

Fordham International Law Journal

Volume 21, Issue 3

1997

Article 2

Air Transport and EC Competition Law

Lars Gorton*

*

Copyright ©1997 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Air Transport and EC Competition Law

Lars Gorton

Abstract

This Essay is about air transport and EC competition Law. The air transport industry has, in many countries, developed as a mixture of public utility and commercial venture. With the deregulation of the airline market, the EC Commission has also, to an increasing extent, become involved in the competition aspects of the airline industry. Part I deals with the transportation industry. Part II discusses liberalization within the EC. Finally, Part III deals with competition rules.

AIR TRANSPORT AND EC COMPETITION LAW

*Lars Gorton**

INTRODUCTION

The air transport industry has, in many countries, developed as a mixture of public utility and commercial venture. Frequently, governments have been deeply involved in the air transport industry and many rules and regulations have surrounded its use and commercial operation. The air transport industry has, to a large extent, developed in an international environment. It has mainly been geared at passenger transportation and the carriage of valuable and perishable goods. During the last decade, faster trains, better trucks, and faster ships with quicker turnaround have become competitors to the airlines. The congestion of airports has also contributed to new traffic schemes.¹

The history of aviation is relatively short. Since early times there have been economic regulations concerning the right to fly over and land in national territory, the right to pick up and deliver passengers and cargo,² and environmental and safety issues. Although U.S. international air carriers have basically been privately owned, there is a conundrum of U.S. rules and regulations concerning air transport. In many other countries, the air carriers have been wholly or partly state owned, with monopoly rights tied to strict government control and regulation. The international transport industry has also been controlled through

* Professor of Business Law at the University of Lund; Adjunct Professor of International Business Law at the Stockholm School of Economics.

1. *See, e.g.*, BLANCO & VAN HOUTTE, *EC COMPETITION LAW IN THE TRANSPORT SECTOR* 1 (1996).

2. *See* Chicago Convention on Civil Aviation, April 4, 1947, art. 1, pt 1 (stating that "contracting states recognize that every state has complete and exclusive sovereignty over the airspace of its territory."). International air transport is — or at least has been — based on rights of access, which the different states grant one another by multilateral or bilateral air service treaties, or which are granted upon application. The rights of access have been generally described by reference to the so called five freedoms of the air. These freedoms are both of "technical" type and of "commercial" type. *See* LØODRUP, *LUFTRETT* 34 & 116 (1965); BERNITZ, GORTON & GRÖNFORS, *SJÖFART OCH KONKURRENSRATT*, GÖTEBORG 19 (1976); CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 8 (1962).

international bodies such as the International Air Transport Association ("IATA") and the International Civil Aviation Organization ("ICAO") with respect to tariffs, other conditions of carriage, safety measures, and airport slots.³

During a period beginning in the United States in 1978, there has been a trend of deregulation, particularly with regard to economic regulation, which has been replaced by corresponding antitrust rules.⁴ This change in U.S. policy has been of paramount importance for the policy makers in Brussels. The changes caused by the new policy have affected several projects of the airline industry, both on a macro level and on a micro level. Thereby, there have been effects on the international level both intergovernmentally and between the airlines and the different international bodies involved. There have also been effects on the internal company policy of the different airlines.

Historically, the idea of IATA has been to promote safe, regular, and economical air transport for the benefit of the peoples of the world, and to foster air commerce cooperation with ICAO. The further legal development has included various aspects such as the development of the Conditions of Carriage, the Bermuda Agreement — a bilateral air transport agreement between the United States and the United Kingdom, one of the first of almost 4,000 bilateral air transport agreements signed and registered with ICAO — as well as a number of Traffic Conferences for the purpose of controlling prices charged by international airlines. The Traffic Conferences have been central in reaching nearly 400 resolutions covering many aspects of air travel, including multilateral interline traffic agreements and passenger and cargo services conference resolutions governing standard formats and technical specifications for tickets and air waybills. The IATA Tariff Conference was granted a block exemption from the provisions of community competition law,⁵ but IATA's legislative importance with respect to air transport

3. An airport slot is the time allocated to airlines at airports during which they may use the runway for take off and landing. See, e.g., DEVINE, THE ECONOMICS OF COMMUNITY AIR TRANSPORT AND THE IMPACT OF AIRPORT SLOT ALLOCATION (1997); Sundberg, *Airline Deregulation. Legal and Administrative Problems* [hereinafter *Airline Deregulation*], in GENERAL REPORTS XIV INTERNATIONAL CONGRESS 541; VAN BAELE & BELLIS, COMPETITION LAW OF THE EUROPEAN COMMUNITIES 1030 (1988).

4. See *Airline Deregulation*, *supra* note 3, at 535.

5. IATA, 50 DYNAMIC YEARS: A BRIEF HISTORY OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION (1995).

related to the European Community has gradually decreased since the development of community legislation on air transport and competition policy in this particular field.⁶

Certain features should be kept in mind with respect to airline service. There is an important distinction between scheduled air service and charter, a distinction which has been upheld in much legislation.⁷ National governments have also given particular preference to national "flag" carriers, which are usually scheduled airlines, before charter airlines and other scheduled airlines.⁸ In order to compensate for a statutory obligation to operate services, even at a loss, tariffs, among other things, have been subject to approval. Because the regulatory system generally prevented the sale of tickets at prices below the approved tariffs, "national carriers" for a long time never had to face real competition. They did not have to fear foreign competition of scheduled traffic due to bilateral air service agreements which divided capacity between the "national carriers" involved.

Apart from the competition policy, certain other factors have played an important role for changes on airline industry, such as environmental factors, like pollution and noise, and congestion and technological factors, like size of air planes, jet engines, and computerization. Thus, one could make a distinction between competition questions related to airlines and ancillary service on the one hand, and on the other hand, various policy and competition questions.

Thus the international aviation scene has changed drastically. After mergers and bankruptcies, the number of U.S. international air carriers has diminished radically, for example, Pan Am and TWA, and new low budget airlines, such as South West Airlines and Value Jet, have entered the market, and new alliances with regional air carriers have sprung up. On the worldwide scene, several forms of cooperation have been used, and now international alliances are also developing at a growing pace.

The changes occurring have taken many different directions: the privatization of state-owned flag carriers, new forms of cooperation between air carriers and also between aircraft man-

6. See BLANCO & VAN HOUTTE, *supra* note 1, at 26.

7. See SUNDBERG, AIR CHARTER. A STUDY IN LEGAL DEVELOPMENT 51 (1961).

8. See *Airline Deregulation*, *supra* note 3, at 571.

ufacturers, hub bypass⁹ due to congestion and also the comfort of passengers, mergers and joint ventures, the coming up of new regional air carriers, and new alliances among the large international carriers and the smaller regional carriers.

Different types of cooperation may have a comparatively narrow scope, such as common technical exchange agreements, common training programs, cargo handling or luggage handling, reservation systems, and inter line agreements. But they may also have a wider coverage, as seen, for example, in franchise agreement¹⁰ and full-fledged joint venture agreements.

With the deregulation of the airline market, the EC Commission has also, to an increasing extent, become involved in the competition aspects of the airline industry.

The promotion of competition is considered one of the fundamental means to achieve a number of objectives of Article F of the Treaty of Rome.¹¹ The Treaty also sets out as a goal in Article 3e the creation of a common transport policy ("CTP").¹² The Treaty contains general rules on freedom of movement of services,¹³ transportation,¹⁴ competition,¹⁵ state aid,¹⁶ and safety, which in various ways may serve as instruments to strengthen or weaken competition. Furthermore the Merger regulation plays an important role.¹⁷ As a general observation, the relation be-

9. Hub bypass is where an airline, instead of servicing the preferred large airports, carries passengers directly between smaller airports.

10. To my knowledge, there is so far no EC case involving the franchising of air carriage, and the method is quite new in this area. One of the few cases involving franchising is *Pronuptia v. Pronuptia*, Case 161/84, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414, 445. See generally VALENTINE KORAH, *FRANCHISING AND THE EEC COMPETITION RULES* (1989). Commission Regulation 4087/88 provides a block exemption for distribution and service franchises, which might also apply to airline franchises, even if they are not the immediate target. In aviation, this cooperation form has been used by British Airways, Delta, and Lufthansa. Commission Regulation No. 4087/88, O.J. L 359/46 (1988)

11. Treaty Establishing the European Economic Community, Mar. 25, 1957, art F, 298 U.N.T.S. 11 [hereinafter EEC Treaty] in *TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987).

12. See BLANCO & VAN HOUTTE, *supra* note 1, at 5 & 7.

13. EEC Treaty, *supra* note 11, art. 59, 298 U.N.T.S. at 40; cf. *id.* art. 52ff, 298 U.N.T.S. at 37.

14. *Id.* art. 74-84, 298 U.N.T.S. at 44-47.

15. *Id.* art. 85-90, 298 U.N.T.S. at 46-50.

16. *Id.* art. 91-92, 298 U.N.T.S. at 50-51.

17. See Commission Regulation No. 4064/89, O.J. L 257 (1990).

tween Article 61 on the freedom to provide services, and the transportation and competition rules should be noted. Another general observation is that the Commission has become gradually more interested in involving itself in the deregulation of the air transport industry, in bringing up the air transport policy on a European level, and in applying the competitions rules to the airlines. This has also meant that both Directorate General IV (competition) and Directorate General VII (transportation) have become involved, causing a certain conflict of interest. There has, thus, been a development leading to a gradual increase of new regulations and directives aimed at the airline industry.

I. *THE TRANSPORTATION INDUSTRY*

A. *In General*

The transportation industry involves the carriage of goods or passengers. There are, however, substantial differences between the various modes of transport with respect to their use and markets. Air carriage is mainly geared at the transportation of passengers, and carriage by ship mainly at the carriage of goods. Private cars, buses, publicly operated trains; domestic, regional, global aircraft; and various types of trade vessels may compete with each other in different market segments. Thus, short haul air carriage may, for example, have private cars as its most fierce competitor.

These factors also explain the differences in the legal framework between the different means of transportation and the different trades. As already mentioned, there is one fundamental distinction in all transport services, namely that between liner service (scheduled service) and charter (tramp). Another important feature, particularly in relation to air traffic, is government involvement as owner, financier, and regulator.

Seen from the customer's point of view "air carriage" means the combination of various types of services, which may not be distinguishable, that serves him well and at a reasonable price. Thus certain items such as ground handling, interline service, coordination of air schedules, reservations and ticketing, and airport congestion and air traffic control are different parts that together make up a package of air carriage service. In many ways IATA has contributed to the development of a rather effi-

cient total service for the passenger, and the criticism against air carriers is largely a consequence of high prices.

B. *The Swedish Market and the Competition Act (1993:20)*

Mention of the Swedish market should also be made as there is now in Sweden a competition act (1993:20) considered largely to be a blue copy of the EC Competition rules. It does not, however, contain the particular rules in the forms of subsequent regulations eventually developed in the European Community.

Article 6 of the Swedish act largely corresponds to Article 85 of the Rome Treaty, Article 19 to Article 86, and Article 34 to the Merger Regulation.¹⁸ Many of the block exemptions and other regulations or directives have, however, no equivalent Swedish rule, but it is specifically stated in the preparatory work that the Swedish competition act shall be applied in conformity with the EC law as it develops.

Because the EC rules on air transport have no set counterpart in domestic Swedish law, the question will sooner or later be, whether the whole "EC package of rules" will apply and whether Swedish competition authorities will in some instances fall back on the general Swedish rules only, which may appear tougher than the EC rules, lacking the relative precision given in later EC block exemptions and other rules.

C. *Rules On Air Transportation in the EC*

Title IV of the Rome Treaty singled out transportation as an industry exempted from the general EC competition rules and policies. Considerations were instead given to developing a common transport policy. Whereas Articles 74-83 of the Rome Treaty contain certain rules applicable to road, railroad, and inland waterway transportation, Article 84 states:

1. The provisions of this Title shall apply to transport by rail, road and inland waterway.
2. The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport. The

18. Council Regulation No. 4064/89. O.J. L 395/1 (1989), *corrected version in O.J. L 257/13 (1990)*.

procedural provisions of Articles 75(1) and (3) shall apply.¹⁹

Though Regulation 17/62 and the basic competition rules, Articles 85 and 86 of the Rome Treaty were generally implemented at the same time, Regulation 141/62 exempted the transport sector from the application of Regulation 17/62. Notwithstanding Regulation 141/62, the Commission found that regulation 17/62 still applied to certain services which are ancillary to air transport, such as ground handling service,²⁰ computer reservation systems,²¹ and computerized air cargo information systems.

Thus, for a long time, competition in the air transport market remained highly restricted with little interference from the EC Commission. Air traffic to a large extent continued to be based on bilateral agreements between states containing capacity-fixing provisions. International air transport in the EC also continued to be heavily regulated with high national barriers against the entry of new competing air lines. Tariffs were largely preset and maintained.²²

In 1974, the European Court of Justice in the *French Seaman* case²³ ruled that the general principles in the Rome Treaty, including the competition rules in Articles 85 and 86, had general application. This came to have immediate effect in the field of maritime law, where the so-called UNCTAD Code was discussed. The case did not, however, have much impact on the air transport sector, and its practical effects in aviation were, for the time being, limited. Some attempts towards liberalization were then taken gradually, such as the first memorandum published by the Commission in 1979,²⁴ and the Council Directive liberalizing scheduled inter-regional services. But by large no far reaching

19. EEC Treaty, *supra* note 11, art. 84, 298 U.N.T.S. at 47.

20. Commission Decision No. 85/121/EEC, O.J. L 46/51 (1985).

21. Commission Decision No. 88/589/EEC, O.J. L 317/47 (1988).

22. In 1986, before the enactment of Regulation 3975/87, the Commission made use of Art. 89 in connection with capacity and revenue sharing arrangements, joint ventures, and etc., in violation of Art. 85. See COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTEENTH REPORT ON COMPETITION POLICY 1986, at 36 (1987); COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTEENTH REPORT ON COMPETITION POLICY 1987, at 46 (1988); COMMISSION OF THE EUROPEAN COMMUNITIES, TENTH REPORT ON COMPETITION POLICY 1980, at 136-38 (1981).

23. Commission v. French Republic, Case 167/73, [1974] E.C.R. 359.

24. 12 E.C. BULL., no. 5 (1979).

measures were taken.²⁵

In the mid 1980s, changes came gradually, mainly due to the deregulation of domestic air transport in the United States, which affected the structure of the U.S. industry, its competitiveness with other airlines, and the general worldwide air carriage "climate";²⁶ the decision of the European Court of Justice ("ECJ") in the *Nouvelle Frontière* case,²⁷ which confirmed that the Treaty's competition rules applied to air transport; and the conclusion of the Single European Act in 1986,²⁸ whereby a qualified majority was adopted for decisions in many cases involving the air carriage sector.

The latter meant that an internal market for EC air transport was to be achieved by gradually breaking down restrictions on competition between airlines of different States, abolishing national barriers, and moving from a bilateral to a multilateral system. In addition, competition rules were to be applied in order to eliminate anti-competitive arrangements between airlines. This is also how the air transport policy came to develop side by side with the competition rules and policies. It is, then, also important to keep in mind that on an EC Commission level, air transportation and competition fall under two different directorates, namely DG VII and DG IV, respectively.

II. LIBERALIZATION WITHIN THE EC

A. In General

Following the 1979 memorandum issued by the EC Commission with respect to air transport policy,²⁹ a second one was published in 1984.³⁰

Thus, by the end of 1987, a first package of liberalization

25. Balfour, *Air Transport - A Community Success Story?*, in CML REVIEW 1026 (1994); see SLOT & DAGTOGLOU, TOWARD A COMMUNITY AIR TRANSPORT POLICY 5 & 63 (1989); BALFOUR, AIR LAW AND THE EUROPEAN COMMUNITY 5 & 19 (1990).

26. *Airline Deregulation*, *supra* note 3, at 536.

27. *Ministere Public v. Lucas Asjes*, Joined Cases 209-213/84, [1986] E.C.R. 1425, [1986] 3 C.M.L.R. 173.

28. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957 [hereinafter EEC Treaty], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987)).

29. 12 E.C. BULL., no. 5 (1979).

30. Commission of the European Communities, Progress Towards the Development of a Community Air Transport Policy, COM (84) 72 Final.

measures was adopted.³¹ The European Parliament made an evaluation of the effects of the first package, and in view of this evaluation, the Commissioner concluded that the first package brought too little change, and that harsher steps were needed in order for better results to be achieved through a second package. The Commissioner also stated that only a further, well balanced, liberalization of competition could lead to progress towards a liberal common transport market.

The second package was adopted by the Council in 1990 revoking the provisions of the first one on fares, access, and capacity, and replacing them with more liberal provisions, which will be discussed below.³² In a further step, a third package meant a more radical change, including three regulations.³³ It removed most barriers to an internal community air transportation market and introduced new rules on airline licensing.³⁴

B. *Licensing of Air Carriers*

According to the regulation on licensing an airline³⁵ ("Licensing Regulation"), an applicant seeking a license to operate an airline has to satisfy certain requirements, such as financial and technical standards and nationality of ownership³⁶ and control. There has been much discussion on the interpretation of the ownership and control requirements enshrined in Article 4(2) of the Licensing Regulation.³⁷ In *Swissair/Sabena*,³⁸ the

31. Council Directive No. 87/601, O.J. L 374/12 (1987); Council Decision No. 87/602/EEC, O.J. L 374/19 (1987); Council Regulation No. 3975/87, O.J. L 374/19 (1987); see BLANCO & VAN HOUTTE, *supra* note 1, at 23.

32. Council Regulation No. 2342/90, O.J. L 217/1 (1990); Council Regulation No. 2343/90, O.J. L 217/8 (1990); see BLANCO & VAN HOUTTE, *supra* note 1, at 24.

33. Council Regulation No. 2407-2409/92, O.J. L 240/1 (1992); see BLANCO & VAN HOUTTE, *supra* note 1, at 25.

34. It deserves to be mentioned that several different types of rules have been introduced gradually, such as rules on computerized reservation systems, ground handling, airport charges, and passenger protection (denied boarding), which I here leave out. See *Airline Deregulation*, *supra* note 3, at 541; see also VAN BAEL & BELLIS, *COMPETITION LAW OF THE EUROPEAN COMMUNITY* 655 & 664 (1994). I shall, however, before discussing the competition rules related to airlines, briefly touch upon certain rules, which have been introduced as a consequence of the second, and to some extent the third, packages. These rules concern fares, access, and capacity.

35. See Council Regulation No. 2407/92, O.J. L 240/1 (1992).

36. It deserves to be mentioned that there should no longer be any restriction on nationality requirements with respect to an airline company as far as EU citizens or companies are concerned.

37. Council Regulation No. 2407/92, art. 4(2), O.J. L 240/1, at 2 (1992).

Commission clarified those requirements.

Firstly, Article 4(2) was essentially designed to safeguard the interests of the Community's air transport industry, and to ensure that the market access was effectively exploited by Community air carriers and not by third country air carriers. This is, thus, another area where the European market is opened and free internally with common barriers to the outside. Secondly, 50% plus one share of the equity capital of the air carrier was to be held by Member State nationals or companies. An airline that fulfilled these requirements would be granted an operating license allowing it to operate to almost any destination within the Community. Moreover, the Commission stressed that the authorization was required exclusively for "the purposes of ensuring safety and liability standards." Nonetheless, the national licensing authorities have had certain leeway in applying the regulation, which may lead to somewhat diverging national practices, and, ultimately, distortions of competition within the common market.³⁹ Therefore, the Council called upon the Commission to examine the application of the rules in order to ensure their uniform enforcement by all Member States.

C. Access to Air Routes

The Regulation on Access⁴⁰ requires Member States to allow any licensed Community carrier to operate between any two points within the Community, subject to certain exceptions. According to this regulation, there was a progressive implementation of market access rights along the following timetable: a) as of January 1993, access to routes between Member States in principle was to be, and basically has been, fully liberalized; b) until January 1996, access to domestic routes was partly restricted by allowing Member States to maintain exclusive concessions which were granted prior to the entry into force of the first package on routes, where other forms of transport could not ensure an adequate and uninterrupted service; c) until April 1997, access to domestic routes could be restricted for air carriers licensed in the respective Member State; and d) cabotage operations contin-

38. Commission Decision No. 404/95/EC, O.J. L 165 (1995).

39. MICHAL NIEJAHN, *THE NEXT IMPLEMENTATION ROUND* (1996).

40. Council Regulation No. 2408/92, O.J. L 240/8 (1992).

ued to be partially limited, but the limitations principally expired in March 1997, completing the liberalization process.

D. *Fares and Rates for Air Services*

The regulation on fares⁴¹ removes all restrictions on Community air carriers, whether on a scheduled or non-scheduled basis, from charging what fares they wish on intra-Community air routes. Member States cannot require prior authorization of fares more than twenty-four hours before they become effective. The regulation contains safeguard clauses that, under certain conditions, allow for intervention by Member States and the Commission in view of withdrawing excessively high basic fares or stopping further fare decreases in cases of sustained downward developments of air fares.

E. *Slots*

IATA has been deeply involved in the slot allocation in international air service.⁴² The airlines regulate themselves in accordance with certain principles and guidelines set up by IATA. One such principle, known as Grandfather Rights, gives "absolute priority [to] . . . an airline using a particular slot during a season . . . to continue using it during future corresponding seasons; it may change the type of service, type of aircraft, even the destination and still enjoy the right to use the slot to the exclusion of other interested airlines."⁴³ Under Regulation 1617/93, slot allocation and airport scheduling concerning air services between Community airports have been exempted because it "can improve the utilization of airport capacity and airspace, facilitate air traffic control, and help spread out the supply of air transport services from the airport."⁴⁴ The exemption requires an open and non-discriminatory application of the measures agreed-upon; thus, in order to be exempt from Article 85(1), consultations on slot allocation and airport scheduling must be open to all interested airlines, and any rules of priority must not be related to carrier identity or nationality or category of service, whether directly or indirectly.

41. Council Regulation No. 2409/92, O.J. L 240/15 (1992).

42. See BLANCO & VAN HOUTTE, *supra* note 1, at 181; DEVINE, *supra* note 3, at 3.

43. BLANCO & VAN HOUTTE, *supra* note 1, at 181.

44. Commission Regulation No. 1617/93, O.J. L 155/1 (1993).

For the exemption to apply, new entrants must have priority regarding fifty percent of newly-created, unused, or given-up slots. In addition, carriers participating in the consultations must be granted access to certain information relating to slot allocation.

There has been much discussion on the distribution of the economic value of airports slots, and particularly whether the slots have an economic value to be enjoyed by the party, could be sold, or should be given up for free.⁴⁵ The slots have been used several times by the Commission as a tool when discussing questions related to mergers and alliances.

III. THE COMPETITION RULES

A. *In General*

It is apparent the rules already mentioned have a direct or indirect influence on the competitive environment of airline service. Parallel to this development, a number of competition rules have developed.

Following the deregulation of airline transportation in the United States, there has been a restructuring of U.S. airlines involved in international, national, or regional air traffic.⁴⁶ Generally, the number of airlines has decreased, but on the whole the competition seems to have led to lower rates. In the European market, a similar development could be discerned, but in Europe many governments have been directly or indirectly financially involved in "national flag carriers." Many European airlines — like, for that matter, air carriers from other parts of the world — in order to survive, have developed various types of cooperation arrangements, both with other international carriers and with regional air carriers, whether in the form of capacity planning, revenue sharing, alliances, mergers, franchising arrangement, or code sharing, all which have competitive implications.

As mentioned above, the EC competition rules were previously not directly applicable to air transport, despite the Commission's 1979 proposal.⁴⁷ This changed, however, with the

45. See DEVINE, *supra* note 3, at 40.

46. See *Airline Deregulation*, *supra* note 3, at 547.

47. 12 E.C. BULL., no. 5 (1979).

ECJ's decision in the *Nouvelle Frontière* case.⁴⁸

The *Nouvelle Fontière* case, although somewhat particular, has been understood to lay down the rule that competition rules apply to air transport even in the absence of an implementing regulation. Both the Commission and the competition authorities of the Member States from then on had the competence to extend the enforcement of the competition rules to air carriage. As mentioned above, the Commission subsequently put forward certain proposals in the field of competition law in relation to airline service, which were adopted in December 1987 and came to form a part of the first package as Council Regulations (EEC) 3975/87 and 3976/87.⁴⁹

There were then three different procedural frameworks in which EC competition law could be applied to the air carriage sector, namely:

- A) through the general implementing Regulation 17/62, as far as services ancillary to air transport were concerned;
- B) through the limited regime of art. 88 and 89 of the treaty, as far as flights between the Community and third countries were concerned; and
- C) through the air transport implementing regulations, Regulations 3975/87 and Regulation 3976/87, as far as flights between Community airports were concerned.

In 1992, the Council adopted the third package, introduced some new rules, and sharpened some of the former ones. A Community-wide licensing framework was established for air carriers in the European Community,⁵⁰ and certain previously protected routes were opened to all EC carriers as of January 1, 1993, with the remaining routes opened up as of April 1, 1997.⁵¹ Furthermore, there was a liberalization of the Member State-based fare approval system.⁵² It was also thought that this liberalization was to be backed up through additional competition rules.⁵³

48. *Ministere Public v. Lucas Asjes*, Joined Cases 209-213/84, [1986] E.C.R. 1425, [1986] 3 C.M.L.R. 173.

49. Council Regulation No. 3975-76/87, O.J. L 374/1 (1987).

50. Council Regulation No. 2407/92, O.J. L 240/1 (1992).

51. Council Regulation No. 2408/92, O.J. L 240/8 (1992).

52. Council Regulation No. 2409/92, O.J. L 240/15 (1992).

53. See COMMISSION OF THE EUROPEAN COMMUNITIES, XXTH REPORT ON COMPETITION POLICY 1991, at 69 (1992).

The Regulation 2409/92 in Article 6 also contains the basis for the prohibition of air fares which are "excessively high" or which are so low so as to result in "widespread losses among all air carriers concerned." Pressure from certain new low budget airlines cause Europe's leading carriers to consider new steps to protect their traffic. This included a couple of regulations relating to competition rules, of which one extended the scope of the existing regulation authorizing the issuance of block exemptions, made some changes to the categories of agreement eligible for exemption, and extended the period of validity of any block exemptions adopted beyond the end of 1992.⁵⁴

Below I shall deal somewhat with the application of the competition regulations and with those block exemptions which have been introduced regarding mergers, capacity planning, revenue sharing, and tariff consultation.

B. Concentrations

Apart from Articles 85 and 86 in the Treaty, there are two Council Regulations relating to the control of concentrations between undertakings.⁵⁵ Although the merger regulation is a comparatively late step with respect to EC antitrust law, I shall in this connection take up some merger and acquisition cases from the air industry.

One case involving aircraft, illustrative as to the determination of aircraft market, is the *Aerospatiale - Alenia/De Havilland*.⁵⁶

Aerospatiale SNI and Alenia-Aeritalia produce civil and military aircraft, satellites, and space systems. At the time Alenia and Aerospatiale already controlled the Groupment d'Interet Economique ("GIE") Avions de Transport Regionale ("ATR") the most important producer of short haul turbo-props aircraft in the world, and were going jointly to buy from Boeing the assets of the de Havilland division.

Because the aggregate turnover of Aerospatiale and de Havilland was over 5 billion ECU, and the Community turnover of Aerospatiale and Alenia over 250 million, the proposed merger had a Community dimension.

54. Council Regulation No. 2410/92, O.J. L 240/18 (1992).

55. Council Regulation No. 4069/89, O.J. L 257/13 (1989); Council Regulation No. 4064/89, O.J. L 395/1 (1989).

56. Commission Decision No. 91/619/EEC, O.J. L 334/42 (1991).

Aerospatiale and Alenia gave notice to the Commission of their plan to buy de Havilland. After having first suspended the merger for further examination under Article 2 on June 12, 1991, the Commission initiated proceedings under Article 6(1)(c) of the Regulation.

In order to establish the relevant market, the relevant product market and the relevant geographical market had to be determined. The Commission had to go through the market structure and determine the impact of the new concentration. In this connection, the Commission had to assess the strength of the remaining competition's strength and the customers' strength and the potential entry into the market.

The market was considered to be the worldwide market (excluding China and Eastern Europe) because "there is no tangible barriers to the importation of these aircraft into the Community and there are negligible costs of transportation."

The analysis of the relevant produce market was divided into the demand side and the supply side of the market. According to the Commission, the turbo-props from 20 to 70 seat aircraft were not in the same market as the jet aircraft because the latter were more expensive to buy and operate. The Commission also found that there was a difference in relation to the saving of time for the customer. The aircraft under 20 seats could not be seen as belonging to the same market. Thus, the Commission established that in order to reflect the different conditions of competition, the product market had to be divided into three segments, distinguishing between commuters with 20 to 39 seats, 40 to 59 seats, and 60 seats and over.

The parties argued that there were only two segments, namely the 20 to 50 seats and over because most national regulations require a second air hostess in the latter segment. Later, the parties argued that the number of seats was not the only consideration, but technical and performance factors were decisive for the choice of aircraft. The Commission did not accept these arguments.

The Commission did not think that a new type of aircraft would be in the market as it takes many years to develop such a product. It was, however, always possible for a manufacturer to "stretch" an old model, but such a new model would then be in a different segment and thus not in the same relevant product

market. It was also estimated that the short haul turbo-props aircraft demand could be maintained until the mid-1990s and then decline and stabilize. The Commission also found that there was no synergy between jet aircraft development and turbo-props aircraft, explaining why Boeing wanted to sell de Havilland and why the other jet aircraft manufactures were not likely to enter the market.

The parties also argued that IPTN from Indonesia had developed a 50 seat turbo-props aircraft for the domestic market and might enter the relevant market in the mid-1990s.

In evaluating the relevant market share of the proposed merger, the Commission added the number of units already delivered plus the ones in order but not yet delivered and found that the combined ATR/de Havilland entity would have:

- 64% of the world market and 72% of the Community market in the 40 to 59 seats segment;
- 76% of the world market and 72% of the Community market in the 60 and over seats segment;
- 50% of the world market and 65% of the Community market in the overall turbo-props aircraft market.

The Commission found that such a share of the market would eventually lead to an even larger share. The new entity would concert its sale strategy by offering more flexibility in its prices and financing. Because it would be able to offer the whole range of commuters, ATR/de Havilland would offer some mixed deals to airlines in need of different sizes of aircraft. Furthermore, the new group would have a strong position in the 51 to 70 seats segment where the most important expansion was expected in the European market.

Also, according to the Commission the elimination of de Havilland, the world's second most important manufacturer, would have a major impact on the structure of the competition, especially as de Havilland was planning to enter the 51 to 70 seats market with its Dash 8-400. The airline companies could make substantial savings on the pilots training and maintenance by using only one "technology". Because the new entity would be the only one to offer the whole range of commuter to its customers, it would increase even more its position on the market. By gaining the customers of de Havilland, the new entity would even broaden its base of customers up to 80, and the savings of

using only one "technology", a "locked-in" effect of the customers would be created. The Commission further assessed the strength of the competitors and found that Fokker would be the most important competitor and with only 9% of the overall market and 22% of the 40 to 59 seats segment, Fokker would be the most important competitor to the new entity.

The Commission blocked the merger, finding that "the combined entity, ATR/de Havilland, could act to a significant extent independently of its competitors and customers on the world markets as defined for commuters of 40 to 59 seats and 60 seats and over." It was the first time that the Commission blocked a merger, and its decision "was criticized for an unduly narrow product market definition that exaggerated economic power, which is a criticism on the application of the Regulation."⁵⁷

I concur in the criticism of the Commission's relevant market segmentation, but for different reasons. For one, the new entity would be able to offer commuters the whole range of the market. Also, the "locked-in" effect was based on the savings made due to the use of only one "technology," but in fact, the ATR and the de Havilland would still work with two different "technologies".

Also, the supply market side could be criticized. Due to the predicted decline of demand in the mid-1990s, the Commission did not foresee the entry of new competitors. However, if ITPN from Indonesia and Aero Czechoslovak developed a short haul turbo-props aircraft, they might very well enter the market. In fact, the reasons why Boeing wanted to sell de Havilland were not clearly discussed by the Commission.

It is hard to evaluate the immediate effects of this decision on airline service, and whether the "product market" as determined here would be upheld with respect to airline service.

Furthermore it is interesting to compare the Commission's view in this case with its clearance of the merger between Boeing Company and McDonnell Douglas Corporation.

During the negotiations with the Commission, Boeing offered certain commitments to resolve the competition problems

57. WEATHERILL & BEAUMONT, *EC LAW* 827 (1995).

which were identified by the Commission and which primarily included the following items:

- the cessation of existing and future exclusive supply deals;
- commitments to report annually to the Commission on military and civil aeronautics R & D projects benefiting from public funding;
- the “ring-fencing” of MDC’s commercial aircraft activities;
- the licensing of patents to other jet aircraft activities; and
- commitments not to abuse relationships with customers and suppliers.

The Commission considered the commitments given by Boeing as sufficient to clear the identified competition problems. In its considerations, the Commission found that the market for large commercial jet aircraft is world-wide and that the EU is an integral and important part of this world market. It is also stated that European airlines should account for almost a third of future demand over the next ten years period, and that the combined market share of Boeing and MDC is about two-thirds of the EU market. In its considerations for clearing the merger the Commission had to balance commercial and military interests as well as geographical, i.e, European and U.S. interests.

C. Other Developments

1. Tariff Consultations

Principally, Article 85(1)(a) prohibits price-fixing, and, as mentioned above, the ECJ stated in *Nouvelle Frontière*⁵⁸ that Article 85 might apply to the fixing of air tariffs within the framework of IATA. Tariff consultations have, however, not been attacked as price fixing by the Commission. Following Regulation 1617/93,⁵⁹ the Commission granted a block exemption to certain consultations as to passenger ticket prices, as well as, cargo tariff rates on scheduled air services between airports within the European Community. The exemption with respect to cargo tar-

58. *Ministere Public v. Lucas Asjes*, Joined Cases 209-213/84, [1986] E.C.R. 1425, [1986] 3 C.M.L.R. 173.

59. Commission Regulation No. 1617/93, O.J. L 155/18 (1993).

iffs has, however, been withdrawn during 1996, and from July 1, 1997, the air carriers have had to abide by the new situation.

Recital 5 of Regulation 1617/93 underlines that the consultations must not amount to tariff fixing in practice. The Regulation applies, provided that such consultations are voluntary and open to any carrier operating or intending to operate direct or indirect services on the route in question, and that the participants are not bound by any proposal.

Art. 4(1)(f) of the Regulation lays down that any such consultation on air fares and cargo rates must not also involve discussions on capacity or agreements on agents' remuneration "or other elements of the tariffs discussed." Recital 5 further adds that tariff consultations "must not exceed the aim of facilitating interlining" and have to be "limited to fares and rates which give rise to actual interlining." Thus, the Regulation takes into consideration the passenger's/cargo owner's interest in purchasing a single ticket — combining services of more than one carrier and, provided that it is permitted by the first reservation, to change a reservation to another service on the same route operated by the same carrier. According to Article 4(1)(b) of the Regulation, it is, however, permissible for a carrier who is participating in tariff consultations to refuse the combination of its services with those of another participating carrier or refuse voluntary reservation changes "for objective and non-discriminatory reasons of a technical or commercial nature, in particular where the air carrier effecting carriage is concerned with the credit worthiness of the air carrier who would be collecting payment."

The *British Midland v. Air Lingus* case⁶⁰ also involved the question of refusal to interline. The Commission has considered the interlining and the tariff consultation between airline carriers. Interlining is regarded as one of IATA's major achievements. It consists of the Multilateral Interline Traffic Agreement ("MITA"), where airlines are authorized to sell each other's services. As a result, a single ticket can be issued comprising different segments to be performed by different airlines. The main advantages of MITA are: a) passengers can buy a single ticket providing for transportation by different carriers, b) airlines are able to supplement their network and frequencies, and c) travel agents benefit by avoiding the loss of time and ex-

60. Commission Decision No. 92/213/EEC, O.J. L 96/34 (1992).

tra-work involved in issuing separate tickets. The vast majority of the world's airlines, accounting for approximately 95% of all scheduled traffic, participate in the interlining system.

Similarly, the airlines organized under IATA meet every year to discuss Cargo and Passenger Tariffs. This is not necessarily an infringement of Community rules, due to certain exemptions from the EC competition rules.

The *British Midland/Aer Lingus* case had its roots in 1964, when Aer Lingus concurred with British Midland's participation in the MITA. After having been awarded the right to operate London's Heathrow airport to Dublin, on February 22, 1989 British Midland announced its intention to commence services on that route on April 28, 1989. On April 7, 1989, Aer Lingus gave notice that it terminated its concurrence with the British Midland participation in MITA, effective on May 7. Furthermore, Aer Lingus refused to interchange its and British Midland's tickets on the Heathrow to Dublin route. Aer Lingus did not cancel its interline agreements with the other airline operating on the route. Aer Lingus declared that it wished to remain a dominant carrier, while British Midland did not have the resources to offer a similar frequency or service.

On February 7 and 8, 1991, Aer Lingus attended the Special Meeting of the Cargo and Passenger Tariff conference. At the opening of the Conference, the Aer Lingus representative declared that the company would not participate in consultations concerning the routes from Dublin to Amsterdam, London, and Paris, but nevertheless took part in the discussion.

The Commission found that Aer Lingus infringed both Articles 85(1) and 86 of EC Treaty. The infringement of Article 85(1) was due to the fact that tariff consultations could not exceed the lawful purpose of facilitating the interlining. Aer Lingus was obliged to interline with all carriers involved.

Moreover, Aer Lingus, in refusing to interline with British Midland on the route from Dublin to London, pursued a strategy which — even if not wholly effective — was both selective and exclusionary, and restricted the development of competition on the Heathrow to Dublin route, thereby infringing Article 86 of the EC Treaty.

The Commission, by Article 12 of Regulation 3975/87,⁶¹ may impose fines on an undertaking participating in an infringement of Article 85(1) or Article 86 of the EC Treaty. In fixing the amount of the fine, regard was taken both to the gravity and duration of the infringement. The Commission found that the imposition of a fine on Aer Lingus was justified in so far as the infringement was related to Article 86. In view of the fact that Commission Regulation 84/91⁶² had only just entered into force when the infringement related to Article 85 was committed, the Commission did not, however, impose a fine on account of the parallel violation of Article 85. The Commission considered that a duty to interline with British Midland should be imposed on Aer Lingus for a two-year period, and during this period the Commission had the possibility to decide whether this duty needed to be extended. A fine was imposed on Aer Lingus.

This brings us back to one of the main problems in EC competition law, namely the determination of the market, the relevant product market, and the geographical market. In connection with the *de Havilland* case, a determination was made of the relevant product market. In my view, and I think this is supported by the Commission and case law, the relevant product market should be regarded as scheduled air transport of passengers. The Commission has stated on a number of occasions that scheduled air transport is not substitutable for charter traffic, and it follows that transport of cargo is not substitutable for passenger services.

The relevant product market, however, also has to be seen in light of the geographical market, because depending on the geographical market, air transport meets competition from other means of transport. Such means of transport may include train, bus, high-speed ferry, and car. It is commonly accepted that, over certain distances, surface means of transport may compete with air transport.

When it comes to determining the relevant geographical market, this, of course, also depends on the traffic performed by the parties involved. As seen by the *Aer Lingus* case, the basis was a city pair analysis. Depending on the agreement or measures

61. Council Regulation No. 3975/87, art. 12, O.J. 374/1, at 5 (1987), *as amended*, O.J. L 240/1, at 5 (1992).

62. Commission Regulation No. 84/91, O.J. L 10/1 (1991).

involved, the situation may differ considerably from a local market to a regional market and to a global market. There may be an interdependence between the lines of the different air carriers involved where the combination of the regional air carrier as feeder line will be important for the international carrier's services.

This may also change the geographical market from a narrow market taking its point of departure in the regional carrier's more limited geographical market into an international market, depending on the combined net of lines. This also seems to be, and rightly so, the view of the Commission.

In one case, Commission case law suggests that the analysis should aim at a wider market than the city pair involved and the alternative routes between the actual starting point and destination. The Commission has also, in several decisions, shown its willingness to take into consideration competitive factors outside the traditional city pair analysis.

At the same time, there are certain cases where the Commission has been inclined to adopt a market definition based on the provision of the services in question along individual air routes between city pairs. A similar situation may occasionally apply in respect of other modes of transportation.

2. Coordination of Schedules

In accordance with Regulation 1617/93, the Commission also exempted arrangements on joint planning and coordination of the schedules of air services between Community airports, and it follows from the Twentieth Report on Competition Policy,⁶³ that such joint planning could also include connecting flights between different airlines. These different arrangements have, according to Regulation 1617/93, recital 3, served to develop and maintain air service during less busy hours of the day, during less busy periods, or on less busy routes, as well as to develop and maintain for the benefit of the air traveler of onward connections.

Regulation 1617/93, Article 2(a)(ii), allows planning and coordination regarding the minimum capacity to be provided

63. COMMISSION OF THE EUROPEAN COMMUNITIES, XXTH REPORT ON COMPETITION POLICY 1991, at 60, ¶ 71 (1992).

on routes where carriers have agreed on coordination.⁶⁴ The benefit from the block exemption, however, presupposes that such planning or coordination does not limit the capacity to be provided by participating carriers or serve to share capacity.

According to Regulation 1617/93, the establishment of schedules that facilitate interlining connections between coordinating parties, as well as the minimum capacity to be utilized on such schedules, may be achieved by means of a binding arrangement. This means that other types of planning and coordination have to be achieved through non-binding agreements.

The participating carriers have to be free to introduce additional services or to withdraw from the cooperation altogether for future seasons without incurring penalties or being required to give more than three months notice. Finally, the conditions require that the planning and coordination do not attempt to influence the schedules of non-participating carriers.

As mentioned above, the Commission has taken a stance concerning a cooperation agreement between Lufthansa and Scandinavian Airlines System ("SAS") based on Article 85 of the Rome Treaty and considering Regulation 3975/87 as amended by Regulation 2410/92.⁶⁵ The Commission, in great detail, considered the company structure, the relative sizes of the airlines, and their profitability.

The agreement between the parties aimed at the creation of a long term alliance in order to carry through an integrated system for air carriage. The Joint Venture shall be owned equally by the parties and shall have world wide cover and common marketing. It will, however, not have sufficient financial resources by itself, but will be dependent on the owners supplying the services in their respective names.

Although the Commission considered that certain elements of the agreement could be beneficial for competition, the restriction of competition was considered to be unacceptable unless certain conditions were met. Such conditions were, for example, a reduction of departures in case competitors would decide to enter certain markets, the giving up of certain slot times, the obligation to offer and allow interlining agreements with

64. Commission Regulation No. 1617/93, art. 2(a)(ii), O.J. L 155/18, at 20 (1993).

65. See Council Regulation No. 3975/87, O.J. L 374/1 (1987), as amended by Council Regulation No. 2410/92, O.J. L 290/18 (1992).

newcomers, the termination of certain other cooperation agreements, and the duty to keep the Commission advised on certain items.

Based on Article 89 of the Rome Treaty, the Commission has also started investigating a number of other transatlantic alliances, such as British Airways' alliance with American Airlines, Lufthansa's alliance with SAS and United Airlines, and KLM's alliance with North West.

A summary of the agreements of the first three alliances has been published by the Commission with the request for third parties to submit their comments.⁶⁶ A corresponding summary has also been published in respect to the KLM agreement with North West.⁶⁷

D. Article 90 and State Aid

Article 90 falls under the Rules on Competition, applying to public undertakings and undertakings to which Member States grant special or exclusive rights. Many airlines are characterized in this way, which is why the Commission has had reason to apply Article 90 in some instances, although only a few.⁶⁸ Presumably it will be less important in the future in this field following a continued privatization and deregulation.

This is not the proper context for going into the question of state aid, but some words should be mentioned about this development due to its importance for the competitive environment. State Aid is regulated in Articles 92 to 94 of the Rome Treaty, and the Commission has issued certain guidelines on their application.⁶⁹ On the other hand, it was only in 1991 that the Commission initiated its first major investigation after having approved Belgian State aid to Sabena. This would form part of a restructuring package, where the aid would be the last step.⁷⁰ Since then, there have been a number of cases where that question of state aid to national flag carriers has been examined.

Thus, the Commission has examined several cases involving

66. Commission Notice, O.J. C 289/4 (1996).

67. Commission Notice, O.J. C 117/8 (1997).

68. Re Transport to the Canary & Balearic Islands, [1988] 1 C.M.L.R. 331.

69. Commission of the European Communities, Progress Toward the Development of a Community Air Transport Policy, COM (84) 72 Final.

70. Commission Decision No. 91/555/EEC, O.J. L 300/48 (1991).

Air France,⁷¹ Iberia,⁷² Air Lingus,⁷³ TAP,⁷⁴ Olympic,⁷⁵ and Air France.

In spite of a somewhat harder attitude, the Commission has largely allowed such capital injections but often with provisos. Basically, authorizations of state aid injections have been granted based on presentations of comprehensive and self-contained restructuring programs, designed to restore the carrier's financial health within a reasonable time period implying or explaining that further aid will not be granted in the future. The Commission has imposed a number of conditions on the national authorities and the air carriers to ensure that competition is not affected. For instance, the Court imposed five such conditions in the Sabena case and twenty one in the Olympic Airways case.

Furthermore, the Commission made a commitment in 1994 in its guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to state aids in the aviation sector,⁷⁶ not to allow any further restructuring aids, unless it is justified by exceptional circumstances, unforeseeable and external to the company, the one-time-last-principle. Still, a Member State can inject capital into an air carrier under certain circumstances. According to case law of the ECJ, the market economy investor principle can be applied by the Commission for determining whether or not a capital injection should be scrutinized or not.⁷⁷ Consequently, capital injections into state-owned carriers are only subject to the one-time-last-time-principle if the market economy investor principle demonstrates that it constitutes state aid.

The market economy investor principle has been used twice thus far. In the Iberia case, the Court concluded that it was not a question of state aid, although the Spanish authorities made a second capital injection. The Commission approved the plan on January 31, 1996, due to changed circumstances and a number of commitments made by the Spanish authorities. There are

71. See Commission Press Release IP (91) 1024 and IP (92) 587.

72. See Commission Press Release IP (92) 606.

73. Commission Decision 94/118/EEC, O.J. L 54/30 (1994).

74. Commission Decision 94/653/EEC, O.J. L 254/73 (1994).

75. Commission Decision 94/696/EEC, O.J. L 273/22 (1994).

76. O.J. C 350/5 (1994).

77. Kingdom of the Netherlands and Leeuwarder Papierwarenfabriek BV v. Commission of the European Communities, Joined Cases 296 & 318/82, [1985] E.C.R. 809, [1985] 3 C.M.L.R. 380.

three further precedents of May, July, and October 1995 involving, respectively, Lufthansa, Sabena, and the French air carrier AOM. The Sabena precedent shows the determination of the Commission to 1) adhere to the one-time-last principle; 2) treat privately and publicly owned air carriers equally; and 3) apply the market economy investor principle primarily to structural, rather than operational, conditions.

E. *Swedish Examples*

The Swedish competition authorities have considered some cases concerning air line traffic and ancillary services. I will mention them because they cover certain parts of the competition aspects.

One case concerns the acquisition rule, and here KV accepted the acquisition by the Norwegian air carrier, Braathen Safe, of 50% of the shares of Transwede Airways AB. Through this acquisition, Transwede would have a new and strong owner with good knowledge of the airline business, thus making the Swedish airline market more competitive.

Another case concerns interesting agreements, where SAS, at an early stage, refused interlining agreements with Nordic East. Based on the *Aer Lingus/British Midland* case and the particular circumstances, KV decided to sue SAS in the City Court of Stockholm for fines. SAS has explained that it has been very careful in not refusing to enter into an interline agreement but just postponed a positive decision waiting for a clarification of the situation.

A third case in the same field concerns an interline agreement of a particular type, where KV has decided not to allow this particular interline agreement.

CONCLUSION

There is a conflict between DG IV (competition) and DG VII (transportation). The respective commissioners do not always share common views on questions that may relate to one or the other or possibly both directorates. This may complicate certain matters.

It could also be pointed out that the present transportation commissioner, Neil Kinnock, in different connections has expressed his concern of the generally high European airfares —

notably certain Scandinavian routes. The competition commissioner, van Miert, has involved himself in certain aspects of airlines competition, particularly the air mileage bonus. "Slot times" is another important factor considered by the transportation and competition authorities.

It seems as if the whole transportation sector has developed into an area where several questions with a competition edge have come into focus. There is an interaction between the different sets of rules that have been gradually introduced. The general frame laid down in the primary rules has presupposed a development of secondary rules and case law, whereby an intricate system of rules has and is gradually being developed.

Furthermore, as shown above, the last years have seen a number of competitive arrangements, such as the acquisition of some or all shares in other air carriers, code sharing, and franchising, which may be considered anticompetitive.⁷⁸ There is, thus, a continuous development of cooperative and corporate measures taken by the airlines as there is an ongoing development in DG IV and DG VII respectively. This means that it is very hard to give a "present state of the market" considering the different aspects. For instance, franchising has developed in another business surrounding, and the group exemption with respect to franchising and/or the implications of the *Pronuptia* case may be questioned as not suitable for the airline business. Code sharing is a practice that is particular for the airline business and whether code sharing could be regarded as anticompetitive from the Commission's or the KV's point of view is not easy to foresee, although, according to my view, code sharing, like interlining, is rather beneficial to the customers, and therefore rather not anticompetitive. It is, thus, not always easy to combine the competition authorities' standpoint in certain cases with the effects of their decisions in other cases.⁷⁹ Although it is my belief that there will be a certain caution in the application of the competition rules without considering the particular effect on the air transportation policies.

I submit that there is a need for an overall view, where the relevant authorities take into consideration the effects of their

78. See *Airline Deregulation*, *supra* note 3, at 555.

79. Thus I have, for instance, difficulties in understanding the Commission's view on through rates compared to its pursuit of a need of interlining agreements.

decisions in different cases and try to develop consistent holdings. It may be worth quoting some points from Karl-Heinz Neumeister's personal note on "Airfares in a competitive industry."⁸⁰ This is, of course, a plea from one side but nevertheless merits to be mentioned:

In reviewing the progress of liberalization to date, the Commission sees itself as taking the lead, with the airlines lagging behind. In reality the airlines have responded to their markets with countless new fares, but we have yet to see a single action by the Commission which has helped the airlines to reduce their costs.⁸¹

As we have seen, the slot time problem plays an important role in airline policy and the particular importance of Heathrow has been recognized in the case of BA and America Airlines before the EC Commission. On June 4, 1997, a statement by John H. Anderson, Jr. was released where he concluded with the following words:

As a result of the challenges inherent in addressing the barriers to entry at Heathrow, significant intergovernmental agreement will be needed well beyond the scope of a traditional open skies accord. In particular, additional agreement will be needed between the United States, United Kingdom, and EU on issues regarding the transfer of Heathrow slots and use of its facilities to ensure substantial new entry by U.S. airlines at the same time American Airlines and British Airways commence joint operations. Otherwise, consumers in both countries will likely not enjoy the full benefits of lower fares and better service that open skies agreements are designed to bring.⁸²

80. *Airfares in a competitive industry*. (Assoc. of Eur. Airlines), Oct. 31, 1996 (on file with the *Fordham International Law Journal*),

81. *Id.*

82. U.S. General Accounting Office, Rep. No. GAO/T-R CED-97-103. *Competition Issues in the U.S.-U.K. Market* 18 (June 4, 1997) (testimony before the Subcommittee on Aviation, Committee on Commerce, Science, and Transportation).