framework of the Air Transport Industry*

International civil aviation is governed by the principle of the sovereignty of a state over its airspace.¹² While most states recognize the right of overflight without landing and the right to land for noncommercial reasons, such as refueling, other "freedoms of the air" are not widely accepted.¹³ Thus, states desiring air service between their territories must exchange commercial air rights through bilateral or multilateral negotiations.¹⁴ These trade agreements regulate air services between

12. The legal basis of the modern international civil aviation community is the Chicago Convention of December 7, 1944. Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295. The operation of international scheduled air services is controlled by Article 6 of the Convention, which provides: "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." *Id.* art. 6.

One commentator has stated that "[t]he philosophy underlying Article 6 involves viewing international air routes and traffic as a 'potential commodity' subject to granting, acquisition or exchange." Gertler, *Nationality of Airlines: A Hidden Force in the International Air Regulation Equation*, 48 J. AIR L. & COM. 51, 55-56 (1982). The Chicago Convention, however, was unable to resolve many economic issues of international aviation on a multilateral level. See B. GIDWITZ, *supra* note 11, at 50-51. It did result in the creation of the International Civil Aviation Organization (ICAO), now a specialized agency of the United Nations, which is concerned mainly with technical issues, such as developing international air navigation standards. *Id.* at 81-83. For a detailed discussion of the Convention, see W. WAGNER, *INTERNATIONAL AIR TRANSPORT AS AFFECTED BY STATE SOVEREIGNTY* 79-146 (1970).

13. These technical privileges constitute two of the so-called "five freedoms of the air" proposed at the Chicago Convention. See B. GIDWITZ, *supra* note 11, at 49-50. The third freedom gives an airline the right to set down in another state traffic picked up in the state in which the airline is registered (outbound traffic). The fourth freedom gives the right to pick up in another state traffic destined for the state of registration (inbound traffic). The fifth freedom gives the right to pick up and discharge traffic between third countries (extra-national traffic). *Id.* The fifth freedom is rarely recognized within the EEC. Dagtoglou, *Air Transport and the European Community*, 6 EUR. L. REV. 335, 337 (1981). The five freedoms are listed in Contribution of the European Communities to the development of air transport services—Memorandum of the Commission, E.C. Bull. Supp. No. 5, Annex II-1 (1979) [hereinafter 1979 Memorandum].

14. B. GIDWITZ, *supra* note 11, at 51. The era of bilateralism began with a 1946 agreement concluded in Bermuda by the United States and the United Kingdom, the two major post-World War II powers in international civil aviation. Agreement Between the Government of the United States and the Government of the United Kingdom Relating to Air Services Between Their Respective Territories, Feb. 11, 1946,

the respective territories of the party states, and in some cases beyond to third countries, with provisions controlling fares, capacity,¹⁵ frequency of flights, types of aircraft, designation of airlines¹⁶ and route structure.

A 1967 international agreement on scheduled air services,¹⁷ concluded under the aegis of the European Civil Aviation Conference¹⁸ (ECAC), was signed by all Member States

United States-Great Britain, 60 Stat. 1499, T.I.A.S. No. 1507. Known as the Bermuda agreement, it became the accepted standard for future bilateral air transport agreements. B. GIDWITZ, *supra* note 11, at 51. Although the scope of scheduled international air transport has increased dramatically since the signing of the Bermuda agreement, bilateral agreements remain the primary instruments used by states to regulate the activities of airlines and presently regulate 27 of the possible 36 links between EEC Member States. Comm'n, Eighth Report on Competition Policy ¶ 38 (1979).

The Bermuda agreement represented a compromise between opposing economic philosophies—the “open skies” approach of the United States and the strict governmental interventionist position of the United Kingdom. See N. TANEJA, *AIRLINES IN TRANSITION* 42 (1981). The United States accepted governmental tariff control, which they had been unwilling to do at the Chicago Convention, delegating determination of international air tariffs to the rate-making machinery of the International Air Transport Association (IATA), subject to the approval of both governments. *Id.* The United Kingdom accepted the idea that airlines themselves would fix capacity and frequencies of flights, subject to ex post facto government review. *Id.*

15. Capacity refers to the number of commercial seats on an aircraft multiplied by the number of flights over that route within a specific period of time. B. GIDWITZ, *supra* note 11, at 139. Many nations have rejected the liberal capacity provisions of the Bermuda agreement and replaced them with provisions for at least some governmental control of capacity. P. HAANAPPEL, *PRICING AND CAPACITY DETERMINATION IN INTERNATIONAL AIR TRANSPORT* 35 (1984). One report found governmental limitations on capacity on 90 percent of the routes between member countries of the European Civil Aviation Conference. Garland, *The American Deregulation Experience and the Use of Article 90 to Expedite EEC Air Transport Liberalisation*, 7 *EUR. COMPETITION L. REV.* 193, 202 n.52 (1986). Agreements between Member States generally include “capacity-sharing” arrangements, which ensure that routes to other states are split equally between national carriers. EUROPEAN COMMUNITIES COMMISSION, *BACKGROUND REPORT, COMPETITION IN CIVIL AVIATION* 3 (Sept. 18, 1986) [hereinafter *BACKGROUND REPORT*]. And revenue pooling agreements between airlines, involving the pooling of all revenue earned by different carriers on a single route, are common. *Id.* at 4.

16. Most states also adhere to the principle of a “chosen instrument,” that is, designation of one airline as official instrument to operate the government franchise on a particular route. B. GIDWITZ, *supra* note 11, at 3.

17. International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services, July 10, 1967, 696 U.N.T.S. 31. This agreement is the only multilateral agreement ever concluded in international rate-making. P. HAANAPPEL, *supra* note 15, at 21.

18. The European Civil Aviation Conference (ECAC) is a regional intergovernmental body comprised of 22 European countries, including all Community members. *BACKGROUND REPORT, supra* note 15, at 2. Although it has no regulatory power per se, its recommendations and resolutions are often implemented as binding regu-

except for Germany and Luxembourg.¹⁹ The agreement provides that fares are to be set by airlines through the Traffic Conferences of the International Air Transport Association²⁰ (IATA)—the trade association of the world's airlines. Fares set in this manner are subject to final approval by the governments of both airlines, a process known as the double approval rule.²¹ This approval is often perfunctory, since most European air-

lations on its members since they are agreed to by the directors-general of the national civil aviation administrations. See 1979 Memorandum, *supra* note 13, at 25.

19. BACKGROUND REPORT, *supra* note 15, at 3. The latter two nations have bilateral agreements which contain similar provisions. *Id.*

20. IATA is involved in both trade association and tariff coordinating activities at the multinational level. It represents approximately 180 airlines world-wide, including all EEC Member States except Luxembourg. BACKGROUND REPORT, *supra* note 15, at 2. For extensive analysis of IATA, see J. BRANCKER, IATA AND WHAT IT DOES (1977); R. CHUANG, THE INTERNATIONAL AIR TRANSPORT ASSOCIATION (1972).

21. Under the "double approval" rule, fares may be inflated because neither carrier has an incentive to keep prices low. The less efficient airline seeks fares that will comfortably cover its higher costs. The more efficient carrier is unlikely to oppose high fares that will lead to even greater profits. See Ghandour, *Unilateralism versus Multilateralism: A Dilemma for International Civil Air Transportation Today*, in INTERNATIONAL AIR TRANSPORT IN THE EIGHTIES 51, 54 (H. Wassenbergh & H. Van Fenema eds. 1981) [hereinafter INTERNATIONAL AIR TRANSPORT]. Even if one carrier chooses to offer cheaper fares or more frequent flights, the government at the other end of the route may intervene to force alignment of fares and flight frequency with that of its own airline. BACKGROUND REPORT, *supra* note 15, at 3. Thus, the delegation of ratemaking power by governments to IATA is to the advantage of "weak" aviation countries. R. CHUANG, *supra* note 20, at 122.

Since the purpose of the IATA tariff coordinating procedure is to develop uniform fares, subject to unanimous approval of IATA members, price competition between participating IATA airlines is significantly diminished. See P. HAANAPPEL, *supra* note 15, at 81. "For all intents and purposes IATA organises meetings wherein the air carriers fix prices and provides material assistance to facilitate the process." Salzman, *IATA, Airline Rate-Fixing and the EEC Competition Rules*, 2 EUR. L. REV. 409, 411 (1977). Fares are determined subjectively and thus end up higher than they would have been under a more competitive atmosphere. Ghandour, *supra*, at 54. Rarely is there an attempt to make the results economically sound; there is no internal mechanism guaranteeing maximum efficiency nor is there a systematic response to consumer demands. Raben, *Deregulation: A Critical Interrogation*, in INTERNATIONAL AIR TRANSPORT, *supra*, at 20.

IATA's organizational structure was changed in 1978 to make airline participation in ratemaking optional, and perhaps less anticompetitive. See P. HAANAPPEL, *supra* note 15, at 61-89. IATA has shifted its focus to traditional trade association activities in North America and Europe while remaining the primary fare-setting mechanism for the rest of the world. See *Liberal Regulatory Environment Alters IATA's Fare-Setting Role*, AVIATION WEEK & SPACE TECH., November 11, 1985, at 102; *IATA Change of Season Seen at Hamburg AGM*, AIR TRANSPORT WORLD, November 1985, at 18. However, IATA's fare-setting machinery still provokes criticism and suspicion. Ghandour, *supra*, at 56.

lines are state-owned.²² Thus government influence on tariff coordination within IATA is significant, and in many cases decisive.²³

The French Code at issue in *Nouvelles Frontières*, similar to legislation of other Member States, simply establishes procedures that enforce the provisions of the 1967 agreement.²⁴ It enables the French authorities to approve air fares that have been jointly agreed upon by the airlines within the IATA framework, and then impose them on the airlines by preventing unauthorized fares. The Paris Tribunal, however, reasoned that the compulsory approval procedure encouraged and, in some cases, required concerted action among the airlines to fix prices, and as such restricted competition in violation of the antitrust prohibitions of the EEC Treaty.²⁵

22. The "flag carriers" of the EEC are more than 50 percent state-owned in all but two Member States—Luxembourg and the Netherlands. *Rek, Euro-deregulation, Ideals and Reality*, 42 *INTERAVIA* 7 (1987). The Scandinavian Airlines System (SAS), of which Denmark is a participant, operates through state-controlled holding companies. *Id.*

23. While IATA provides the mechanism for the price-fixing function of the European airline industry, it does so only with the approval, assistance and often the explicit mandate of governments under the system of bilateral agreements. Salzman, *supra* note 21, at 412. Ultimately it is the governments who are responsible for the setting of fares. Comm'n, Eighth Report on Competition Policy, *supra* note 14, ¶ 38.

24. See Kuyper, *Case Law, supra* note 6, at 663.

25. *Nouvelles Frontières*, 1986 E.C.R. — (para. 4 of the judgment), 4 *Comm. Mkt. Rep. (CCH)* ¶ 14,287, at 16,774. Article 85 prohibits collusion between undertakings which "have as their object or effect the prevention, restriction or distortion of competition within the common market . . ." EEC Treaty, *supra* note 1, art. 85(1). The Treaty prohibits in particular those agreements which "(a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment . . ." *Id.*

Agreements that violate Article 85(1), such as those which fix prices or divide markets, are automatically void under Article 85(2). *Id.* art. 85(2). However, an exemption from the prohibition of 85(1) may be granted under 85(3), either individually or by way of a group exemption, where the restriction on competition is outweighed by its beneficial effects. *Id.* art. 85(3). Article 86 is aimed at abusive exploitation by firms in a dominant position which affects interstate trade. *Id.* art. 86. There is no exemption procedure under Article 86.

The prohibitions of Article 85(1) are clearly applicable to the restrictive practices of the airline industry. See Bentil, *Attempt to Regulate Restrictive Commercial Practices in the Field of Air Transportation Within a Transnational Antitrust Legal and Institutional Framework*, 50 *J. AIR L. & COM.* 69, 82 (1984); Salzman, *supra* note 21, at 416-21. Article 86 is pertinent in this context to curb abuses of dominant market power. See Bentil, *supra*, at 83; Tyrrell, *Evolution or Revolution—A Review of Progress on the Abolition of Restrictions on Competition in the Air Transport Sector*, 2 *EUR. COMPETITION L. REV.* 91, 92 (1981). The Commission may also have recourse to Article 90, which controls the

In its judgment of March 2, 1984, the Tribunal acquitted the directors of the travel agencies, discharged the travel agencies themselves, and ruled that the proceedings against the airlines and against their directors should be dealt with separately.²⁶ It then suspended its proceedings and requested a ruling from the Court of Justice regarding the validity of the compulsory approval procedure under Community law.²⁷

B. *Applicability of EEC Competition Rules to Air Transport*

After dispensing with several jurisdictional objections,²⁸ the Court reframed the question referred by the French Court. The Paris Tribunal had initially requested a determination of the compatibility of the French Code with Community law, which is an impermissible inquiry under Article 177.²⁹ The Court restated the issue in terms of whether a Member State may set up a compulsory approval procedure for air fares, and criminally punish noncompliance, where such fares are found to arise out of concerted practice among airlines in violation of Article 85.³⁰

restrictive practices of public enterprises and enterprises to which Member States have granted special or exclusive rights. See *infra* note 51 and accompanying text.

26. *Nouvelles Frontières*, 1986 E.C.R. at — (opinion of Advocate General Lenz), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,782.

27. *Id.* (para. 5 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,774.

28. The Court rejected procedural objections made by Air France, KLM and the French and Italian Governments. *Id.* (para. 16 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,775; see Chavan, *Comments on the Judgment Delivered by the Court of Justice of the European Communities on April 30th, 1986 Concerning the Application of the Competition Rules of The Treaty of Rome to Air Transport*, SWISS REV. INT'L COMPETITION L., June 1986, at 59-61. It held that it was up to the referring court, and not the Court of Justice, to determine whether the reference was necessary. *Nouvelles Frontières*, 1986 E.C.R. — (para. 10 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,775. Moreover, neither the possibility of mistakes in the reference itself, *id.* (para. 12 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,775, nor the failure of the Tribunal to specify which Treaty provisions were to be applied, precluded the Court's jurisdiction under Article 177. *Id.* (para. 14 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,775. In addition, the existence of international civil aviation agreements did not affect the competence of the Court to hear the case. *Id.* (para. 13 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,775.

29. *Id.* (para. 12 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,775.

30. *Id.* (para. 17 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,775.

Nouvelles Frontières, the United Kingdom and the Commission took the view that the competition rules of the EEC Treaty are applicable to air transport.³¹ They relied on an earlier judgment by the Court of Justice in the *French Seamens' Case*,³² which held that air and sea transport, while excluded from the common transport policy in the absence of a Council decision under Article 84(2), nevertheless remain subject to the "general rules of the Treaty."³³ These parties reasoned that this judgment implies the applicability of the competition rules to sea and air transport.

The French Government argued that "general rules" refers only to the rules contained in Part Two of the Treaty on the foundations of the Community, and not to Part Three ("Policy of the Community"), which contains the competition rules.³⁴ The Court, however, rejected this argument and held that the competition rules are to be considered among the general rules of the Treaty and, thus, are applicable to air transport.³⁵

31. *Id.* (para. 30 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,777.

32. *Commission v. French Republic*, Case 167/73, 1974 E.C.R. 359, Comm. Mkt. Rep. (CCH) ¶ 8270.

33. *Id.* para. 32, Comm. Mkt. Rep. (CCH) ¶ 8270, at 9187. The Court in the *French Seamans' Case* was only called upon to decide the application of the general rules of Part Two of the Treaty, relating to the free movement of workers, and so it left the question open as to the meaning of the term "general rules." See Weber, *The Application of European Community Law to Air Transport*, 2 ANNALS AIR & SPACE L. 233, 240 (1977) ("Since the term is neither a legal expression used in the Treaty, nor a part of the current language of the Community institutions, it remains open for interpretation."). In a subsequent case, which is not mentioned explicitly in the *Nouvelles Frontières* decision, the Court strongly implied that the general rules of the Treaty relating to State aids, which are part of the rules on competition as a whole, are applicable to transport. *Commission v. Belgium*, Case 156/77, 1978 E.C.R. 1881, paras. 10-13, Comm. Mkt. Rep. (CCH) ¶ 8513, at 7292.

34. *Nouvelles Frontières*, 1986 E.C.R. — (para. 34 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,777.

35. *Id.* (para. 42 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,777. The Court reasoned that the first provision in the Transport Title, providing that the Treaty objectives shall be pursued within the framework of a common transport policy, indicates that the competition rules, as mentioned in Article 3(f) regarding the institution of a system ensuring that competition in the Common Market is not distorted, were equally applicable to the transport sector. *Id.* (para. 36 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,777. The Court further concluded that the applicability of the competition rules is not conditioned upon the realization of a common transport policy, *id.* (para. 37 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,777, nor does any provision expressly preclude air

The Court, in light of the absence of a Council regulation concerning competition in air transport,³⁶ focused on technical issues rather than on the substantive issues that concerned the parties and observers.³⁷ The applicability of the competition rules to air transport had already been strongly implied in

transport from the application of the competition rules. *Id.* (paras. 40-41 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,777. The Court also noted that under Article 77 of the Transport Title, state aids that "meet the needs of the coordination of transport" are compatible with the Treaty. *Id.* (para. 39 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,777. This presupposes that the competition rules, of which the provisions on State aids are a part, are applicable to the transport sector whether or not a common transport policy has been established. *Id.* For a critical analysis of Court's reasoning on this issue, see Kuyper, *Case Law, supra* note 6, at 668.

36. See Comm'n, Eleventh Report on Competition Policy ¶ 1 (1982). Article 87 obliges the Council, acting on proposals from the Commission and after consulting Parliament, to adopt regulations giving effect to the competition rules. EEC Treaty, *supra* note 1, art. 87. By Council Regulation No. 141, 124 J.O. C 2753 (1962), O.J. Eng. Spec. Ed. 1959-62, p. 291, the Council exempted the Transport sector from the scope of Regulation 17, the first Regulation implementing Articles 85 and 86 of the EEC Treaty, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, p. 87, 2 Comm. Mkt. Rep. (CCH) ¶ 2401. A regulation adopted in 1968 implements the competition rules for rail, road and inland water transport, but makes no mention of sea and air transport. Council Regulation No. 1017/68, J.O. L 1750 (1968), O.J. Eng. Spec. Ed. 1968(I), p. 302, 2 Comm. Mkt. Rep. (CCH) ¶ 2761.

The competition rules are primarily enforced by the Commission. V. KORAH, *supra* note 3, at 5. But, without procedures that put into effect the competition rules for air transport "the law as it now stands does not allow for the consistent application of the rules of competition to sea and air transport . . . [making] for uncertainty in the law, and this is to the disadvantage of shippers, airlines and users." Comm'n, Fifth Report on Competition Policy ¶ 14 (1976).

Sea and air transport are also excluded from the provisions of the Common Transport policy, EEC Treaty, *supra* note 1, arts. 74-84, until the Council unanimously decides "whether, to what extent and by what procedure" to include them. EEC Treaty, *supra* note 1, art. 84(2). The lack of progress in developing a Common Transport policy led the Parliament to bring an action against the Council under Article 175 for failure to act. Judgment of May 22, 1985, *European Parliament v. Council of the European Communities*, Case 13/83, 1985 E.C.R. —, 4 Comm. Mkt. Rep. (CCH) ¶ 14,191. However, the Court of Justice held that the Council's general obligation to establish a Common Transport policy was not sufficiently defined for a failure to act to be actionable. *Id.* at — (para. 53 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,191, at 16,163. It thus appears that the possibility of Parliamentary action against the Council for failure to pass any legislation in the air transport sector is foreclosed. For a detailed discussion, see Fennel, *The Transport Policy Case*, 10 EUR. L. REV. 264-76 (1985).

37. See Bellis, "Nouvelles frontières" and EEC Competition Law in the Air Transport Sector: A Restatement of Classical Jurisdictional Rules, SWISS REV. INT'L COMPETITION L., June 1986, at 51. "The Court's opinion resembles a legal steeplechase that ends somewhere in the middle of the track." Pescatore, *Public and Private Aspects of European Community Competition Law*, 10 FORDHAM INT'L L.J. 373, 414 (1987).

prior case law, and the Commission had been espousing that view for over two decades.³⁸ In finding Articles 85 through 90 to be among the general rules of the Treaty, the Court merely reaffirmed its precedent, resolving any doubts that could hinder Council discussion of liberalization proposals.

C. *Enforcement of the Competition Rules*

The essence of *Nouvelles Frontières* involved the question of what body would act to enforce the competition rules in the air transport industry in the absence of Council regulations implementing those rules. While confirming the applicability of the competition rules to air transport, even without any legislation by the Council, the Court found that the absence of a Council regulation has repercussions on the direct effect of the rules within a Member State,³⁹ which cripples the ability of EEC institutions to coordinate the liberalization process.

The Court relied on its prior decision in the *Bosch*⁴⁰ case in holding that agreements concerning air fares remain valid on a provisional basis until such time as the authorities of the Member States or the Commission find that they are incompatible with Article 85 or 86.⁴¹ The Court thus rejected both its

38. As early as 1960, the Commission took the view that the competition provisions of the Treaty applied to air transport. See Dagtoglou, *supra* note 13, at 335.

39. *Nouvelles Frontières*, 1986 E.C.R. — (paras. 66-69 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,780.

40. *Bosch v. van Rijn*, Case 13/61, 1962 E.C.R. 45, Comm. Mkt. Rep. (CCH) ¶ 8003.

41. *Nouvelles Frontières*, 1986 E.C.R. — (paras. 67-68 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,780. The Court in *Bosch* held that procedures set in Articles 88 and 89 did not ensure the complete and consistent application of Article 85. *Bosch*, 1962 E.C.R. at 51, Comm. Mkt. Rep. (CCH) ¶ 8003, at 7138. Thus, until the Council acts the competition rules cannot be applied retroactively where it is unclear who can grant exemptions under Article 85(3). *Id.* If *Bosch* is applicable to air transport, then air tariffs that have already been approved are provisionally valid. Otherwise, agreements between airlines may be prematurely voided under Article 85(2) before the implementation of procedures under which the Commission might later grant an exemption pursuant to Article 85(3). *Nouvelles Frontières*, 1986 E.C.R. — (para. 64 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,779. For an extensive discussion of the issues raised by the *Bosch* case, see Kuyper, *Case Law, supra* note 6, at 672-75.

One commentator has noted that since Article 86 contains neither an automatic nullity clause nor an exemption clause, Article 86 should be given "full direct effect," even in the absence of Commission action under Article 89 or Member State action under Article 88. *Id.* at 675. The German Supreme Court has requested a preliminary ruling from the Court of Justice on this point, among others, in *Firma Ahmed*

Advocate General's⁴² and the Commission's⁴³ position. It held that neither the Court itself nor national courts could determine whether agreements between airlines are covered by the prohibition of Article 85(1) in a civil or criminal context, given the lack of Council legislation concerning air transport.⁴⁴ Citing the importance of legal certainty in business agreements, the Court found the direct effect of Article 85 inapplicable in national courts until Member States or the Commission have recorded an infringement under the transitional rules of Articles 88 and 89.⁴⁵

Article 89, while requiring the Commission to apply Articles 85 and 86, provides it with limited powers to deal with an infringement.⁴⁶ The Commission may investigate suspected

Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V., Case 66/86, O.J. C 105/6-7 (1986).

42. Advocate General Lenz, in his preliminary opinion, advanced an intermediate position. Noting that the *Bosch* decision had been motivated by the desire to protect legal certainty for existing agreements between *private* parties, he found that criminal sanctions imposed for selling air tickets at prices below government-approved levels were unacceptable because the tariffs themselves are based on agreements contrary to the competition rules. *Nouvelles Frontières*, 1986 E.C.R. — (opinion of the Advocate General), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,798. He urged that while it may be appropriate to regard agreements contrary to Community law as provisionally valid under *civil* law, the same is not true in a *criminal* context. *Id.* In other words, it is the duty of national courts to defend citizens against such compelled compliance. *Id.*

43. The Commission argued that the *Bosch* decision was inapplicable because the circumstances of that judgment differed significantly from those of air transport. *Id.* (para. 66 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,779. The case involved the applicability of Article 85 before national courts prior to procedural implementation under Regulation 17. The agreements concerned had been concluded before entry into force of the Treaty and Regulation 17 was adopted while the case was being heard by the Court. *Id.*, 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,779.

44. *Nouvelles Frontières*, 1986 E.C.R. — (para. 68 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,780.

45. *Id.* (paras. 64-65 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,779. Thus, there is no private cause of action for damages before national courts in the absence of actions by the Commission and the Member States under Articles 89 and 88, respectively. For example, a case brought by Lord Bethell, a member of the European Parliament, against British Airways for fixing fares on the London to Amsterdam route was dismissed by the Queen's Bench Division of the High Court, citing the *Nouvelles Frontières* decision. *UK Court Won't Entertain Case Attacking Collusion by Airlines*, 51 Antitrust & Trade Reg. Rep. (BNA) No. 1284, at 475 (Oct. 2, 1986).

46. Article 89(1) provides:

Without prejudice to Article 88, the Commission shall, as soon as it takes up its duties, ensure the application of the principles laid down in Articles 85 and 86. On application by a Member State or on its own initiative, and in

infringements and propose nonbinding measures to bring them to an end.⁴⁷ The Commission does not have power to grant exemptions under Article 85(3). However, it must rely on Member States for enforcement. If Member States fail in this duty, the Commission has recourse to the Court of Justice,⁴⁸ but this may give rise to protracted legal battles. The Commission's ability to address infringements is further weakened by the vague investigatory powers set out in Article 213, which rely to a large extent on voluntary disclosures by the accused parties.⁴⁹

While the Commission has limited means to attack a private air cartel under Article 89, it cannot control the anticompetitive practices of airlines under Articles 85 and 86 without also addressing government involvement.⁵⁰ The Commission can take action under Article 90(1), which controls the restrictive practices of public enterprises and enterprises to which Member States have granted special or exclusive rights.⁵¹ Arti-

cooperation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

EEC Treaty, *supra* note 1, art. 89(1). In 1981, Lord Bethell brought action under Article 175 and 173 to compel the Commission to move under Article 89 against airline price-fixing in the EEC. The Court of Justice dismissed the case for lack of standing. *Bethell v. Commission*, Case 246/81, 1982 E.C.R. 2277, paras. 16-17, *Comm. Mkt. Rep. (CCH)* ¶ 8858, at 8103.

47. EEC Treaty, *supra* note 1, art. 89.

48. Under Article 169 the Commission may bring suit against a Member State for failure to fulfill an obligation under the Treaty. EEC Treaty, *supra* note 1, art. 169.

49. Article 213 provides: "The Commission may, within the limits and under the conditions laid down by the Council in accordance with the provisions of this Treaty, collect any information and carry out any checks required for the performance of the tasks entrusted to it." EEC Treaty, *supra* note 1, art. 213.

The Sterling Airways incident highlighted the difficulties the Commission faces in applying the competition rules to air transport without investigatory powers similar to those conferred by Regulation 17. In that case a Danish private airline operator challenged the exercise of the monopoly power of the Scandinavian Airlines System (SAS). In light of the prevailing legal situation and the limited information at its disposal, the Commission did not feel it appropriate to dispute the legality of the grant of exclusive rights to SAS. *Comm'n, Tenth Report on Competition Policy* ¶ 136-38 (1981).

50. See Bentil, *supra* note 25, at 102; *supra* notes 14-24 and accompanying text.

51. Article 90(1) is specifically addressed to the Member States and their subordinate organs and applies when an Article of the Treaty has been violated. It provides:

cle 90 prevents Member States from adopting measures contrary to the competition rules or from sheltering illegal actions by enterprises because of a special right it has granted.⁵²

In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

EEC Treaty, *supra* note 1, art. 90(1). There is a general consensus that Article 90(1) applies to scheduled airlines in the EEC, whether they are considered public enterprises under de jure or de facto state control or enterprises granted a special or exclusive right (i.e. a privileged position as "chosen instrument"). See Weber, *Air Transport in the Common Market and the Public Air Transport Enterprises*, 5 ANNALS AIR & SPACE L. 283, 286 (1980) [hereinafter Weber, *Air Transport in the Common Market*]. Member States violate Article 90(1) by requiring the setting of uniform fares, which is contrary to the competition rules in Article 85. See Salzman, *supra* note 21, at 424.

The airlines may claim, pursuant to Article 90(2), that the competition rules are inapplicable to their restrictive practices. Enterprises charged with the service of "general economic interest" are exempted from the scope of Articles 85 and 86 if the application of these rules would obstruct the achievement of the particular tasks entrusted to them, and if the development of Community trade is not thereby impaired. EEC Treaty, *supra* note 1, art. 90(2). This exception is strictly construed, BRT v. SABAM, Case 127/73, 1974 E.C.R. 313, para. 19, Comm. Mkt. Rep. (CCH) ¶ 8269, at 9185-37 (*BRT II*), and is applicable only if enforcement of the Treaty is "incompatible" with the performance of the tasks. Sacchi v. TeleBiella, Case 155/73, 1974 E.C.R. 409, 431, paras. 14-15, Comm. Mkt. Rep. (CCH) ¶ 8267, at 9185-4. It is doubtful that the application of Articles 85 and 86 is incompatible with the performance of the tasks assigned airlines under bilateral agreements to perform scheduled international services. See Dagtoglou, *supra* note 13, at 353; Garland, *supra* note 15, at 215-16. The exemption applies solely to the tasks themselves, not to individual enterprises. Salzman, *supra* note 21, at 425.

Most significantly, under Article 90(3), the Commission can issue binding directives or decisions to Member States addressing Treaty violations. EEC Treaty, *supra* note 1, art. 90(3). Because EEC airlines are for the most part state-owned or controlled, a decision directed to a Member State with respect to those airlines would likely have the same effect as if it were directed to the airline itself. Garland, *supra* note 15, at 217. The Member State could, of course, refuse to comply, leaving only recourse to the Court of Justice, and raising the prospect of a lengthy legal battle. *Id.*

While Article 90 is potentially a very effective process, at least one commentator has expressed doubts about the possibility of simply applying the competition rules in conjunction with Article 90 at different stages of the airline fare-fixing process. See Kuyper, *Airline Fare-Fixing and Competition: An English Lord, Commission Proposals and US Parallels*, 20 COMMON MKT. L. REV. 203, 214 (1983) [hereinafter Kuyper, *Airline Fare-Fixing*]. A debate has recently arisen concerning the compatibility of Member State intervention in the marketplace with Community law. Compare Pescatore, *supra* note 37, at 416 (the principle of free competition applies equally to Member States and private economic operators) with Marengo, *Competition Between National Economies and Competition Between Businesses—A Response to Judge Pescatore*, 10 FORDHAM INT'L L.J. 420, 433 (1987) ("provided competition is not restricted between national economies, each Member State is allowed to continue to regulate, or not to regulate, its economy . . .") (emphasis in original).

52. The Court in *Nouvelles Frontières* noted that a Member State violates its duty

Under Article 88, the authorities in the Member States can rule on the admissibility of agreements and on abuses of a dominant position, in accordance with their national law and Articles 85 and 86, when these are submitted to them for approval.⁵³ The authorities also may grant exemptions under Article 85(3). The Article 88 procedure for Member State enforcement of the competition rules, however, could create a significant amount of legal uncertainty. Member States are likely to differ in their interpretations of Articles 85 and 86 and vary in the jurisdictional and enforcement powers granted to the national "authorities."⁵⁴ Moreover, there is no procedure that permits an enterprise to obtain the Commission's formal assurance that its commercial practice does not violate Article 85(1).⁵⁵

Thus, the Court's decision in *Nouvelles Frontières* is applicable to airlines and their governments only insofar as the Council has not yet adopted a regulation implementing the competition rules. The prohibitions of Articles 85 and 86 are only applicable to agreements which the national authorities, acting under Article 88, or the Commission, acting under Article 89,

under the Treaty not only if it "requires" concerted action between airlines, but also if it "favours" the adoption of such practices or "reinforces the effects thereof." 1986 E.C.R. — (para. 72 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,780.

53. Article 88 provides:

Until the entry into force of the provisions adopted in pursuance of Article 87, the authorities in the Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Articles 85, in particular paragraph 3, and of Article 86.

EEC Treaty, *supra* note 1, art. 88. The Court gave a narrow interpretation to the definition of "authorities in the Member States" provided in *BRT v. SABAM*, Case 127/73, 1974 E.C.R. 51, para. 19, Comm. Mkt. Rep. (CCH) ¶ 8268, at 9185-23 (*BRT I*). The Court in *Nouvelles Frontières* held that the term refers to either the administrative authorities entrusted with the task of applying domestic legislation on competition (subject to judicial review in the national courts), or the courts to which the application of competition law is specifically entrusted. 1986 E.C.R. — (para. 55 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,778. Thus, the Paris Criminal Court, which itself does not fall within this definition of "authorities in the Member States," was denied the competence to rule on the question it had referred to the Court of Justice because the Commission and French authorities have not acted. *Id.* (para. 56 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,778. See Kuyper, *Case Law*, *supra* note 6, at 670-72.

54. Salzman, *supra* note 21, at 414-15.

55. *Id.*; Bentil, *supra* note 25, at 84-85; cf. Regulation 17, *supra* note 36, art. 2 (negative clearance procedure).

have found to violate the competition rules. In the case before the French Tribunal, no such decision by the French authorities or the Commission had been made.⁵⁶

D. *Nouvelles Frontières*: Benchmark or "Nondecision"?

The decision in *Nouvelles Frontières* managed to please both supporters and opponents of deregulation alike.⁵⁷ Many observers believed that once the Court of Justice confirmed the applicability of the competition rules to air transport, competition would finally land in Europe. Media reaction following the case decision heralded the end of Europe's air cartel and the inauguration of an era of "open skies."⁵⁸ Others, however, claimed "nothing had changed."⁵⁹

Those who opposed liberalization or advocated a gradual approach were satisfied because enforcement was left largely in the hands of the Member States, in cooperation with the Commission.⁶⁰ The Member States are likely to move slowly, if at all, to enforce competition rules, and can make it difficult for the Commission to exercise its powers under Article 89.⁶¹ Governments have little incentive to sanction their own national airlines, and in any event have the power under Article 88 to exempt certain restrictive arrangements under Article 85(3).⁶² Member States and their airlines remain insulated from the direct effect of Article 85 as long as Commission proposals remain tabled.

While there is still no firm mechanism to enforce the competition rules, *Nouvelles Frontières* has proven valuable for its timing in the political arena if not for its substance. The decision clarified the legal status of European air transport and

56. *Nouvelles Frontières*, 1986 E.C.R. — (paras. 57, 59 of the judgment), 4 Comm. Mkt. Rep. (CCH) ¶ 14,287, at 16,778.

57. See Bellis, *supra* note 37, at 51.

58. See Krause, *Air Travel: Deregulation Lands in Europe*, Int'l Herald Tribune, May 15, 1986, at 5, col. 1. London sources described the ruling as "outlawing air fare price fixing" and "the lift off for competition." *EEC Air Transport Industry is Governed by Treaty of Rome*, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1267, at 953 (May 29, 1986) [hereinafter *EEC Air Transport*].

59. *Id.* (comment of senior official with IATA following *Nouvelles Frontières* decision).

60. Bellis, *supra* note 37, at 51.

61. See Kuyper, *Case Law*, *supra* note 6, at 681 n.37.

62. See *supra* notes 53-55 and accompanying text.

provided a boost for liberalization. The Council's obligation to act on Commission proposals was reinforced, as was the mandate to national governments and the Commission to apply the competition rules. The case gave the Commission a stick with which to prod recalcitrant national airlines and their Member States, and the legal endorsement to attack opponents of deregulation.

On the other hand, *Nouvelles Frontières* has had less impact than initially hoped, as evidenced by the failure of the Council of Transport Ministers to pass even a watered-down version of the Commission's proposals in December 1986.⁶³ This further underscores the need for a rapid decision on the establishment of a Community policy for air transport. *Nouvelles Frontières* may have marked the beginning of a transitional period during which Member States and the Commission take ad hoc actions under Articles 88 and 89 to quicken the liberalization process, but eventually a common policy must be adopted. The lack of progress in deregulating the air transport sector is a clear setback to EEC competition policy and the Community's goal of a free "internal market" by 1992.⁶⁴

II. AFTER NOUVELLES FRONTIÈRES: COMPETITION STILL UP IN THE AIR

In the wake of *Nouvelles Frontières*, it is clear that the Commission may bring actions against Member States and their airlines under Articles 89 and 90 while waiting for the Council to act on Commission proposals that liberalize air transport in the EEC.

A. Commission Attempts at Bringing EEC Airlines Down to Earth

As an immediate consequence of *Nouvelles Frontières*, the Commission in July, 1986, carried out its oft-repeated threat to bring action against airlines under Article 89.⁶⁵ It sent warn-

63. At a December 15, 1986 meeting the Transport Ministers again failed to reach agreement on liberalization proposals. *EC Fails to Free Civil Aviation; Airlines Will Face Antitrust Charges*, 52 *Antitrust & Trade Reg. Rep.* (BNA) No. 1298, at 94 (January 15, 1987) [hereinafter *EC Fails to Free Civil Aviation*].

64. COM(85) 310 final, *Completing the Internal Market: White Paper from the Commission to the European Council*, ¶ 1 (June 14, 1985).

65. Comm'n Press Release, IP (86) 353 (July 10, 1986), 4 *Comm. Mkt. Rep.* (CCH) ¶ 10,798. The airlines concerned are Sabena (Belgium), SAS (Denmark), Luf-

ing letters to ten national EEC airlines demanding the end of certain restrictive practices such as price-fixing and capacity sharing.⁶⁶ The letters asked the airlines to indicate what measures they would take to eliminate the restrictions on competition.⁶⁷ If the violations were not brought to an end, the Commission would be obliged to issue a reasoned decision declaring the bilateral agreements null and void and to authorize measures needed to remedy the situation.⁶⁸ Failure to comply would leave the airlines open to actions before the Court of Justice under Article 169 and to enforcement actions in national courts by private parties injured by their agreements.⁶⁹

The Commission had initially planned to drop the proceedings if the Transport Ministers agreed on an acceptable air transport policy in 1986.⁷⁰ Since airline practices are governed by bilateral agreements between governments, it was feared that state-owned airlines would argue that the legal problem should be addressed by the transportation authorities of the governments concerned.⁷¹ However, all ten airlines have since agreed to negotiate with the Commission on central issues and the Article 89 proceedings have been suspended.⁷² By pressing the issue, the Commission has forced the airlines to consider voluntary change, though it is unclear how far negotia-

thansa (Germany), Olympic Airways (Greece), Air France (France), Aer Lingus (Ireland), Alitalia (Italy), KLM (Netherlands), British Airways (U.K.) and British Caledonian (U.K.).

66. *Id.*

67. *Id.*

68. *Id.*; see *supra* notes 46-47 and accompanying text.

69. See *supra* note 48 and accompanying text.

70. See Feazel, *Europeans Deadlock on Easing Discount Fare Restrictions*, AVIATION WEEK & SPACE TECH., Nov. 17, 1986, at 30 [hereinafter Feazel, *Europeans Deadlock*].

71. *EEC Commission Advises Airlines to Revise Fare, Capacity Agreements*, 51 Antitrust & Trade Reg. Rep. (BNA) No. 1274, at 116 (July 17, 1986) [hereinafter *EEC Commission Advises Airlines*].

72. *Airlines Avoid EC Action By Agreeing to Negotiate*, Wall St. J., Apr. 10, 1987, at 19, col. 4 [hereinafter *Airlines Avoid EC Action*]. As of March, 1987, Lufthansa, Olympic Airways and Alitalia had refused to negotiate, and the Commission had extended the deadline. See *The Beginning of the End for Europe's Airline Duopolies*, THE ECONOMIST, March 21, 1987, at 71 [hereinafter *The Beginning of the End*]. The Chairman of Alitalia had previously stated, "We are not answerable to [the Commission]. We will comply only with directives from our own government." *Alitalia Rejects EEC Request For Data on Operational Practices*, AVIATION WEEK & SPACE TECH., Nov. 17, 1986, at 39. The federal cartel office in West Germany has begun its own investigation into Lufthansa. *The Beginning of the End, supra*.

tions will go toward eliminating restrictive practices.⁷³

B. Pending Commission Proposals: Permanently Grounded?

Although Community antitrust policy in the air transport sector remains undefined, it has not been for lack of proposals by the Commission. In 1984, the Commission proposed a package of measures concerning capacity, tariffs and competition in its Civil Aviation Memorandum No. 2, Progress towards the development of a Community air transport policy⁷⁴ (Memorandum No. 2), which it amended following *Nouvelles Frontières*.⁷⁵ The provisions of Memorandum No. 2, if adopted by the Council, might increase fare flexibility, but would achieve little with regard to capacity and market access.

The Commission's proposal on air fares,⁷⁶ which would affect only intra-Community flights,⁷⁷ would permit airlines to set their tariffs freely within "zones of flexibility" without consulting other airlines or seeking government approval.⁷⁸ Tariff consultation between airlines would still be permitted, however, provided that airlines retain the effective right to act independently, subject to limited government control, and that Member States and the Commission may act as observers.⁷⁹

Although "zones of flexibility," which establish a range of permissible fares, still constitute price-fixing, they could pro-

73. *Airlines Avoid EC Action*, *supra* note 72, at 19, col. 4. The Commission has left open the possibility of renewing legal action against the airlines if negotiations are unsatisfactory. *Id.*

74. *Civil Aviation Memorandum No. 2, Progress towards the development of a Community air transport policy*, COM(84) 72 final, O.J. C 182/1-3 (1984) [hereinafter Memorandum No. 2]. Memorandum No. 2 and the proposals annexed to it expand on the objectives of the 1979 Memorandum, *supra* note 13.

75. Following *Nouvelles Frontières*, the Commission sent the Council a communication on civil aviation in which it set out a general policy framework. COM(86) 338 final/2. It followed this with an internal document slightly revising several proposals of Memorandum No. 2 in hopes of expediting agreement. COM(86) 328 final.

76. Memorandum No. 2, *supra* note 74, Annex II. This modifies a proposed Directive submitted for approval in 1981, COM(81) 590 final.

77. Memorandum No. 2, *supra* note 74, Annex II, art. 1.

78. *Id.*, arts. 5-6. Airlines need not consult other airlines or governments provided that the tariffs filed are reasonably related to costs and generate sufficient revenue to cover direct operating costs. *Id.* A binding arbitration procedure would govern disputes concerning fares falling outside established zones. Thus no government could indefinitely block the introduction of a fare proposed by an airline. COM(86) 338 final/2, Annex II.

79. Memorandum No. 2, *supra* note 74, Annex IIIC.

vide effective protection against predatory pricing⁸⁰ and introduce a degree of flexibility into the present system.⁸¹ The latest proposals before the Council, however, would limit such zones to discount and deep discount fares, leaving the basic structure of "normal" fares untouched.⁸² These discounted fare zones are marked more by their restrictiveness than by their flexibility. Member States are quarreling over the conditions to be attached to the discount fares,⁸³ which in many cases already exist at the proposed levels or lower.⁸⁴ This tink-

80. See Remarks of Alfred E. Kahn, former Chairman of the Civil Aeronautics Board, quoted in Dell, *Interdependence and the Judges: Civil Aviation and Antitrust*, 61 INT'L AFF. 355, 361 (1985). Mr. Kahn, a primary architect of U.S. deregulation, describes predatory pricing in the following way: "If predation means anything, it means deep, pinpointed, discriminatory price cuts by big companies aimed at driving price cutters out of the market, in order then to be able to raise prices back to their previous levels." *Id.* "Zones of flexibility" by definition permit variations in pricing only within strictly defined boundaries. Governments can intervene where there are serious departures from the standard or norm. See Garland, *supra* note 15, at 231.

81. See Stanbrook, *Progress Towards a Community Policy on Air Transport*, 10 EUR. L. REV. 52, 56 (1985).

82. EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4428) 5 (Nov. 12-13, 1986). The British President of the Council of Ministers proposed two zones, going from 90 percent to 65 percent of the price of an economy ticket for a discount fare and from 65 percent to 45 percent for deep-discount fares. The Member States deadlocked over the conditions attached to the discount fares. Denmark, Spain, France, Greece, Italy and Portugal objected to easing the restrictions. *Id.*

Britain's recent backtracking from its "liberal" position in anticipation of the denationalization of British Airways further complicated the situation. "[W]orried that even semi-open skies will reduce the stockmarket value of its planned pre-election privatisation of British Airways", the British President of the Council dropped his government's former insistence on the need for urgent reform and accepted the timid ECAC plan. *Skyway Robbery*, THE ECONOMIST, Nov. 1, 1986, at 16. Deregulation proponents denounced the "enormity of the British capitulation." EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4423) 8 (Nov. 5, 1986). The Belgian government, which inherited the semi-annual presidency of the Council of Ministers from Britain in January 1987, was left with the burden of pushing deregulation measures through the Council.

Consumer groups applauded the proposals' demise, calling the plan a "sham" and claiming "[i]t is much better to have no decision at all than for [the Council] to approve the package they were considering." Feazel, *Europeans Deadlock*, *supra* note 70, at 31.

83. Following the November meeting, a Dutch transport ministry official said, "The fares issue may be completely hopeless. The prospects are really black. We are very worried about the future of liberalization." Feazel, *Europeans Deadlock*, *supra* note 70, at 30.

84. EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4344) 14 (June 21, 1986).

ering with discount fares is no substitute for a comprehensive dismantling or reworking of the price-fixing system.

Memorandum No. 2 would eliminate bilateral provisions that provide for an equal division of traffic services between two Member States.⁸⁵ The proposal, however, contains a safety net permitting government regulation of capacity when the share of its national airline falls below 25 percent of the total traffic on that route.⁸⁶ Such capacity sharing agreements would be permissible provided that they are not obligatory, that they help ensure a spread of services during less busy periods, and that any party may withdraw on three months notice.⁸⁷ There appears to be a consensus, however, to move to a less liberal 60/40 capacity share on a given route within a three-year period.⁸⁸

Capacity controls, while relaxed under present proposals, still constitute market-rigging. Although the Commission proposal seeks to free the airlines from controls exercised by Member States, it enables the Member States jointly to plan the capacity to be provided and assumes some governmental predetermination of capacity. Moreover, increased fare flexibility without capacity flexibility could prove meaningless. There would be no incentive to lower fares if an airline could not significantly increase capacity in order to carry the additional traffic generated by lower fares.⁸⁹

The proposed regulation included in Memorandum No. 2 implementing the competition rules in the air transport sec-

85. Memorandum No. 2, *supra* note 74, Annex I, arts. 1, 4, O.J. C/1-2.

86. *Id.* Annex I, art. 1.

87. COM(86) 328 final, Annex I. One commentator has noted that the three month notice provision, "held out as a significant concession, is in all probability no more than what airlines already have in their agreements." Stanbrook, *supra* note 81, at 56. The Commission, in addition to granting group exemptions for capacity sharing and tariff consultations, is prepared to grant a group exemption to pools which limit the transfer of revenue between airlines to one percent of the revenue earned on a particular route by the transferring partner. COM(86) 328 final, Annex I. To allow airlines time to adjust to more open competition, the Commission would grant these three group exemptions from the competition rules for a trial period of three years and subject to compliance with certain conditions. *Id.*

88. EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4428) 5 (Nov. 12-13, 1986); *see infra* note 113 and accompanying text.

89. *See* Feazel, *European Nations Near Agreement Allowing Airlines Greater Freedom*, AVIATION WEEK & SPACE TECH., Feb. 17, 1986, at 38.

tor⁹⁰ is necessary to provide a comprehensive administrative machinery assuring uniform application to Member States. It would give the Commission the necessary powers to investigate, make decisions and impose penalties;⁹¹ it also determines the procedures for granting exemptions from the ban on cartels under Article 85(3) or cease-and-desist decisions under Articles 85(1) or 86.⁹²

However, the direct applicability of the competition rules will not easily secure deregulation. The proposed regulation, aside from providing an exemption for certain technical cooperation agreements,⁹³ is concerned only with procedure and applicable only to air transport between Community airports.⁹⁴ The scope of the proposed regulation is limited, given that Articles 85 and 86 are directly applicable only to *enterprises* (i.e. airlines) and not to Member States.⁹⁵ The Commission has recognized that, to the extent airline tariff practices merely carry out government instructions, the planned regulation will not change the present situation.⁹⁶ To effect this change the conduct of Member States will have to be challenged under Article 90.⁹⁷ Yet, the regulation would at least ensure that the

90. In 1981 the Commission submitted to the Council a proposal for a regulation applying the competition rules to air transport. COM(81) 396 final, O.J. C 291/4 (1981). In 1982 a slightly revised version was presented to the Council. O.J. C 317/3 (1982). This was amended by Memorandum No. 2., *supra* note 72, Annex III, O.J. C 182/2. These amendments were later withdrawn and resubmitted. COM(86) 328 final.

91. O.J. C 317/3, arts. 13-15.

92. O.J. C 317/3. These procedural rules are modeled on both Regulation 17 and Regulation 1017/68, which governs transport by rail, road and inland waterway. *See supra* note 36. Consistent with Regulation 1017, the approach adopted for obtaining individual exemptions under Article 85(3) is less stringent than in Regulation 17. Agreements, decisions, and concerted practices do not have to be notified in advance. It is for the Commission alone, O.J. C 317/3, art. 7, acting either in response to a complaint or on its own initiative, to determine whether prohibition or exemption is justified in each case. *Id.* art. 4(3). In practice, however, companies desiring exemption of a restrictive practice must still make a formal application to the Commission. Unless the Commission opposes the practice within 90 days of publication of a summary of the application in the Official Journal, the restrictive practice is deemed exempt for the time already elapsed, and for the ensuing three years. *Id.* art. 5(3).

93. COM(86) 328 final, art. 2, at 3-4.

94. *Id.* art. 1(2), at 3.

95. *See EEC Treaty, supra* note 1, art. 85(1).

96. Comm'n, Tenth Report on Competition Policy ¶ 13 (1980).

97. *Id.*

Commission could avoid the vagaries of the Article 89 procedure and the self-serving exemptions granted by Member States under Article 88.⁹⁸

Memorandum No. 2 did not include provisions regarding market access—the right of an airline to operate services. But the Commission did propose amendments to a 1983 Directive on scheduled inter-regional air services between Member States.⁹⁹ That Directive has had a negligible effect in increasing market entry¹⁰⁰ because it permitted regional carriers to establish new services only between small regional airports involving routes of at least 400 kilometers and aircraft carrying no more than 70 passengers.¹⁰¹ Amendments would liberalize access from a central airport to a regional destination, eliminate the requirement that new routes be at least 400 kilometers long, allow carriers to operate flights that take off and land outside their home country—which is known as “fifth freedom” rights—and permit entry of more airlines on regional routes, subject to certain conditions.¹⁰²

Access to major airports is a sensitive issue and Member States are unlikely to reach a consensus in the near future on this point.¹⁰³ What is missing from the Commission amendments is a proposal to open *all* existing routes to new carriers, which would provide the very element of competition that the bilateral system by definition excludes. This type of free market access has been one of the cornerstones of U.S. deregulation.¹⁰⁴

The Commission's proposals are ambivalent, permitting greater flexibility within the existing system, on one hand, and

98. See Kuyper, *Airline Fare-Fixing*, *supra* note 51, at 229.

99. Council Directive No. 83/416, O.J. L 237/19 (1983).

100. Only 14 new routes have been opened since its passage. Feazel, *EEC Officials Draft New Directive to Ease Regional Airline Regulation*, *AVIATION WEEK & SPACE TECH.*, Apr. 14, 1986, at 37. The Directive had initially aimed to increase flexibility in market access in the area of regional transport. But, as adopted by the Council, it was substantially reduced in scope compared to the original Commission proposal. See Feazel, *EEC Examines Liberalization of Inter-regional Air Services*, *AVIATION WEEK & SPACE TECH.*, Nov. 11, 1985, at 32.

101. Council Directive 83/416, *supra* note 99.

102. COM(86) 424 final, O.J. C 240 (1986).

103. See *Editorial Comments: Liberalising Air Transport*, 23 *COMMON MKT. L. REV.* 517, 519 (1986).

104. Martin, *An End to Europe's Airline Cartel?*, *Wash. Post*, Sept. 21, 1986, at D8, col. 1.

modifying that system by applying the competition rules, on the other. But given the political conflicts between EEC institutions, the division between Member States,¹⁰⁵ and the division within the Commission itself over the pace of reform,¹⁰⁶ Memorandum No. 2 is unlikely to be passed.

C. ECAC Compromise Indicates Retreat

In January 1987, while the Commission's proposals remained blocked, the ECAC implemented "memorandums of understanding" partially liberalizing fare and capacity regulations among the ECAC's member countries.¹⁰⁷ These memoranda mirror compromise positions put before the Council in late 1986.¹⁰⁸ Although the Commission opposed the memoranda, and Great Britain, Ireland and the Netherlands refused to sign the agreement because they believed the reforms were not extensive enough,¹⁰⁹ the memoranda are now in effect for all other member nations and replace the 1967 agreement and existing bilateral agreements on fares and capacity.¹¹⁰

The memoranda set up zones of reasonableness for discount and deep discount fares, subject to several conditions.¹¹¹

105. The Member States have been described as falling into four groups: the "great liberalisers"(Netherlands, Great Britain and Ireland); those who would accept a measure of liberalization, but later rather than sooner (Germany, France and Luxembourg); those who wish to maintain fairly tough regulations but seem willing to move toward some liberalization (Belgium, Italy and Portugal); and the "champions of the restrictive regime" (Denmark, Spain and Greece). EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4427) 8 (Nov. 10-11, 1986).

106. Mr. Peter Sutherland, the Irish Commissioner responsible for competition, advocates an accelerated approach to deregulation, while Mr. Stanley Clinton Davis, the British Commissioner responsible for transport, supports a more cautious program. See Peel, *Commission Divided Over Airline Regulations*, Int'l Herald Tribune, June 12, 1986, at 2.

107. See *ECAC Approves Liberalizing Fare, Capacity Regulations*, AVIATION WEEK & SPACE TECH., Jan. 12, 1987, at 36 [hereinafter *ECAC Approves*].

108. See *supra* notes 82-88 and accompanying text.

109. *ECAC Approves, supra* note 107. The Dutch, British and Irish delegations to the ECAC found the proposals "hopelessly restrictive." *Civil Aviation Conference Presents No Solutions for Airline Deregulation*, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1302, at 280 (Feb. 12, 1987) [hereinafter *No Solutions for Airline Deregulation*].

110. *ECAC Approves, supra* note 103.

111. *Id.* The ECAC agreement establishes two fare zones, a discount zone for fares ranging from 65-90 percent of the economy fare, and a deep discount zone ranging from 45-65 percent of the full economy fare. To qualify for approval within the discount zone, trips must be round trip, with a minimum stay of six days or over a

The Council discussions in late 1986 had broken down over proposals to ease these discount fare restrictions.¹¹² Under these proposals, a Member State may intervene to regulate capacity if the market share of its national carrier falls below 45 percent on a given route.¹¹³ The memoranda do not give airlines the right of free access to routes, liberalize interregional service, or change the present system for determining first class, business or full economy fares.

This cautious three-year experiment is moderate enough to satisfy the Commission's more reactionary members but does little to further overall liberalization. Proponents of competition fear that the memoranda are an attempt to forestall a decision by the Council on the Commission's proposals, and that the impetus to achieve liberalization has spent itself on garnering concessions that fail to effect system-wide reform.¹¹⁴ Moreover, the memoranda are already outdated by more liberal bilateral agreements.¹¹⁵

Sunday, and a maximum stay of six months. Deep discount zone conditions include these conditions plus an additional one, such as going standby. See *EEC Deregulation Proposal Blocked While ECAC Plan Proceeds*, AVIATION WEEK & SPACE TECH., July 7, 1986, at 33-35 [hereinafter *EEC Deregulation*]. It has been estimated that more than half of European passengers are business travelers who could not meet the conditions for the discount fares. *Id.* at 35.

112. See *supra* note 83 and accompanying text.

113. *EEC Deregulation*, *supra* note 111, at 33. One commentator noted that the ECAC scheme presents no multilateral aspect other than the "multilateral agreement to tighten (instead of liberalize) the capacity clause of *bilateral* air agreements [T]he scheme amounts to *over-regulation* of both government- and airline-activity instead of effecting *de-regulation*." Wassenbergh, *The "Nouvelles Frontières" Case*, 11 AIR L. 161, 165 (1986) (emphasis in original).

114. See Donne, *Airlines given more freedom*, Fin. Times, June 28, 1986, at 1. The Secretary of State for Transport in the United Kingdom said the effect of the arrangements is "to shore up the existing system, rather than to make real steps in the direction of a more liberal regime." *No Solutions for Airline Deregulation*, *supra* note 109, at 280.

115. For example, the British and Dutch Governments negotiated a new bilateral agreement in 1984 liberalizing air services between their two nations. Fares need be approved only by the country where the flight starts (country of origin rule), airlines themselves may determine frequency and capacity levels, and any airline certified by the two nations may fly any route between the countries. See Brown, *Britain Urges Deregulation Effort in 1986*, AVIATION WEEK & SPACE TECH., Dec. 2, 1985, at 36. Traffic between the two countries grew by 24 percent during the first eight months under the agreement, seating capacity on the Amsterdam-London route grew by 77 percent between 1983 and 1986, and the number of airlines making nonstop flights between the two countries rose from seven to ten. Woolley, *Airline Liberalisation: Europe in Transition*, 41 INTERAVIA 859, 860 (1986). A liberalization of air routes be-

III. FLIGHT PATH FOR THE FUTURE

Government regulation of international air transport in a free or mixed economy has been justified in part by the oligopolistic nature of the airline industry and by its status as a quasi-public utility.¹¹⁶ Because the industry is capital intensive, market entry is not easy.¹¹⁷ With a limited number of large suppliers, governments rely on IATA's tariff coordinating function to avoid tariff wars.¹¹⁸ Through the framework of IATA, a sophisticated, reliable, and highly regulated, international air transport system has been created.¹¹⁹ This system has made possible, for example, the "interlining" process by which air tickets paid in the currency of one state are accepted by most of the world's airlines.¹²⁰ Moreover, this regulated system can also mean regular service to small regional airports, consistent service standards and convenient flight schedules.¹²¹

For all its convenience, however, the present system has spawned indiscriminate protectionism. Dependence on state intervention in the form of bilateral agreements has resulted in the introduction of partisan, non-economic elements into the system, such as national defense, prestige and foreign policy concerns.¹²² National carriers may be required to earn specified amounts of convertible currency, maintain a level of employment in excess of real need, support a domestic aircraft manufacturing industry, or operate commercially unsound routes consistent with a particular foreign policy.¹²³ Moreover, a national airline is a "flag carrier" that expresses national

tween Ireland and Great Britain has resulted in fares falling from £94 to £69 and a thirty percent increase in passengers. *The Beginning of the End*, *supra* note 72, at 72.

116. See P. HAANAPPEL, *supra* note 15, at 47.

117. *Id.*

118. *Id.* Deregulation critics point to several factors, including a market that can reasonably support only a limited number of competitors, highly variable demand and difficulties in forecasting demand—some even arguing that there are low barriers to market entry—as tending to lead to over-capacity and, thus, predatory pricing. Garland, *supra* note 15, at 231.

119. Dagoglou, *supra* note 13, at 337.

120. *Id.*

121. See Carey, *Common Market Prods Europe's Airlines to Cease Anti-Competitive Agreements*, Wall St. J., Aug. 20, 1986, at 19, col. 2.

122. See P. HAANAPPEL, *supra* note 15, at 49.

123. See B. GIDWITZ, *supra* note 11, at 19-26. For example, both British Airways and Air France receive substantial governmental subsidies to operate the commer-

pride and is thought to deserve national protection.¹²⁴ Thus, political aims have a significant impact on international air transport.

Because the EEC is a relatively small geographic area with a large number of sovereign states, the deficiencies of the present system are glaringly apparent. As Member States often combine tariff control, capacity control and pooling arrangements, there is almost no competition between airlines.¹²⁵ Government control over market entry and the absence of price competition under IATA accomodates inefficiency, results in high fares and inadequate profits, and deprives consumers of a free choice of airlines and services.¹²⁶

The protectionist character of the present system fosters conservative rather than innovative policies¹²⁷ and may adversely affect the level of service offered travelers. It is unlikely that significant changes could be achieved at the national level.¹²⁸ The European consumer would likely benefit from the introduction of greater competition into this system.¹²⁹ More reasonable fares would no longer keep the less affluent consumers on the ground. Air travel would be opened to a

cially nonviable Concorde, a product of British and French state aircraft industries. B. GIDWITZ, *supra* note 11, at 21.

124. Dagtoglou, *supra* note 13, at 343.

125. P. HAANAPPEL, *supra* note 15, at 37.

126. Colegate, *Pricing in International Air Transport—A British View*, in *INTERNATIONAL AIR TRANSPORT*, *supra* note 21, at 142.

127. Raben, *supra* note 21, at 18.

128. *Id.* at 21.

129. At present less than 10 percent of European citizens use air transport services. EUROPE, AGENCE INTERNATIONALE D'INFORMATION POUR LA PRESSE DOCUMENTS (No. 4453) 16 (Dec. 17, 1986). In North America, where 91 percent of the miles flown by passengers were on discount fares—almost double the percentage for Europe—the growth in the number of passengers from 1981 to 1985 was 36.2 percent, compared with 10.3 percent in Europe. *The Beginning of the End*, *supra* note 72, at 71. Given Commission estimates that forty percent of EEC airline costs are "manageable," Memorandum No. 2, ¶ 42, one commentator noted that if competition forced a saving of only 10 percent of those costs, European consumers would save over half a billion U.S. dollars annually. See Stelzer, *Air Transport Deregulation: The U.S. Experience and its Applicability to Europe* (speech delivered at symposium sponsored by the Institute of Air Transport, Paris, France, May 21, 1984), in 1984 *Vital Speeches of the Day* 694, 698. An analysis of air fares within the EEC published in 1986 reports substantially lower air fares where competition exists with charter airlines, where more than one national airline has access to a route, or where competition related to Great Britain's bilateral agreements has arisen. See Garland, *supra* note 15, at 206 n.77.

wider market and would offer a greater variety of airlines and prices.

The international legal underpinnings of the air transport industry do not preclude the introduction of effective economic competition into air transport. The implementation of "zones of reasonableness" for air fares on the North Atlantic route between the United States and ECAC member countries¹³⁰ illustrates the viability, under certain conditions, of a free competition system not only in a domestic environment but also in an international context.

While European policymakers have been unable to agree on the method for liberalization of air transport, the large majority reject the applicability of American-style deregulation to Europe.¹³¹ A "go-slow" attitude and an unwillingness to disrupt the existing bilateral system best characterizes the European approach.¹³²

Although relevant, comparisons with the U.S. experience are not wholly valid. The United States is a large single market, while the EEC is a series of fragmented markets made up of 12 sovereign nations. Labor costs, air navigation charges, landing fees and fuel costs are higher in Europe than in the United States.¹³³ Member States argue that the existing ar-

130. The U.S.-ECAC Memorandum of Understanding went into effect in 1982, establishing "zones of reasonableness" for fares on scheduled North Atlantic flights within which governments may not interfere. P. HAANAPPEL, *supra* note 15, at 164. Unlike the ECAC memorandums of understanding recently implemented within Europe, *supra* notes 111-114 and accompanying text, this understanding does not exclude zones for first class, business and full economy fares. P. HAANAPPEL, *supra* note 15, at 164. The ECAC and the United States have recently approved a new two-year memorandum of understanding on North Atlantic fares allowing a 10 percent drop in the deep discount "zone of reasonableness." *ECAC, U.S. Renew North Atlantic Pact, AVIATION WEEK & SPACE TECH.*, Feb. 23, 1987, at 32.

131. Condom, *Liberalism and Public Service*, 41 *INTERAVIA* 725, 725 (July 1986); *see also* Comment of Stanley Clinton Davis, Commissioner for Transport of the European Commission (Memorandum No. 2 "says 'No' to U.S.-style deregulation. We refuse to bring about this sort of market free-for-all."), *quoted in* Comm'n Press Release, IP (85) 385 (Sept. 11, 1985), 4 *Comm. Mkt. Rep. (CCH)* ¶ 10,726, at 11,700.

132. *See, e.g.*, Garland, *supra* note 15, at 204. The package of proposals included in Memorandum No. 2 expressly "maintain[s] the structure of the present regulatory system based on bilateral intergovernmental agreements." Memorandum No. 2, *supra* note 74, at I (summary).

133. P. HAANAPPEL, *supra* note 15, at 177. Yet airline costs within Europe are only 20 percent higher than in the United States, while ticket prices for comparable services are on average 35 to 40 percent higher. *Europe's Air Cartel*, *supra* note 2, at

agement ensures service to less populated regions¹³⁴ and preserves jobs where job creation has been a problem. In addition, most European governments consider their state airline, no matter how inefficient and unprofitable, to be essential to national prestige, while the United States has a relaxed view about the fate of any one of its carriers.¹³⁵ In Europe, much more so than in the United States, there also exists attractive alternatives to scheduled air travel. An extensive and relatively low-cost charter service,¹³⁶ a highly developed and heavily subsidized rail system and excellent international highways satisfy the needs of many intra-European travelers.¹³⁷

European air transport, however, is not so unique that it needs to be shielded from itself or from the effects of greater competition. Productivity gaps between U.S. and European airlines reveal that the present system has sheltered waste and inefficiency.¹³⁸ The Commission has noted that experience outside Europe evidences the positive economic consequences of deregulation. These include increased passenger traffic, stimulus to civil aircraft industry, and growth of ancillary services such as hotels, restaurants and tourism.¹³⁹ U.S. deregula-

24. Thus, there remains a 15 to 20 percent margin for decrease through increased competition. *See id.*

134. Salzman, *supra* note 21, at 419.

135. Comm'n Press Release, *supra* note 131.

136. The European charter airline industry has "traditionally played much the same role in Europe as the no-frills carriers . . . have done in the American domestic market." *Europe's Air Cartel*, *supra* note 2, at 26. Charter services supply sixty percent of all travel within Europe. *Id.* However, one commentator argues that a charter flight "cannot reasonably be compared to a scheduled flight; for it is attached to so many conditions that, in practice, it can only appeal to the tourist who plans his journey well in advance, while it offers no genuine alternative to the scheduled flight for the 'normal' passenger." Dagtoglou, *supra* note 13, at 340 n.24.

137. *See* Rek, *supra* note 22, at 7. "In Europe, even deregulated scheduled airlines are unlikely to be able to match the fares offered by subsidised surface transport If road and rail had to cover their costs from revenues, as even state-owned airlines have to, then there would be real competition between transport modes in Europe." *Id.* Indeed, Great Britain, France and Germany are presently considering a proposal to build a railway tunnel beneath the English Channel (a "chunnel") as part of a high-speed rail network linking the big cities of northwestern Europe. *See Europe's Supertrains*, *THE ECONOMIST*, Feb. 14, 1987, at 41.

138. *The Gap*, *AIR TRANSPORT WORLD*, Nov. 1985, at 2 (editorial).

139. *See* Comm'n Press Release, IP (86) 48 (Jan. 30, 1986), 4 Comm. Mkt. Rep. (CCH) ¶ 10,762, at 11,750. The Federal Aviation Administration estimates that 400 million Americans will take to the air in 1986, 20 million more than in 1985. *Turbulent Times*, *THE ECONOMIST*, Sept. 6, 1986, at 28. Airline traffic has grown nearly 55 percent since 1978, when deregulation formally began. *Airport Oasis*, *AIR TRANSPORT*

tion proves that airlines free of regulatory constraints can become highly innovative and competitive, offering lower fares and improved services for most travelers.¹⁴⁰

The argument that free competition would lead to an unsafe air transport system is unconvincing.¹⁴¹ Fears for safety could be allayed if EEC Member States maintain a reliable system of government technical supervision and guard against reductions in government expenditures for air traffic and safety inspections.¹⁴² Anxiety concerning loss of jobs in the overmanned airline industry following deregulation is balanced by the proposition that increased competition and the accompanying lower fares would increase passenger traffic and in turn give rise to new carriers, more flights, and eventually more jobs.¹⁴³ Memorandum No. 2's mention of safety and employment protection concerns¹⁴⁴ indicates that the Commission recognizes that profitability and efficiency are not the only goals of air transport policy.

The major European airlines are presently in as good a position economically as they have ever been to meet the challenges of a deregulated system.¹⁴⁵ Oligopolies and predatory

WORLD, Jan. 1987, at 2 (editorial). In Europe, airframe manufacturers, with an eye to U.S. developments, have become a lobbying force for liberalization in the hopes that relaxed regulations will bring new sales opportunities. See *Liberalized European Airline Rules Could Increase Airframe Sales*, AVIATION WEEK & SPACE TECH., Apr. 14, 1986, at 39.

140. Gordon, *GAO Finds Deregulation Has Led to Lower Fares, Improved Service*, AVIATION WEEK & SPACE TECH., Dec. 16, 1985, at 33. One study estimates that U.S. deregulation has saved travelers US\$6 billion annually. *Study Stresses Benefits Achieved With Deregulation*, AVIATION WEEK & SPACE TECH., May 19, 1986, at 44 [hereinafter *Study Stresses Benefits*].

141. See Salzman, *supra* note 21, at 409; Stelzer, *supra* note 129, at 696. The National Transportation Safety Board cited 1986 as one of the safest years ever for U.S. airlines. *Safety Board Cites 1986 as one of Safest Years Ever*, AVIATION WEEK & SPACE TECH., Jan. 19, 1987, at 36. However, there remains the danger of struggling airlines taking short cuts on safety to cut costs. See Garland, *supra* note 15, at 226-29.

142. See Garland, *supra* note 15, at 228-29.

143. *Id.* at 224 (footnote omitted).

144. Memorandum No. 2, *supra* note 74, ¶ 44. It has been estimated that civil aviation within the Community employs 300,000 people, and approximately 200,000 ancillary workers. BACKGROUND REPORT, *supra* note 15, at 2.

145. The 20 large scheduled airlines of the Association of European Airlines (AEA) projected a US\$950 million net profit in 1986, *Major European Airlines Expect \$1-Billion Profit in 1986*, AVIATION WEEK & SPACE TECH. July 7, 1986, at 41, and annual traffic growth rates within Europe are estimated at 5.4 percent for the next five years. Feazel, *World Airline Profits Fall Following Decline in Fares*, AVIATION WEEK & SPACE TECH., July 14, 1986, at 41.

pricing are not inevitable in the wake of deregulation. While the degree of U.S. airline consolidation¹⁴⁶ present a frightening prospect to European flag carriers, some of the larger mergers could have been avoided if the U.S. government had moved to block the emerging oligarchy.¹⁴⁷ Similar problems in the EEC could be avoided through "merger control" under Community law.¹⁴⁸ The establishment of broad zones of reasonableness for tariffs and a vigilant stance by the Commission seems the best protection against predatory pricing practices.¹⁴⁹ Moreover, the Commission has noted the importance of applying rules on subsidies in Articles 92 and 93 of the Treaty to prevent the distortion of competition by subsidy wars.¹⁵⁰ Member States could, however, reimburse airlines for maintaining services to less populated and economically unprofitable areas.¹⁵¹

In practice, deregulation could mean simply treating aviation like other industries. Increased market access and flexibility in pricing and route structure are the key elements to increased efficiency. Within the legal and institutional framework of the EEC's regional grouping of states, the best elements of U.S.-style deregulation and IATA multilateralism could be merged. The intra-European market is a mature transport market where the public utility character of air trans-

146. Scheduled airlines in the United States have undergone a huge expansion and subsequent contraction since deregulation began. See Ott, *Competition, U.S. Merger Policy Quicken Consolidation Trend*, *AVIATION WEEK & SPACE TECH.*, July 14, 1986, at 33. From a peak of 229 scheduled carriers in 1984, 132 airlines have since been eliminated by acquisition, merger, liquidation and decertification. *Id.* A recent consolidation saw the merger of People Express, New York Air and Continental Airlines under the umbrella of Texas Air Corp.—a holding company which also owns Eastern airlines—to form a combined fleet of nearly 600 large transports. See Preble, *People Express, New York Air Merging Under Continental Umbrella*, *AVIATION WEEK & SPACE TECH.*, January 19, 1987, at 32.

147. Alfred E. Kahn has stated, "[I]t is very difficult to believe that future administrations will be as negligent as this one about enforcing [the antitrust laws] against mergers between competitors . . ." Kahn, *The Flying Monopoly Game*, *Wash. Post*, Aug. 26, 1986, at A17, col. 2.

148. Weber, *Air Transport in the Common Market*, *supra* note 51, at 300.

149. See Garland, *supra* note 15, at 231.

150. See Memorandum No. 2, *supra* note 74, Annex IV; Comment, *Introducing Competition to the European Economic Community Airline Industry*, 15 *CAL. W. INT'L L.J.* 364, 392-93 (1985).

151. A similar process exists in the U.S., B. GIDWITZ, *supra* note 11, at 14, and it appears that service to smaller communities has actually improved since deregulation. See *Study Stresses Benefits*, *supra* note 140, at 44.

port could be retained alongside competition in a system of "regulated competition."¹⁵²

In light of the present difficulties of EEC institutions in formulating a uniform regulation to be applied to the air transport sector, the Commission should use such powers as it has to compel liberalization. The Commission should continue unilateral actions against airlines under Article 89 and begin procedures against Member States under Article 90 to stimulate an evolutionary process of development, while being careful to avoid conservative backlash against a perceived "heavy hand."¹⁵³ Moreover, the negotiating of liberal bilateral agreements could provide the foundation for air services based on free market entry and unrestricted fares. Member States who support liberalization should seek to gain bilaterally what has yet to be gained collectively through political action at the Community level. An appropriate starting point is the elimination of the double approval rule and replacing it with a "double disapproval" or country of origin rule whereby the market is geared to the pace of the fastest runner.

These improvisations, though uncoordinated, are but a step toward reexamining the foundation of the air transport system, with a view toward systematic improvements. The Council must take decisive action on the entire package of Commission proposals as *originally* submitted, as well as allow the unrestricted development of regional air services. Under the Single European Act,¹⁵⁴ expected to enter into force sometime in 1987, proposals regarding the common transport policy need no longer be unanimous, but need only pass the Council by a majority vote.¹⁵⁵ An EEC-wide scheme, in order to prove effective, must liberalize capacity and market entry as well as tariffs. While Memorandum No. 2 seeks to relax pres-

152. See P. HAANAPPEL, *supra* note 15, at 49.

153. A source at the U.K. Department of Transport pointed out that some Council Ministers disliked being "bullied" by the Commission. *EEC Commission Advises Airlines*, *supra* note 72, at 116.

154. Single European Act, E.C. Bull. Supp. 2/86 (1986). The enactment of the Single European Act has been delayed by private litigation in Ireland challenging the instrument. See *Enactment of Single European Act Delayed When Ireland Fails to Deposit Instruments of Ratification*, 4 Comm. Mkt. Rep. (CCH) ¶ 10,849, at 11,996 (1987) (CCH Comment).

155. The Act amends Article 84 of the Treaty to provide for majority voting in the area of air and sea transport. E.C. Bull. Supp. 2/86, tit. II, § II(1), art. 16(5).

ent agreements and arrangements without significantly modifying the underlying system of bilateral agreements and inter-airline cooperation, it is far better than the measures being implemented by the ECAC, which provide for little more than cosmetic changes.¹⁵⁶ However, the involvement of the ECAC in any EEC approach is important, since that group is comprised of all the states which might wish to change the scene of European air transport.

The full application of the competition rules would lead to a new system of regulations limited to the territory of the EEC. However, it would also affect states which exercise fifth freedom rights within the Community, that is, the right to undertake commercial transport between third countries. Any deregulated system in Europe must involve the extension of fifth freedom rights. This could be achieved under a "plurilateral approach,"¹⁵⁷ which has been touted as a flexible means of transition towards a liberal framework at the Community level. This approach involves a combination of bilateral agreements that completely liberalize traffic between two states.¹⁵⁸ By combining these agreements, airlines in states party to the plurilateral agreement would share full fifth freedom rights with any other two parties to the agreement.¹⁵⁹

In conjunction with a "plurilateral" approach, Member States could institute a market-by-market approach calling for liberalism between dynamic markets, such as the United States and Western Europe, that are characterized by high density routes and elastic prices.¹⁶⁰ Once full fifth freedom rights are recognized throughout the EEC, Member States could also attempt a reorganization of the airline route system along the lines of the American "hub-and-spoke" system, whereby airlines route their flights from one part of the system into an intermediate "hub" where passengers connect with flights to

156. See *supra* notes 107-15 and accompanying text.

157. Wassenbergh, *A New Plurilateral Approach to International Air Transport Regulation*, in *INTERNATIONAL AIR TRANSPORT*, *supra* note 21, at 209 [hereinafter Wassenbergh, *A New Plurilateral Approach*]. A draft plurilateral air transport agreement is then presented. See Veenstra, *The 'Plurilateral Air Transport Agreement': A Draft for a Better Regulatory Instrument*, in *INTERNATIONAL AIR TRANSPORT*, *supra* note 21, at 215.

158. Wassenbergh, *A New Plurilateral Approach*, *supra* note 157, at 209-10.

159. *Id.* at 209.

160. Ghandour, *supra* note 21, at 56-57.

other parts of the system.¹⁶¹ This results in fewer nonstop flights but more efficient use of aircraft, higher load factors, and lower costs.¹⁶²

CONCLUSION

EEC competition policy in the air transport sector remains decentralized and ineffective. The legislative vacuum that has existed since the Community's inception thirty years ago has permitted the air transport sector to develop unconstrained by competitive pressures and insulated from the normal consequences of commercial inefficiency. There is an urgent need for regulations that confer on the Commission the powers of investigation and sanction necessary to properly apply competition rules to air transport. At present, uncertainty still hovers over this sector, and the progress of liberalization has been left unresolved in the wake of *Nouvelles Frontières*. Immediate action at the Community level must be taken before political momentum to reform the present regulatory regime dissipates.

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161. Garland, *supra* note 15, at 224.

162. *Id.*

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