

Fordham International Law Journal

Volume 23, Issue 6

1999

Article 15

Defense Strategies of National Carriers

Romina Polley*

*

Copyright ©1999 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Defense Strategies of National Carriers

Romina Polley

Abstract

This Essay will examine strategies implemented by national carriers in the European Union (or 'EU') to preserve their longstanding monopolies that were constructed and protected by Member States against new airlines emerging in the framework of the liberalization of European Community ("EC" or "Community") air transport. This analysis necessitates an assessment of whether liberalization of air transport in Europe has been a success, and if not, or not completely, what remains to be done to allow new entrants to challenge flag carriers, which still benefit from the advantages attributable to former protectionist regulation.

3. AVIATION

DEFENSE STRATEGIES OF NATIONAL CARRIERS

*Dr. Romina Polley**

INTRODUCTION

This Essay will examine strategies implemented by national carriers in the European Union (or "EU") to preserve their long-standing monopolies that were constructed and protected by Member States against new airlines emerging in the framework of the liberalization of European Community ("EC" or "Community") air transport. This analysis necessitates an assessment of whether liberalization of air transport in Europe has been a success, and if not, or not completely, what remains to be done to allow new entrants to challenge flag carriers, which still benefit from the advantages attributable to former protectionist regulation.

I. HISTORICAL DEVELOPMENT

To understand the current structure of the EC aviation industry and the origin of the advantages of national carriers that tend to persist even after liberalization,¹ one has to recall the time before liberalization.

A. Era of Bilateralism

For more than four decades, air transport in the Community has been dominated by a system of protection where national air carriers were protected by Member States against national and foreign competitors.² Under this system, each Mem-

* Attorney, Oppenhoff & Raedler.

1. See HANSJOCHEN EHMER, EIN WETTBEWERBSLEITBILD FÜR DEN LUFTVERKEHR. DLR 8 (1997) (summarizing study commissioned by German Transport Minister on European Air Transport Liberalization dated June 3, 1997, stressing that monopoly positions of national carriers are not attributable to advantages obtained in market but to regulation).

2. Ronald Schmid, *Introduction*, in 1 EUROPEAN AIR LAW 120 (Elimar Gjemulla, et al. eds., 1998).

ber State maintained one scheduled airline, in which it had at least a majority stake and controlling ownership. While this system was in place, each Member State had a statutory obligation, taken on as part of their responsibility to the public, to operate services on unprofitable routes.

On the domestic level, the national carrier had to be protected against other scheduled and less regulated charter airlines. This protection was mainly achieved by national aviation laws, which often allowed only one scheduled airline—namely the “flag” carrier—to operate scheduled services, and stressed the distinction between charter and scheduled air traffic through a system of tariffs.³ Tariffs were subject to approval by the competent aviation authority in each Member State that considered the public service obligation of the national carrier, and maintained a high level of airfares. Ticket sales for other airlines that were below the approved tariffs were prohibited. Therefore, the national carrier was not subject to competitive pressure in its pricing scheme.

On the international level, national carriers were protected against foreign competitors under a regime of bilateral agreements between Member States.⁴ This system resulted from the recognition of each Member State’s sovereignty over its air space and, consequently, air services, which were formulated in the Chicago Convention of 1944⁵ (“Chicago Convention”). Until the late 1970s, most bilateral agreements explicitly defined the routes that could be flown, the number of airlines designated by the two contracting Member States that could operate on these routes, and also the capacity and frequency of flights. Capacity was regulated in a variety of ways—for example, through splitting capacity between two countries so that each would have a fifty percent share. The bilateral agreements also provided for methods of determining airfares, and contained requirements concerning the ownership of airlines. This system of bilateral agreements was supplemented by inter-airline pooling agreements and the International Air Transport Association (“IATA”)

3. *Id.* at 22.

4. See WALTER SCHWENK, *HANDBUCH DES LUFTVERKEHRSRECHTS* 363 (1996); Daniel C. Hedlund, *Toward Open Skies: Liberalizing Trade in International Airline Services*, 3 MINN. J. GLOBAL TRADE 259, 264 (1994).

5. Convention on International Civil Aviation, Dec. 7, 1944, ICAO Doc. 7300/6 art. 1.

Tariff Coordination System, which controlled the fares and rates charged by the airlines.⁶ Until 1993, these bilateral agreements between EC Member States also governed intra-Community air transport. From the late 1970s to the 1980s, there was a trend towards more liberal bilateral agreements induced by deregulation of air transport in the United States. One example of this trend is the United Kingdom-Germany Air Service Agreement of December 1994, which provides for more liberal route access and country of origin rules for discount fares.⁷ This development led to different competitive environments for the airlines from country to country, depending on the attitude of the respective Member State to liberalization.

B. *Community Air Transport Regulation*⁸

The first EC intervention in this system of bilateral agreements came with the first air transport liberalization package in 1987.⁹ This package, along with the second liberalization package,¹⁰ which entered into force in 1990, did not set up an EC system of airline licensing and market access, but merely loosened the constraints of the bilateral agreements between Member States. Capacity limitations were eliminated, additional air-

6. PETER MORRELL, *THE SINGLE MARKET REVIEW, IMPACT ON SERVICES, AIR TRANSPORT* 13 (1997).

7. See Hedlund, *supra* note 4, at 264 (describing Open Skies agreement between Netherlands and United States as positive example).

8. The doctrine on liberalization of European Community ("EC" or "Community") air transport is extensive. See, e.g. Dennis A. Duchene, *The Third Package of Liberalization in the European Air Transport Sector: Shying Away from Full Liberalization* 23 *TRANSP. L.J.* 119 (1995); Jurgen Basedow, *Airline Deregulation in the European Community—Its Background, Its Flaws, Its Consequences For EC-US Relations*, 13 *J.L. & COM.* 247 (1994); Matthew Driven, *Liberalization and Privatization in European Community Transport Law* 6 *SPG INT'L LEGAL PERSP.* 97 (1994); Bendoit M.J. Swinnen, *An Opportunity for Transatlantic Civil Aviation: From Open Skies to Open Markets?*, 63 *J. AIR L. & COM.* 249 (1997); Frederik Sörensen, *A Third Package: What Remains To Be Done?*, 3 *EUR. AIR L. ASSN. CONFERENCE PAPERS* 87 (1990); Jestaedt/Hohenstatt, *Das dritte Maßnahmenbündel zur Liberalisierung des Luftverkehrs*, *EuZW* 1992, 115.

9. See Council Directive No. 87/601, *O.J. L* 374/12 (1987) (discussing airfares); Council Decision No. 87/602, *O.J. L* 374/19 (1987) (regarding capacity sharing and market access); Council Regulation No. 3975/87, *O.J. L* 374/1 (1987) (discussing application of competition rules to air transport); Council Regulation No. 976/87, *O.J. L* 374/9 (1987).

10. Council Regulation No. 2342/90, *O.J. L* 217/1 (1990) (concerning airfares); Council Regulation No. 2343/90, *O.J. L* 217/8 (1990) (discussing market access); Council Regulation No. 2344/90, *O.J. L* 217/15 (1990) (regarding application of EC Treaty to certain categories of agreements and concerted practices).

lines were allowed on routes between the contracting EC Member States, and rights to add routes were created. Although bilateral air service agreements were less restrictive than the original EC legislation, they remained applicable.

Only the third European air transport liberalization package of 1993 replaced the bilateral agreement system with a multilateral system within the Community. The third package essentially consisted of three Council regulations: one on the licensing of air carriers,¹¹ one on market access,¹² and one on fares and rates.¹³ Under the EC air carrier licensing regulation, licenses for airline services are still granted by national authorities; however, they are now subject to a set of common rules for air operator's licensing, enabling access to all air transport routes within the Community, including cabotage. Additionally, a system of EC-monitoring of airfares has been established, which eliminated Member States approval. The national ownership/control requirement was replaced by the concept of a "Community Carrier." The common European air carrier license system, however, does not apply to air traffic between EC Member States and third countries. In this context, the bilateral air service agreements still apply.

At the same time that the regulatory constraints were removed from bilateral agreements between Member States, the European Commission (or "Commission") approved a series of regulations enabling the application of competition rules to undertakings in the air transport sector.¹⁴ The idea was that regulatory restrictions of competition should not be replaced by anti-competitive behavior by the airlines. The current measures include Council Regulation No. 3975/87 on the application of the Competition Rules to Air Transport,¹⁵ and the block exemption enabling Regulation No. 3976/87 on the application of the Treaty to certain categories of agreements and concerted prac-

11. Council Regulation No. 2407/92, O.J. L 240/1 (1992) (regarding licensing of air carriers).

12. Council Regulation No. 2408/92, O.J. L 240/8 (1992) (regarding market access).

13. Council Regulation No. 2409/92, O.J. L 240/15 (1992) (regarding fares and rates).

14. Lars Gorton, *Air Transport and EC Competition Law*, 21 *FORDHAM INT'L L. J.* 602 (1998).

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

tices.¹⁶ The application of these procedural rules is, however, limited to intra-Community air transport. Again, neither regulation applies to air transport between the Community and third countries. In connection with the competence conflict of the Commission with the U.S. Department of Justice and Department of Transportation in the "BA/AA" and "Star Alliance" cases, the Commission has, after their first unsuccessful attempt in 1989,¹⁷ again submitted a proposal for extension of the two regulations to air traffic with third countries.¹⁸ The new proposal is currently stuck in the Council.

On the basis of Regulation No. 3976/87, the Commission can issue block exemption regulations regarding certain agreements. The agreements affected by this regulation include joint planning and coordination of capacity, consultation on tariffs, slot allocation at airports, computer reservations system ("CRS"), and ground handling.¹⁹ Additionally, the Commission has enacted other sector specific legislation in the area of slot allocation, CRS, and ground handling.²⁰

II. ASSESSMENT OF THE EFFECTS OF LIBERALIZATION

Slightly more than two years after the implementation of the last step of the Single Aviation Market in April 1997, when cabotage was introduced, we are in a position to assess whether liberalization has been a successful or not. Several empirical studies have been prepared on this subject. The results of these

16. *Id.*

17. Application of the Competition Rules to Air Transport, COM (89) 417 Final (Sept. 1989).

18. See Application of the Competition Rules to Air Transport, COM (97) 218 Final (May 1997) (amending Regulation No. 3975/87, O.J. C 165/13 (1987) and laying down procedure for application of rules on competition to undertakings in air transport); see *id.* (regarding application of Article 85(3) EC Treaty to certain categories of agreements and concerted practices in air transport sector between Community and third countries).

19. The group exemption regulations still in force after the third liberalization package are enumerated in LOUIS ORTIZ BLANCO & BEN VAN HOUTTE, EC COMPETITION LAW IN THE AIR TRANSPORT SECTOR 177 (1996). On the group exemption regulations, see Konstantinos Adamantopoulos, *Block Exemptions in the Air Transport Sector*, 3 EUR. AIR L. ASS'N 73 (1990).

20. See *infra* text accompanying notes 27-50 (regarding slot and ground handling liberalization); see also *infra* text accompanying note 52 (discussing computer reservations systems ("CRS")).

assessments can be summarized as follows.²¹

A. *Liberalization in the Community*

Liberalization in the Community has not led to dramatic changes like those in the United States following deregulation of air transport. In the United States, there was a substantial decrease of airfares, as well as the disappearance of major carriers followed by a high level of concentration. Nevertheless, there were notable changes following liberalization of air transport in the Community, even though they were much less striking than those changes in the United States.

First, there was above average total growth in air transport in the Community, particularly in light of the fact that part of the liberalization process was during an economic recession. Additionally, there was growth in the number of routes operated in the Community, primarily because of the introduction of new non-stop connections and former charter operators that took up scheduled services. Moreover, the number of routes operated increased from 490 in 1992, to 520 in 1996. The number of airlines per route only increased in individual cases in high density routes. Many of the new routes are operated by single carriers. In 1996, thirty percent of the intra-Community routes were still served by two operators and only six percent were served by three operators or more. Sixty-four percent of the routes in the Community were still operated by monopolies.

Furthermore, the overall number of airlines increased. Eighty new licenses were granted since the beginning of liberalization. Since this time, however, sixty companies have already disappeared. As far as airfares are concerned, results have been varied. While there has been a decrease in airfares on routes where more than two airlines operate, there have been allegations of predatory pricing in cases where former monopoly carriers are faced with new entrants on certain routes. While many

21. One example is the Communication from the Commission to the Council and the European Parliament dated October 22, 1996. See Impact of the Third Package of Air Transport Liberalization Measures, COM (96) 514 Final (Oct. 1996); see also Recommendations from the Report by the Comité des Sages for Air Transport to the European Commission, reprinted in Schmid, *supra* note 2, Drafts and Proposals E(i)(1.3); MORRELL, *supra* note 6 (discussing study commissioned by European Commission (or "Commission")); Barton et. al., *Networkers of the Future: European Airlines and Deregulation*, AIRLINE BUS., May 1995, at 40.

discount fares have been introduced, however, many have restrictions on schedule flexibility and only apply to a limited number of seats. On the contrary, fully flexible airfares required by business travelers have increased following liberalization. On certain routes, prices even seem to be excessive. Airfares for cross-border flights tend to be still higher than domestic airfares on comparable distances.

The number of international alliances between airlines has increased. It is, however, disputed that this development is attributable to liberalization in the Community. On the contrary, the number of crossborder mergers appears rather limited. So far, there has not been a major increase in the use of "hubs" like those in the United States.²²

After the recession, which lasted until 1994, most airlines have recovered and have been profitable since 1995.²³ Some national carriers still have considerable problems adjusting to the new environment. These carriers try to cope with these required adjustments by using grants of state aid. Although cost cutting measures adopted by airlines have been successful, European airlines are still less profitable than U.S. carriers. The share of national carriers in total output has also declined; on domestic routes the share of national carriers, however, decreased from ninety percent in 1992 to eighty percent in 1996.

In summary, there has been no fundamental challenge to the flag carriers duopolies and business so far, and flexible airfares have increased following liberalization. On the other hand, consumers benefited from promotional fares and the addition of a number of routes. The phenomenon of discount airfares has certainly contributed to the increase in overall air traffic following liberalization.

B. *Deregulation in the United States*

It is interesting to take a short look at the effects of deregulation in the United States, which initiated a deregulation pro-

22. JOHN H. HUSTON & RICHARD V. BUTLER, AIRLINE HUBS IN THE SINGLE EUROPEAN MARKET: A BENCHMARK ANALYSIS 8, 407 (1993).

23. For example Lufthansa's financial statements for the first quarter 1998 are sensational. Its regular business profit alone—DM125 million—exceeded the previous year's record figure by DM105 million. Lufthansa has therefore sustained its excellent result for 1997 with a pretax profit of DM1.65 billion.

gram in 1978.²⁴ In the earlier stage of deregulation, there was a considerable decrease in airfares. Another effect of deregulation, however, was increased concentration of the industry, which was not resolved by application of antitrust rules. While the number of airlines had increased from forty-six in 1978 to 123 in 1996, in 1987 ten airlines shared eighty-seven percent of total airline services, and in 1995, only eight carriers claimed ninety-three percent of the market. Deregulation also led to the hub and spoke system. Although this system inconvenienced passengers who had to cope with travelling on more connecting rather than direct flights, it proved efficient for the airlines. This system has led to dominance of a few large carriers at their respective hubs—market shares of more than seventy percent at individual hubs and correspondingly high air fares. After price decreases in the first phase of deregulation, fares have risen again since 1998 to levels higher than before deregulation. Business ticket prices have risen by eighty-six percent in the last five years. Problems were less striking during the recession, when all airlines were operating with overcapacities. Now, however, with a thriving economy accompanied by growth in air traffic, prices have increased even more. There are several instances of “cut price” airlines that tried to assert themselves in the market like Pan Am and Western Pacific, but these reduced fare airlines were driven out of business again by the major airlines that held a stronger position in the price wars that took place. Currently, the U.S. Secretary of Transport is considering an “Airline Competition and Lower Fare Act,” which would allow investigations against such complaints.²⁵ Some critics claim that deregulation will be succeeded by times of re-regulation.²⁶

C. Obstacles to Liberalization

There are many reasons why liberalization in Europe has had only moderate effects on the industry so far. With regard to

24. Severin Borenstein, *Airline Mergers, Airport Dominance and Market Power*, 80 AEA PAPERS AND PROCEEDINGS 2, 400 (1990); Andreas Spaeth, *U.S. Luftverkehr: Ohne Konkurrenz Explodieren die Preise*, BRT TRAVEL, Jul.-Aug. 1998, at 14.

25. See Spaeth, *supra* note 24, at 16.

26. In general, the assessment of U.S. deregulation is positive despite its negative side effects. See Barry Hawk, *United States Regulation of Air Transport*, in, TOWARD A COMMUNITY AIR TRANSPORT POLICY 255 (Piet Jan Slot & Prodromos D. Dagoglou eds., 1989); see also Hedlund, *supra* note 4, at 282; Barton, *supra* note 21, at 40.

why liberalization in Europe has only had moderate effects, many different factors can be mentioned that contribute to the problem. First, the Commission was influenced by the experiences following the more radical approach to deregulation in the United States, and therefore took a more gradual approach.²⁷ One also has to take into account that ten years of liberalization cannot eradicate a system of protection of national carriers, which has been practiced for more than four decades. Additionally, at least parts of the implementation of the liberalization took place during a period of economic recession.²⁸ In particular, during the Gulf crisis, most airlines incurred losses. Another contributing factor is that some European airlines are less influenced by European markets than by global developments because they depend on air services between the EU and other parts of the world for more than half of their total revenue.²⁹

Another serious problem is the limitation of the Commission's competence to control air transport within the Community.³⁰ The continued application of bilateral agreements that protect the national carriers of the contracting parties, by monodesignation and capacity restrictions on air traffic between EC and third countries, is a serious obstacle to effective liberalization. Bilateral agreements between EC Member States and third countries that do not allow ownership of designated airlines by nationals of other Community countries limit the scope of competition on routes between third countries, the EC, and cross-border equity investments. Aside from differences in bilateral agreements with third countries, these agreements also distort competition between carriers operating within the Single Market, since some airlines operate on protected markets while other carriers face competition on all markets where they operate.

The fact that many airlines are still state-owned and have a close relationship to the national regulatory authorities is an-

27. Carole A. Shifrin, *European Airlines to Enter 21st Century with New Look*, AVIATION WK. & SPACE TECH., Mar. 15, 1993, at 63.

28. See Schmid, *supra* note 2, at 72-76.

29. See MORRELL, *supra* note 6, at 1.

30. Basedow, *supra* note 8, at 272; see Swinnen, *supra* note 8, at 272 (explaining impact of liberalization of air transport in Community on third country airlines); Bo Stahle, *Non EEC Carriers and the EEC Aviation Policy*, 3 EUR. AIR L. ASS'N 45 (1990).

other obstacle to liberalization.³¹ Due to state ownership of the national carrier, certain Member States, particularly during the early phase of liberalization, were not willing to implement the liberalization measures. For example, these Member States employed tactics such as delaying granting licenses to other non-State owned airlines.

Another obstacle to liberalization is the continued practice of state grants of aid to airlines in the Community.³² Airlines that have received state aids include Sabena, Air France, Air Lingus, Olympic Airways, TAP, Air Portugal, and Iberia. In its state aid decisions, the Commission has tried to impose conditions on granting state aid to ensure that state aid is used for restructuring instead of being used for gaining a competitive advantage. In former decisions, the following conditions have been imposed by the Commission. First, the Commission requires that the beneficiaries of the cost reductions ensure that these privileges are necessary for the airline to operate profitably. Next, the Commission imposed requirements for capacity reductions or constraints on expansion. Additionally, the recipient must make commitments not to expand their fleets, which means that the aid is not used to acquire other airlines or to act as price leader in airfares. Furthermore, individual governments must give commitments that they will not interfere in the airline's management and that they will not grant further aid during the restructuring plan. Compliance with the above-mentioned conditions, however, is difficult to supervise. For example, competitors have repeatedly accused Air France of using state funds for predatory pricing. From a competition law perspective, it would, of course, be best if no state aid was granted at all, and the Commission has repeatedly confirmed the political will to phase out state aid to airlines over a relatively short period of time.

One of the most significant obstacles to successful liberalization is airport congestion resulting in slot allocation problems, as the absence of attractive slots is the main barrier to entry for competitors on high density routes. Under the current struc-

31. See Hedlund, *supra* note 4, at 278.

32. See Romano Subiotto, *Legal Principles Governing State Aid and the Commission's Review of State Aid: A Brief Comparison*, 9 EUR. AIR L. ASS'N 83 (1995); See also Heinz Hilbrecht, *An Update on the Commission's Activities in the Area of State Aid in the Aviation Sector*, 9 EUR. AIR L. ASS'N 77 (1995).

ture, national carriers have a competitive advantage since they own all the attractive slots and have superior access to airport facilities.³³ Therefore, one defense strategy of national carriers consists of violently defending the current IATA grandfather rights precedence system in order to block attempts aimed at confiscating slots for new entrants by invoking expropriation.³⁴ The legal framework provided for in Council Regulation No. 95/93³⁵ and Commission Regulation No. 1523/96³⁶ falls short of solving the problem. Council Regulation No. 95/93 designates EU airports as either “fully coordinated,” if congestion occurs for significant periods of time, or as “coordinated,” if a coordinator is appointed to facilitate the allocation of slots. The regulation is based on the principles of neutrality, transparency, and non-discrimination.

Grandfather rights are preserved if the carrier concerned uses at least eighty percent of the slots during a season. Otherwise, the slots have to be surrendered and put into a pool. Withdrawn and newly created slots are put into this pool, of which fifty percent are allocated to new entrants. The definition of “new entrant” in Regulation No. 95/93 is, however, very narrow. Regulation No. 95/93 permits slot exchanges between carriers or one carrier on different routes at coordinated airports, but does not allow their purchase in the absence of an exchange.

Empirical studies on Regulation No. 95/93 have come to the conclusion that the regulation is not able to solve the entry barrier problem caused by the scarcity of slots. Proposals for improvement differ widely. In one empirical study on the impact of Regulation 95/93, the “new entrant” definition in the regulation is criticized as being too narrow, and instead, should consider operators with up to ten percent of the daily slots.³⁷ The

33. See MORRELL, *supra* note 6, at 26; Schmid, *supra* note 2, at 102.

34. *Das nenne Ich Enteignung*, 19 DER SPIEGEL 131 (1998) (citing Mr. Jürgen Weber, Chief Executive Officer of Lufthansa, regarding alliance with United Airlines). He criticizes the obligation to surrender slots as *enteignung*, or expropriation.

35. See Council Regulation No. 95/93, O.J. L 14/1 (1993) (regarding common rules for allocation of slots at Community airports).

36. See Commission Regulation No. 1523/96, O.J. L 190/11 (1996) (amending Regulation No. 1617/93 on application of Article 85(3) of EC Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services, and slot allocation at airports).

37. COOPERS & LYBRAND, THE APPLICATION AND POSSIBLE MODIFICATION OF COUN-

new entrants should also be given a stronger position to get distributed slots from the slot pool. Besides, it was found that there is a need for greater transparency in determining capacity levels at congested airports and in the slot allocation process itself by requiring the coordinator to be fully independent of airport authorities, national governments, and airlines. It can be doubted whether such measures, even if implemented, would solve the problem. The central issue seems to be that, under the current Regulation, there will almost never be enough attractive slots in number and time in the pool to accommodate new entrants. Studies have shown that most slots at airports are held by the former national carrier.³⁸

Another more far-reaching proposal suggests obliging incumbent airlines by holding a portfolio of slots above a certain threshold in order to surrender a proportion of those slots to the scheduling committee.³⁹ Airlines holding more than a certain percentage of slots at a fully coordinated airport would be obliged to surrender a fixed percentage to the scheduling committee either all at once or in phases of several years. This option could theoretically generate a sufficient number of attractive slots that could be made available to new entrant airlines. Priority rules could give preference to new entrants to operate on monopoly or duopoly routes. This option, however, would seriously affect the position of the flag carriers and might also impair their ability to compete globally. Additionally, it might not be clear to whom the slots belong and whether any compensation would need to be granted in the case of their confiscation under expropriation rules.⁴⁰

Free trading of slots is, as discussed, an alternative model.⁴¹ Auctioning of slots has been practiced at a limited number of

CIL REGULATION 95/93 ON COMMON RULES FOR THE ALLOCATION OF SLOTS AT COMMUNITY AIRPORTS, FINAL REPORT 1 (1995).

38. Severin Borenstein, *Prospects for Competitive Air Travel in Europe*, in SINGULAR EUROPE: ECONOMY AND POLICY OF THE EUROPEAN COMMUNITY AFTER 1992 251 (William James Adams ed., 1995).

39. MORRELL, *supra* note 6, at 26 (discussing proposal by U.K. Civil Aviation Authority ("CAA"), dated 1993).

40. Crosby, *Recent Developments in Slot Allocation*, 10 EUR. AIR L. ASS'N 3 (1996) (favoring ownership of airports).

41. Starkie, *Recent Developments in Slot Allocation—What Can We Learn from the U.S. Market in Airport Slots?*, 10 EUR. AIR L. ASS'N (1996); Christopher Allen, *Comments on Slot Allocation*, 10 EUR. AIR L. ASS'N (1996), Karel Van Miert, *Competition Policy in the Air Transport Sector*, Speech at the Royal Aeronautical Society, Mar. 9, 1998.

airports in the United States since 1986. Unfortunately, the U.S. experience has shown that barriers to entry have increased following slot trades rather than vanished.⁴² Slots are mainly traded between the incumbent airlines. According to economists, this result would always be the case since the slots are more valuable for an incumbent airline than for a new entrant, so that the former would always pay more.⁴³ One has to admit, however, that a gray market for slots currently exists at certain airports in the Community. Therefore, it is argued that at least the transactions that take place in practice should be formally recognized.⁴⁴

The approach of the Community to the problem is still open, given the expiration of Council Regulation No. 95/93. Currently, Directorate General IV and Directorate General VII seem to disagree as to whether slot trades are viable options.⁴⁵ Whereas Directorate General IV strongly opposes trading in slots, pointing to the adverse affects on competition⁴⁶ indicated by U.S. empirical data, Directorate General VII seems to advocate this approach. The most favorable solution from a legal point of view would be the expansion of capacity by building new airports and new terminals. Given that airports are currently financed by Member States when budget constraints hit, and that EC citizens are gaining a stronger environmental awareness, expansion does not, however, appear to be a viable solution to the problem.

Closely related to the slot allocation issue is the issue of liberalization of ground handling services. Ground handling services amount to a high percentage of airlines' costs and are a means for airlines to distinguish themselves from competitors by offering better services. Under the traditional structure, airlines have no impact on the cost of ground handling which is either done through public entities—the national carrier—or the airport operator itself. Due to their current monopoly situation, airports tend to operate highly inefficiently, so that costs are higher than they would be in the presence of competition.

42. See Starkie, *supra* note 41, at 5; Borenstein, *supra* note 38, at 251.

43. Pietro Crocioni, *The Lufthansa/SAS Case: Did the Commission Get the Economics Right?*, ECLR 116, 122 (1998).

44. See Allen, *supra* note 41, at 2; Starkie, *supra* note 41, at 5.

45. *EU Briefing*, REUTER, Jan. 31, 1997.

46. Van Miert, *supra* note 41.

Therefore, it is desirable that ground handling is liberalized in order to allow airlines to lower their costs and compete globally.

It is clear that in countries where the national carrier is also responsible for the ground handling, there is potential for discrimination against new entrants that pose a threat to the incumbent's position. For example, many airports have discriminatory discount schemes for landing fees that favor the national carrier with a high volume of traffic at a particular airport.⁴⁷ On some occasions, there have been allegations that inferior services are offered to foreign airlines at higher prices. In June 1995, the Council of Ministers (or "Council") rejected a Draft Directive prepared by the Commission on the Liberalization of Ground Handling Services⁴⁸ due to the opposition of Germany and Austria. In October 1996, however, the Council adopted Directive No. 96/97 on access to ground handling services at European airports.⁴⁹ The directive, which aims at opening the ground handling market to airlines and handling companies, provides for the freedom of self-handling to be introduced in 1998 and one year later. Member States, however, are allowed to limit the number of operators for particular handling components, provided there are no less than two for each service category. In case of space and capacity problems, airports can claim exemptions from the obligation to admit other operators. By the end of 2002, ramp handling monopolies will be completely abolished. A lot will depend on the implementation of this directive. As has already become apparent in connection with the history of the draft directive from 1995, some Member States are reluctant to give up public ground handling monopolies. Another option besides this directive is the enforcement of Article 86 of the Treaty establishing the European Community ("EC Treaty") against airports engaging in discriminatory or other abusive behavior. A recent example is the Commission decision on abusive practices by the airport in Frankfurt, Germany.⁵⁰

47. See, e.g., Commission Decision No. 95/364/EC, O.J. L 216/8 (1995) (examining "Airport Zaventem" on discriminatory discount scheme).

48. Social and Economic Committee, Draft Directive on the Liberalization of Ground Handling Services, SEC (93) 1896 final; Corrine Dussart-Lefret & Christine Federlin, *Ground Handling Services and EC Competition Rules*, 19 AIR & SPACE L. 50 (1994).

49. See Council Directive No. 96/97, O.J. L 272/36 (1996) (regarding access to market of ground handling services on Community airports).

50. Commission Decision No. 98/67, O.J. L 72/30 (1998).

III. AIRLINES' STRATEGIC RESPONSES TO LIBERALIZATION

After having described the background of liberalization in the Community and several problems that impair its implementation, I would like to draw your attention to several strategies implemented by former national carriers facing the new phenomenon, "competition" in air transport. Again I start out with empirical data on what has apparently been the airlines' responses to air transport liberalization.⁵¹ The question then arises to what extent competition law can, in the current legal framework, counter strategies that may be a threat to competition. Two main strategies can be detected among the different airlines.

The first strategy consists of pre-emptive moves either to block market entry by potential competitors, to drive new entrants out of the market if they start operating in the carrier's home market, or increase barriers to entry in the whole market. Pre-emptive strategies take a variety of forms. The acquisition of small domestic companies by national carriers is one approach. Another approach is the conclusion of franchise agreements with smaller carriers with lower overhead, in particular, in order to obtain feed traffic. Another method is predatory pricing on routes, where a competitor starts to operate services on the national carrier's network. There is also a trend towards vertical integration with travel agencies and tour operators in order to widen distribution channels. Besides, there are various instances of abuses under Article 86 of the EC Treaty such as refusal to interline.

A second strategy adopted by airlines in the Community is a general search for size in order to achieve economies of scale, global marketing, and to obtain a presence in new markets. Size can be obtained through mergers, equity investments, strategic alliances, code sharing agreements, and franchise agreements. Accordingly, all European airlines have implemented cost-cutting measures in order to become fit for global competition.

51. Paul Stephen Dempsey, *Airlines in Turbulence: Strategies for Survival*, 23 *TRANSP. L.J.* 15 (1995); MORRELL, *supra* note 6, at 33.

IV. COMPETITION LAW PRACTICE REGARDING NATIONAL CARRIERS DEFENSIVE MEASURES

The above-mentioned practices are subject to the enforcement of EC competition rules, at least as far as air transport within the Community is concerned. The question therefore arises as to what extent the Commission and Member States competition law authorities must intervene in order to ensure competition.⁵² Of course, a line has to be drawn between practices harming competition, and practices necessary for the restructuring of the Community air transport industry in order to enable it to compete globally. There are strategies that are harmful to competition and there are others that are just smart economic decisions. For example, Lufthansa's strategy to enlarge its domestic network following liberalization certainly was a preemptive move against potential new entrants who might be interested in opening cabotage services in the decentralized German market, but nothing to be challenged under competition law. One area where the Commission and Member States authorities were faced with the sensitive balance to be drawn between global competitiveness and preservation of competition in the Community was merger control.

A. Merger Control Practice

1. National Merger Cases

Especially in the early phase of liberalization, national carriers had a tendency to acquire small competitors at a national level. One example is the British Airways/British Caledonian merger,⁵³ which occurred before the existence of the European Merger Regulation. The Commission took up an investigation, but probably due to the financially poor condition of British Caledonian imposed rather limited conditions in connection with clearance of the merger. British Airways ("BA") had to give up certain routes and slots at Gatwick Airport to competitors. The next British case was the acquisition of the independent carrier Dan Air by BA,⁵⁴ which the Commission ruled to be beyond the

52. See Basedow, *supra* note 8, at 276 (discussing competition policy designed for air transport); EHMER, *supra* note 1.

53. See Dempsey, *supra* note 51, at 74.

54. Commission Decision No. IV/M. 278, O.J. C 68/5 (1993) (British Airways/Dan Air).

scope of the European Merger Regulation. The British Secretary for Trade and Industry subsequently cleared the merger. British Midland and Virgin Atlantic filed complaints to the Commission to consider whether the clearance by the national authority could be somehow attacked under EC law, but the Commission refused to intervene. Air France brought an action against the Commission at the Court of First Instance asking to annul the Commission decision, which was dismissed. Later, BA acquired Brymon Airlines⁵⁵ a franchise airline.

In France, Air France bought UTA, another French carrier mainly operating on overseas routes, and Air Inter, a domestic French carrier, in 1990.⁵⁶ At the time, the deal brought the three biggest airlines in France together and made Air France the biggest carrier with a market share of more than ninety percent in the French market. The Commission intervened, and after negotiations an agreement was reached with the French authorities. On the eight most important domestic French routes, at least one airline not belonging to the Air France group was permitted to operate. Regarding international routes, it was agreed that one independent airline would be granted rights to operate from French airports on high-density routes. Further commitments concerned making slots available at Charles-de Gaulle Airport. Besides, Air France was obliged sell its stake in TAT by 1992.

In Germany, the intended acquisition of Interflug, the former national carrier of the German Democratic Republic, by Lufthansa was opposed by the Federal Cartel Office ("FCO") in 1990, which released a notice that the acquisition would not be approved.⁵⁷ Since no other buyer was found, the airline went bankrupt. In 1992, Eurowings emerged from the two regional carriers, Nürnberger Flugdienst and RFG Regionalflug GmbH.

In the Netherlands, KLM acquired forty percent of the shares in the Dutch competitor Transavia in 1989.⁵⁸ The Commission approved the acquisition due to concessions made by the Dutch authorities allowing other EC companies outside the KLM group to compete on KLM routes.

55. See Schmid, *supra* note 2, at 121.

56. See Dempsey, *supra* note 51, at 36.

57. See Schmid, *supra* note 2, at 113.

58. *Id.* at 117.

2. International Mergers

Recently more cross-border acquisitions have occurred, which reflects the airlines' strategy to get a presence in one of the other Member States with high traffic volume. BA has so far been the most active airline to pursue this policy, since it has built up a presence in Germany and France. In 1990, there were plans by BA and KLM to acquire Sabena. The Commission was skeptical that there was a need to allow an interest in an airline by two rather than one competitor, but indicated that it was ready to find a compromise.⁵⁹ In the meantime, the parties gave up their plans for the joint venture. As a next move, BA approached KLM, but negotiations were later abandoned. In 1992, BA bought a share in the former Delta Air, renamed Deutsche BA, which was recently increased to 100%, and started intra-German services. Also in 1992, BA acquired a forty-nine percent share in TAT, the French Airline. In 1996, BA exercised an option to acquire the remaining share in TAT.⁶⁰ TAT was a favorable strategic move by BA, since the airline benefited from concessions by Air France following its acquisition of UTA and Air Inter. The Commission allowed the acquisition under the condition that BA should surrender slots to a carrier wishing to start a London Gatwick/Paris Charles-de-Gaulle service. In 1997, the Commission cleared the acquisition by BA of another French carrier, Air Liberté,⁶¹ mainly active in domestic services. Given Air France's dominant position in the French domestic market, the Commission did not impose any conditions on the clearance of the acquisition.

In 1992, Air France acquired about a thirty-seven percent share in Sabena.⁶² The Commission qualified Sabena as a joint venture falling under the Community Merger Regulation and cleared the merger against several commitments by the parties and the respective governments involved. Only two years later, Air France sold its interest in Sabena to Swiss Air, which acquired

59. COMMISSION OF THE EUROPEAN COMMUNITIES, XXTH REPORT ON COMPETITION POLICY 1989, at 84, ¶ 108 (1990).

60. Commission Decision No. IV/M.806, (British Airways/TAT) (1996). For an analysis of the earlier acquisition, compare *British Airways v. TAT* with Commission Decision No. IV/M.259, [1993] 4 C.M.L.R. 7.

61. Commission Decision No. IV/M.857, [1998] __ C.M.L.R. __.

62. Commission Decision No. IV/M.517, [1994] 5 C.M.L.R. M1 (*Air France/Sabena*).

32.5% of the shares.⁶³ A monopoly situation occurred on several routes between Belgium and Switzerland. The Commission accepted commitments on the part of the Belgian and Swiss government to liberalize their bilateral agreements to allow for multi-designation and to abolish capacity restrictions. Given the limited availability of slots, it also required commitments on the part of Swiss Air and Sabena to give up slots, if a new entrant required them. The commitment also extended to the conclusion of interlining agreements, if requested by new entrants.

Maersk, a Danish carrier, took control of Birmingham European in the United Kingdom, which was the first case of an European airline not being controlled by nationals of the Member State where it is registered.⁶⁴ Another crossborder merger was the acquisition of British Midland by SAS in 1988. In 1997 the Commission cleared the 100% acquisition of Air UK, a U.K. carrier involved in domestic and intra-Community scheduled air traffic, by KLM without imposing any conditions.⁶⁵ It also found that there was a transition merely from joint control to sole control, since KLM has already had a stake in Air UK before. It found a considerable addition in market share only on the Amsterdam-London route, where the merger led to the highest share on the route, which was, however, put into perspective by the fact that competitors like BA also operated on the route.

3. Conditions Imposed By the Commission

The Air France/Sabena decision⁶⁶ is a particularly illustrative example of the types of conditions the Commission has imposed on the parties to a merger and on Member States as a condition to obtain clearance of air transport mergers. The Sabena joint venture of Air France and the Belgian state led to a monopoly situation on the routes between Belgium and France. The Commission accepted certain commitments on the part of Air France, Sabena, and the two governments to improve this situation. With respect to the Brussels/Lyon and Brussels/Nice

63. Commission Decision No. IV/M.616, O.J. C 200/10 (1995) (Swissair/Sabena).

64. See Schmid, *supra* note 2, at 121.

65. Commission decision dated September 22, 1997, "KLM/Air UK", Case No. IV/M.967.

66. See Commission Decision No. 95/404/EC, O.J. C 200/10 (1995) (Swissair/Sabena) (regarding application of Council Regulation No. 2407/92, O.J. L 239/19 (1995)).

routes, one of the companies promised to withdraw in favor of one or several new entrant companies. The corresponding slots and airport facilities would be guaranteed to the new entrant, and interlining agreements were to be concluded, if so desired. With respect to the Brussels/Paris route, other companies would be allowed to operate equally to Air France and Sabena in comparable time zones. This commitment could imply the abandonment of slots of a maximum of ten per day by the parties to the merger. An interline agreement could be concluded with new entrants, providing for the possibility to participate in frequent flyer programs ("FFPs"). The different treatment between the Brussels/Nice and the Brussels/Lyon routes on the one hand, and the Brussels/Paris route on the other, was based on the fact that on the Paris/Brussels route, the Commission took into account that a certain substitutability existed between aerospace and locomotive transportation.

Another problem was routes between Turkey/Hungary on the one side and Brussels/Paris on the other. Due to the long duration of the flights in question, the Commission considered the flights from Brussels and Paris to be substitutable. On the Brussels/Paris/Ankara route, the market share of the parties to the merger amounted to more than eighty-one percent. On the Budapest/Brussels/Paris route, the market share was fifty-four percent. In this respect, commitments were made by the Member States, Belgium, and France, to renegotiate their bilateral agreements with Hungary and Turkey in order to provide for multi-designation on these routes in favor of French or Belgium companies not belonging to the parties to the merger. Given the relatively low volume of traffic on the routes, it was agreed that multi-designation would only start after exceeding a threshold of 100,000 passengers.

Another problem was the routes between European and French speaking African countries. Here, the Commission looked at the bundle of flights departing from the Community and European Free Trade Association ("EFTA") countries to these African countries. Due to the long duration of these flights, good intra-European connecting flights, and the absence of substitutability from the African side due to lack of flights between African cities, the Commission considered a whole network of flights. On several routes, the position of Air France/Sabena was very strong because of traditionally close cultural re-

relationships between the countries, conservative bilateral air service agreements, and a relatively low level of traffic. Commitments in this area were also related to the opening up of competition to potential new entrants. Air France committed itself to abandon weekly service from Paris to Kigali and Bujumbura with the intention of allowing a new entrant to operate on this route. Also, Sabena committed itself to abandon a weekly service on several routes. The Belgium and French governments promised to grant the new entrants traffic rights for their countries and to renegotiate bilateral agreements with the respective African states in order to allow for multi-designation.

The Air France-Sabena decision is also a good example of the Commission taking airport facilities into account in its air transport merger decisions. Given the fact that Sabena already controlled up to forty-four percent of Brussels airport's slots, and the business plan between Air France and Sabena provided to set up a slot-intensive hub and spoke system servicing seventy-five European cities from Brussels, the Commission found that the limited availability of slots might reinforce the dominant position of the parties to the merger. Therefore, the parties undertook to limit themselves for ten years to a number of slots equal to sixty-five percent of the available slots within any two hour period at Brussels Airport. Additionally, the Belgian government committed itself to allow competitors of the Air France-Sabena group to establish their own ground handling services. The Commission also found that the planned hub and spoke system between Air France and Sabena could lead to a strengthening of the dominant position of Air France and Sabena on the routes between France and Belgium. In the event of an implementation of the hub and spoke system, the flights of the two companies would prove most practical for use in transit, and would make competitors' entry into this market more difficult. In the Commission's view, one of the barriers to entry has been that Air France and Sabena had access to the airport facilities in Brussels for the purpose of operating a hub and spoke network, which would not be available for competing airlines to operate at later stage. The Commission, therefore, insisted on a commitment by the French government. According to this agreement, the French government would have to allow, if competitors so demanded, a hub and spoke network in northern France comparable to the one planned by Air France and Sabena.

4. Conclusions on Merger Practice

One conclusion that can be drawn from some of the reported national cases is that national authorities have, in several cases, not proven to be suitable forums for ensuring competition in the EC market for air transport. The national authorities are likely to have been ineffective because they seemed to be driven more by national industrial policy than by competition concerns. Also, Commission practice has been quite lenient in some cases. They did not prohibit a single merger. The Commission was particularly permissive in the early stage of liberalization when there was very little concentration in the industry. Apparently, the Commission was driven by the idea that a restructuring of the European air transport industry was desirable, as it permitted several mergers that led to substantial increases in market share on individual routes and relied more on commitments by airlines to give up slots, routes, and frequencies. The Commission also relied on commitments by Member States to accelerate liberalization and renegotiate their bilateral air service agreements. Where, initially, mergers were primarily national, there recently has been a growing number of cross-border mergers. These mergers did not raise any competition law concerns, because competitors were emerging in the national markets, even though they were still dominated by the local national carrier. This trend toward competition is a welcome phenomenon.

The Commission has mainly relied on a narrow market definition by focusing on the individual route. For the purposes of merger control, which relates to market structure, this approach is questionable. The German FCO, for example, adopts a different approach in airline merger control cases than in cases of alleged abuse of a dominant position. In merger cases, it has defined the relevant product market for an airline merger in Germany to be all flights within the EU having a German city either as a point of departure or as a destination.⁶⁷ On the contrary, in cases of abuse of a dominant position, the FCO defines the relevant market as the individual route on which the abuse occurs.⁶⁸

67. *BKartA, resolution dated May 23, 1989, WIRTSCHAFT UND WETTBEWERB, 2391* ["DLT/Südavia"].

68. *BKartA, resolution dated February 19, 1997, WIRTSCHAFT UND WETTBEWERB, 2875* ["Flugpreis Berlin—Frankfurt/M"].

Despite its narrow market definition as a point of departure, however, the Commission has in some cases looked at networks of routes instead of individual routes and has taken substitutable means of transport into account. As a result of this strategy, despite the very narrow market definition adopted in many cases, the Commission does not seem to have taken the resulting high market shares on the routes as serious as it would have taken equally high market shares in other sectors. The Commission seems, at least in part, to acknowledge the natural monopoly theory that on some routes there is only room for one operator due to lack of traffic. In some instances, it conditioned certain commitments for market access to competitors upon a minimum number of passengers on the route.

There is also an indication that the Commission has accepted an increase in market share as a consequence of a merger against commitments on the part of companies and of Member States for the purpose of facilitating entry of new competitors on the respective routes by providing the necessary infrastructure, e.g., airport facilities and slots. Whether it is enough to provide the conditions needed for potential market competitors to enter routes dominated by national carriers is questionable. For example, in the Lufthansa/SAS case, the slots the parties had to offer to competitors upon request—due to Commission intervention—were never requested. One explanation may be that smaller carriers are afraid of entering into competition with large national carriers, even if they have the opportunity to do so. Since the commitments given by parties and Member States in merger cases are often quite complex, it is difficult to supervise the parties' compliance, e.g., the renegotiation of bilateral agreements. Enforcement of competition rules, therefore, depends at least in part on competitors' complaints being taken up by the Commission. In summarizing Commission practice, one could say that it has not been easy to make the European aviation industry fit for global competition while, at the same time, preserving competition at the Community level. It may become easier in the future, when it is possible to assess the effects of commitments made by the parties to the merger and Member States that have been accepted in the past by the Commission as a condition for clearance.

B. Airline Ownership Requirements

Since Commission practice cannot really be found to deter airlines from cross-border mergers, the question is why more mergers between carriers in different Member States have not occurred following liberalization. The major impediment to cross-border mergers are the regulatory requirements regarding ownership in an airline at the national level and at the level of the bilateral air service agreements between EC Member States and third countries.⁶⁹ Before entry into force of the Community carrier license regulation,⁷⁰ which states that any EC national carrier may own and control any other EC carrier, there were, in each EC Member State, national airline licensing regulations. These regulations provided for national ownership and control of a licensed carrier within the Community. The notion of "control" was interpreted somewhat differently from country to country, but it was generally thought that no more than twenty-five to thirty percent of the airline's voting capital could be controlled by a non-domestic airline.

The national ownership requirement can also be found in bilateral air service agreements. Whereas the Chicago Convention does not provide for national ownership of airlines, only for nationality of aircraft, the standard form bilateral air services agreement⁷¹ does refer to nationality of airlines.⁷² The reason at the time was probably national security, given the fact that World War II was still in progress.⁷³ Another reason may be that the national ownership requirements serve to ensure that the benefits from the negotiated air traffic rights only accrue to the countries that negotiated the agreement. The Chicago Convention has led to a system of nationality in aircraft ownership and airline ownership.

69. Ludwig Weber, *EEC Liberalisation Policy and the Chicago Convention*, 3 EUR. AIR L. ASS'N 17, 28 (1990); Hugh O'Donovan, *Flags of Convenience—A Growing Issue for European Air Transport?*, 9 EUR. AIR L. ASS'N 63 (1995); John Balfour, *Flying the Flag—The Role of Nationalism in Air Transport*, 3 EUR. AIR L. ASS'N 53 (1990); Chapatte, *The Alliance Between SAS and Lufthansa—A Model for Future Cooperation Between Airlines in Europe*, 10 EUR. AIR L. ASS'N (1996).

70. See *supra* note 11.

71. This agreement was included in the final act of the Chicago Conference and the two agreements, which accompanied the Convention, known as the "Two-Freedoms Agreement" and the "Five-Freedoms Agreement."

72. See Balfour, *supra* note 69, at 54.

73. *Id.*

While the national airline ownership requirement has been replaced by the EC licensing regulation requirement of "EC ownership" of airlines in the Community, which provides that every EC-licensed airline must be owned and controlled by EC nationals,⁷⁴ the national aircraft registration provisions still apply.⁷⁵ The main problem, however, is that national ownership requirements persist in bilateral air service agreements between Member States and third countries.⁷⁶ Despite EC licensing regulations, an acquisition of another carrier in the Community remains unattractive due to the threat of losing national airline status under the bilateral agreement between the home state of the airline and third countries. If the target airline operates flights to non-Community countries, then the nationality requirements in the bilateral agreements do not provide for extension to another Community carrier. Often, the national laws of third countries reinforce such ownership requirements, e.g., U.S. regulation.⁷⁷

This situation seems to be the reason why, so far, most cross-border investments in other airlines in the Community have been limited to minority stock ownership. One can argue that the Community air transport industry is restructuring despite this requirement, since airlines have turned towards global alliances as a means to reduce costs and increase their networks. Critics, however, anticipate that these alliances have a smaller incentive to last in the long run than equity investments. It would be better to have a range of possibilities for restructuring that consists of mergers and strategic alliances.

Given the present unsatisfactory situation, it is desirable that the dispute on the Commission's competence regarding third countries air transport will be resolved soon and that its mandate to negotiate open sky agreements with third countries will be renewed. If these actions occurred, then the Commission could negotiate bilateral agreements with third countries and designate EC carriers. Since capital infusions by foreign companies may prove productive in the restructuring of the European avia-

74. An interesting decision on how the EC ownership of airlines is interpreted is the Commission Decision No. 95/404/EC, O.J. L 239/19 (1995) (Swiss Air/Sabena).

75. See Weber, *supra* note 69, at 24; O'Donovan, *supra* note 69, at 66.

76. See Basedow, *supra* note 8, at 272.

77. See Thomas D. Grant, *Foreign Takeovers of United States Airlines: Free Trade Process, Problems, and Progress*, 31 HARV. J. LEGIS. 63 (1994) (discussing U.S. legal framework).

tion industry, third country equity investments in new carriers should be allowed, subject to reciprocity. This restriction would apply particularly to the United States. Although the pertinent U.S. law leaves some discretion as to what "national ownership" means, KLM was denied a minority equity interest in Northwestern Airlines and BA encountered difficulties in obtaining a stake in U.S. Air.⁷⁸

C. Alliances

Given the above mentioned regulatory straightjacket, the airlines have pursued a strategy of global alliances instead of mergers, particularly involving U.S. carriers. The frequency of these mergers is due to the European airlines' belief that they need a U.S. partner and the U.S. carriers' interest in obtaining feed traffic from different countries in the EU.⁷⁹ Since these alliances cooperate on fares, frequencies, schedules, and relationships with travel agencies, they are often very similar to mergers in their effects.⁸⁰ The companies that operate in this cooperative manner can effectively eliminate all competition between them.

1. Types of Alliances

The word "alliances" is not a legal term, and many different types of these arrangements exist. One can distinguish several broad categories, e.g., market oriented and cost oriented alliances.⁸¹ Market oriented alliances involve joint scheduling ("code share agreements"), hub coordination, code sharing, blockspacing, and FFP combinations. Their goal is mainly to increase traffic and market share. On the contrary, cost oriented alliances aim at reducing cost by means of joint ventures, reciprocal sales, catering and maintenance joint ventures, and asset sharing. Most European airlines currently focus on the first alternative.

Another categorization distinguishes between strategic and tactical alliances. Strategic alliances usually comprise a range of

78. *Id.* at 115.

79. Peter Flint, *If You Can't Beat Them*, in AIR TRANSPORT WORLD 34 (1996).

80. Van Miert, *supra* note 41.

81. See MORELL, *supra* note 6, at 35; See Impact of the Third Package of Air Transport Liberalization Measures, COM (96) 514 Final, at 19 (1996).

activities where the airlines plan to cooperate in the long run. Tactical alliances are short-term and focus on one particular area of cooperation, e.g., code sharing on one route. Some alliances are accompanied by minority equity investments in order to make the alliance more stable.

Code share agreements, which can be practiced in the framework of a more far reaching alliance or by itself, offer substantive advantages in selling, in particular with respect to CRS displays. Code sharing essentially means that one airline puts its code on another airline's flight, having the effect that the flight can be marketed as if it were operated by the other airline. By that means, different connecting flights can be offered as one direct flight.

Franchising, another form of cooperation, has been successfully launched by BA in the United Kingdom. A major carrier licenses its livery, style, and brand name to a smaller carrier that can operate at lower costs, particularly by reducing staff costs, accompanied by code sharing. It can, therefore, operate on otherwise unprofitable routes and provide the major carrier with feed traffic.

2. Commission Practice: Star Alliance/British Airlines/ American Airlines

There have always been alliances in the industry, but for a long time the Commission has not been very active in this area. Recently, however, alliances have become more and more strategic. Due to a bundle of different alliances involving international carriers, they have now reached a scale, in particular in transatlantic air traffic, which raises competition law concerns.⁸² While the Commission has acknowledged in principle the beneficial character of such arrangements by offering more extensive networks and decreasing costs, it also stresses that alliances may have detrimental effects on competition, since they may raise barriers to entry.

The most recent examples of Commission practice on alliances are the procedures under Article 89 of the EC Treaty by the Commission concerning the alliance between BA and Ameri-

82. See Van Miert, *supra* note 41; Karel Van Miert, *Intervention Devant la Commission Transports du Parlement Européen on "British Airways/American Airlines"*, (Feb. 25, 1997); Der Spiegel, *Luftfahrt: "Das nenne Ich Enteignung,"* 19 HEFT 130 (1998).

can Airlines (“AA”) and the alliance between Lufthansa, United Airlines, and SAS. In these two cases, it has issued notices in which it proposes appropriate measures to bring an alleged infringement of Article 85(1) of the EC Treaty to an end, as far as the alliances relate to air transport services between Europe and the United States.⁸³ In the case of the BA/AA alliance, the Commission also referred to Article 86 of the EC Treaty on the hub routes, because the market share of the alliance was more than sixty percent on all U.K./U.S. routes. The measure suggested comprises in both cases a reduction in frequencies on certain transatlantic routes with a high traffic volume during a period of six months from the first day of the IATA season following the adoption of the Commission decision; only, however, competitors must request it in order to enable them to operate up to fifty-five percent of the frequencies on the relevant route. The giving up of frequencies is subject to certain conditions that must be fulfilled.

The alliances must surrender, without compensation, a number of slots corresponding to the number of frequencies they must give up—if there are not enough slots available in accordance with ordinary allocation mechanisms. The alliances also must give up the corresponding airport facilities, if needed in connection with giving frequencies to a competitor. The obligation to make slots available also extends to slots in the United States. No slots must be transferred for passengers who are not time sensitive, since the Commission only adopts the narrow route market definition for business travelers. Aside from the situation on the hub-to-hub routes, the alliances must give up slots and corresponding airport facilities if a competitor wishes to launch or expand a new or existing service on a particular cross-border route but cannot get access to the necessary slots either in Europe or in the United States. Up to fifty-five percent of the total number of slots must be made available to competitors. The times of slots given up must correspond to the request of the new entrant. Slots must be allocated on the basis of the criteria laid down in Commission Regulation No. 95/93.⁸⁴ The notices provide for a maximum number of slots to be given up

83. See Commission Notice, O.J. C 239/4, at 5 (1998) (concerning alliance between SAS, Lufthansa, and United Airlines); Commission Notice, O.J. C 239/5, at 10 (1998) (concerning alliance between British Airways and American Airlines).

84. See Commission Regulation No. 95/93, O.J. L 14/1 (1993).

including hub-to-hub routes. The alliances should also commit themselves to conclude interlining agreements with new entrants. Regarding FFPs, the Commission suggests two options: the parties to the alliance renounce to pooling their FFPs and refrain from allowing passengers to transfer points obtained between the alliance members' FFPs, or the alliance allows airlines without comparable FFPs to participate in the joint FFP of the alliance. The Commission also considers conditions in the field of CRS. They are concerned that the double appearance of a flight of the alliance on the computer screen may lead to a disadvantage in selling for competitors regarding flights on high frequency routes because the first screen would be filled. Another concern of the Commission aims at the common policy practiced by the alliances vis-à-vis travel agents in Germany and in the United Kingdom to implement a system of remuneration, e.g., a sales threshold system, which has the object or effect of securing the loyalty of travel agents to the members of the alliance on the relevant markets. Also, the terms of fares offered to large customers should not be based on the threshold system or any other system encouraging loyalty.

As in merger cases, the Commission has also asked for commitments on the part of the Member States to extend traffic rights under the air service agreements with the United States to other airlines established in the Community or European Economic Area ("EEA") besides airlines owned by nationals of the respective Member State. The resulting alliances would allow for a sufficient degree of potential competition. The problem, however, is that the consent of the U.S. authorities on such an extension of the bilateral air service agreements will be necessary. The regimes discussed earlier should, in the view of the Commission, be applied for five years and then be reexamined.

The interested parties have thirty days following the publication of notice before the Commission's decision. If the companies accept the conditions of the final decision of the Commission, which will be drafted later, then the procedure is closed. If they do not, then it will be up to the Member States' authorities to enforce the Commission decision under Article 89 of the EC Treaty. The Commission must initiate proceedings under Article 169 of the EC Treaty if they fail to do so. The British authority had given the BA/AA alliance provisional approval on the

basis of giving up 168 slots.⁸⁵ Therefore, a conflict of competence did arise between the Commission and the British authority. The BA/AA alliance will also be examined by the U.S. anti-trust authority, which still must give its opinion.⁸⁶ The Star Alliance is covered by the open skies agreement concluded between the United States and Germany and therefore enjoys U.S. anti-trust immunity.⁸⁷

Other examples of alliances currently under examination are KLM/Northwest Airlines, which is enjoying U.S. antitrust immunity, and Sabena/Austrian Airlines/Swiss Air/Delta Airlines. The alliance of Lufthansa/SAS had been exempted before being subject to certain conditions.⁸⁸ Maersk and Finnair sought clearance by the Commission regarding a cooperation on passenger and cargo traffic on the Copenhagen-Stockholm route. Another Article 89 procedure initiated from the Commission concerns the Air France/Delta Airlines/Continental Airlines alliance.

3. Criticism of the Commission's Alliance Proposals

Lufthansa has denounced the remedies announced by the Commission as "draconian" and pointed to the fact that the alliance was in operation for four years. The alliance had been approved two years ago by the U.S. Departments of Justice and Transportation.⁸⁹ It criticized the "bureaucratic" intervention by the Commission to reduce frequencies as a "restriction of competition" since the purpose of the alliance was to offer additional services. It indicated that the competitiveness of European airlines would suffer if the conditions were implemented. It did not rule out an action against the coming Commission decision.

BA and AA have, with the exception of some reservations, claimed to accept the conditions imposed.⁹⁰ During the procedure, the parties claimed precedence of their national authority's decision under Article 88 of the EC Treaty. They also criticized the split market definition focusing on direct routes for time sensitive business travelers on the one hand and the trans-

85. *EU Briefing*, REUTER, Feb. 25, 1997.

86. *Europe No. 7258*, AGENCE EUROPE, July 8, 1998, at 10.

87. *Id.*

88. Commission Decision No. 96/180, O.J. L 54/28 (1996); Crocioni, *supra* note 43, at 116.

89. *Europe, No. 7260*, AGENCE EUROPE, July 10, 1998, at 10.

90. *Id.*

port of passengers using indirect flights between the United Kingdom and the United States on the other. The parties to the merger take the view that the Commission should have based its conclusions on only one market definition, taking into account indirect connections. The British authorities responsible for the enforcement of the decision have announced their intention of authorizing the alliance on the basis of the Commission's suggestions. They, however, also await authorization from the U.S. antitrust authorities and the signing of the new open sky agreement with the United States. Washington has already indicated that its approval of the alliance will be contingent upon the signature of the new agreement on the liberalization of air transport, which will supersede the old agreement with the United Kingdom that allegedly favors the United Kingdom.⁹¹ Competitors, such as Virgin Atlantic and Continental Airlines, described the Commission decision as inadequately lenient, and as allegedly leaving the BA/AA alliance with a market share of sixty percent between the United States and the United Kingdom. A problem with the decision is that de facto competition will only be possible for companies taking part in bilateral agreements concluded by Member States with the United States. In the previous case, Lufthansa/SAS slots had not been requested by competitors, which may be interpreted as sign that smaller companies lack the courage to face competition by big alliances.⁹²

4. Conclusion on Article 89 Practice

The Commission has adopted the same approach for examining alliances as it did for merger control. It has looked at the overall level of concentration in the market on the one hand, and at the level of competition on the individual route on the other. Also, the remedies it has suggested are the same as in previous merger cases. Its practice has been essentially permissive. Despite quite serious concerns about eliminating competition on certain routes, it has not prohibited the alliances, but instead imposed conditions to allow market entry. This permissiveness shows that the Commission acknowledges the need to restructure the European industry, which had already been recognized in the Report of the Sages on European Air Transport

91. *EU Briefing*, REUTER, Feb. 25, 1997.

92. *Europe No. 7259*, AGENCE EUROPE, July 9, 1998, at 6.

in 1994.⁹³

Competition law enforcement is difficult for the Commission due to its limited powers under Article 89 of the EC Treaty, regarding air traffic with third countries, and the parallel competencies of Member States under Articles 88 and 89 of the EC Treaty, in light of the absence of procedural rules under Article 87 of the EC Treaty for application of competition rules to air transport with third countries. On the contrary, Regulation No. 3975/87 only extends to intra-Community transport. In the absence of such procedural rules, the transitory regime of Articles 88 and 89 of the EC Treaty applies, in which both the Commission and Member States authorities can become active participants in the process, thus ensuring that the Commission must cooperate with Member States. After a first attempt in 1989, the Commission has made a second attempt to extend Regulation No. 3975/87 and Regulation No. 3976/87 to air traffic with third countries. These proposals, although favored by the European Parliament, are stuck in Council due to the conflict of power between Member States and the Commission in the air transport sector. The limited role of the Commission under the transitional provision of Article 89 of the EC-Treaty is inadequate for an active implementation of the competition rules. Also, the Commission's mandate to negotiate a European open sky agreement with the United States has been set aside by the Council so far.⁹⁴ The Commission has, in the meantime, initiated infringement proceedings against eight Member States that have concluded open sky agreements with the United States.⁹⁵

From an economic perspective, the Commission's assumption that the cost savings achieved will enable the airlines to lower fares is questionable. Economists only seem to understand potential for economies of scale in the presence of hub-and-spoke systems.⁹⁶ Since there is not much hope for such networks in Europe, the argument that airlines' cooperation with each

93. *Recommendations form the Report by the Comité des Sages for Air Transport to the European Commission, reprinted in 1 EUROPEAN AIR LAW E(i)(1.3)* (Elimar Gjemulla, et al., eds., 1998).

94. For an analysis of the legal basis for Commission external competence, see *Close, External Competence for Air Policy in the Third Phase—Trade Policy or Transport Policy?*, 3 EUR. AIR L. ASS'N 31 (1990); John Balfour, *Open Skies Agreements with the U.S.—A Question of Legality*, 9 EUR. AIR L. ASS'N 25 (1995).

95. *Internal Market*, No. 2299, EUROPEAN REP., Mar. 14, 1998, at 12.

96. See HUSTON & BUTLER, *supra* note 22, at 407; Crocioni, *supra* note 43, at 118.

other, instead of competition, will result in cost reduction, should be critically reviewed. So far the Commission has not found a way to distinguish between welfare-improving agreements and agreements that merely restrain competition.

Another issue concerns the barriers to entry identified by the Commission. In some decisions, it seems that the Commission considers the mere size of an alliance and its economic strength as a barrier to entry. From an economic perspective, however, only economies of scale, along with sunk costs, can constitute a barrier to entry.⁹⁷ The barrier to entry at issue in air transport is airport congestion and scarcity of slots. One could, however, argue that alliances, as an investment in capacity, may reinforce the effect of an existing barrier to entry as entry deterring behavior. The Commission has also used this argument by referring to enhancing the airlines' market position by controlling a substantial portion of the slots at main airports in Europe. This view is supported by empirical data that shows that the existence of a hub and spoke system, which consumes more slots than a network of direct routes, has a deterrent effect on new entrants.⁹⁸ Therefore, the Commission was probably right in contemplating frequency freezes and access to the incumbents' FFPs in order to avoid a reinforcement of the existing barrier to entry consisting in capacity constraints.

5. U.S. Practice

U.S. authorities have also been applying their competition law to alliances between European and U.S. airlines with the purpose of executing open skies agreements with Member States.⁹⁹ The different approach taken by the U.S. Department of Transport and that taken by the U.S. Department of Justice as opposed to the European Commission on transatlantic alliances was already visible when the Lufthansa/United Airlines agreement was granted antitrust immunity. The U.S. authorities support alliances and are willing to grant antitrust immunity, provided that an open sky agreement is entered into with the United States, by the home state of the non-U.S. partner. The

97. See Crocioni, *supra* note 43, at 121.

98. Robert A. Sinclair, *An Empirical Model of Entry and Exit in Airline Markets*, 10 *REV. INDUS. ORG.* 541 (1995).

99. See Scott Kimpel, Comment, *Antitrust Considerations in International Airline Alliances*, 63 *J. AIR L. & COM.* 475 (1997) (focusing particularly on jurisdictional issues).

rationale is that if an open skies agreement applies, then new entry by other carriers is possible and a competitive environment can be maintained.¹⁰⁰ Antitrust immunity is used as an incentive for other countries to open their markets to the United States. In the Lufthansa/United Airlines case, the U.S. authorities granted immunity after analyzing U.S./German city pairs and the overall U.S./German market subject to the following conditions: immunity does not apply to cooperation between the two airlines with respect to their overlapping non-stop services, i.e., Chicago to Frankfurt does not cover the activities of Lufthansa/United Airlines as owners of CRS. In addition, the parties must withdraw from participation in any IATA tariff conferences for the routes between the United States and Germany, and other countries whose designated carriers have similar alliances with U.S. airlines and have been or are granted antitrust immunity. After examining slot availability at German airports, in particular at the Frankfurt airport, the U.S. Department of Transportation found that slot restrictions would not be a constraint on new entry. Whereas the Commission has suggested more measures be conducted to ensure market entry, the U.S. authorities have, in essence, concluded that cooperation should not extend to non-stop routes, where both carriers compete, but beyond that they have been reluctant to take measures to facilitate market entry. The main problem with open sky agreements between the United States and individual Member States is that only carriers from the respective state come into consideration as new entrants on transatlantic routes. Due to the smaller size of European countries and the former national carrier system, a situation exists in many countries where there are not many airlines competing with the former national carrier. Therefore, an extension of the traffic rights agreements to Community carriers would be necessary for them to have an equal opportunity to benefit from open skies on both sides.

6. Pricing

The fact that following liberalization fully flexible airfares for the time-sensitive business traveler have increased,¹⁰¹ whereas on certain routes, aggressive discount schemes have been intro-

100. *Id.* at 510.

101. Heft, *Gnadenlos geschöpft*, 25 DER SPIEGEL 118 (1998); *Internal Market No. 2135*,

duced, suggests that another strategy of incumbent airlines is to *cross-subsidize* between routes where they face no competition, and on routes where they intend to drive new entrants out of the market. The Commission may intervene under Article 86 of the EC Treaty and Article 7 of Council Regulation No. 2409/92 against excessively high airfares.¹⁰² Theoretically, the Commission can also intervene against predatory pricing on individual routes on the basis of Article 86 of the EC Treaty. We know, however, that in practice, complaints of competitors against predatory pricing hardly ever succeed. A more recent example is a complaint by EasyJet, a U.K. cut-price carrier, against KLM at the Commission regarding airfares on the London-Amsterdam route.¹⁰³

D. *Frequent Flyer Programs*

FFPs also form part of a national carrier's defense strategies. They are an excellent means to create customer loyalty.¹⁰⁴ In the view of the Commission, they form a barrier to entry for new entrants with a small route network.¹⁰⁵ Potential passengers who are already members of the incumbent's FFP will not switch to the small carrier. If the new entrant opens its own FFP account system, then it will not be likely to win passengers either, since its network will be smaller compared to other major carriers, which offer more opportunities to earn miles. Another way of viewing this problem, other than from the entrant-incumbent perspective, is to consider FFPs' impact between carriers of the same size in the EC.¹⁰⁶ Given the present structure of European airlines, where former national carriers have a strong presence in their home market and a less developed presence in other parts of the Community, the impact of FFPs is difficult to assess. On the one

EUROPEAN REP., May 29, 1996; on the needs and expectations of business travellers, see IATA CORPORATE AIR TRAVEL SURVEY, AVIATION INFORMATION & RESEARCH (1996).

102. The Commission suggested draft Guidelines regarding the examination of Air Fares to Art. 7 in November 1992, *see* Schmid, *supra* note 2, Drafts and Proposals E(i)(1.1).

103. *Business Brief No. 2253*, EUROPEAN REP., Sept. 24, 1997, at 6.

104. Eriksen, *Frequent Flyer Programmes, How Do They Work and What Are the Legal Issues?*, 10 EUR. AIR L. ASS'N (1996); Kofmann, *Frequent Flyer Programmes, How Do They Work and What Are the Legal Issues?*, 10 EUR. AIR L. ASS'N (1996).

105. Drabbe, *Frequent Flyer Programmes Competition Aspects*, 10 EUR. AIR L. ASS'N 1 (1996).

106. *Id.* at 4.

hand, FFPs contribute to national carriers' already strong position in their home markets, leading to price increases in order to recoup the costs incurred by operating FFPs; on the other hand, this marketing tool may be helpful in attracting passengers outside the carrier's home state and help reinforce their presence in other areas of the Community, as well as contribute to the development of a European airline industry. The third perspective suggested by the Commission is to look at the potential impact of FFPs on competition between Community and non-Community carriers.¹⁰⁷ On markets where competition between EC-carriers and third country carriers is high, such as on the transatlantic routes, the anti-competitive effect will, in general, be limited. If, however, several strong alliances have joint FFPs, then the situation changes. Since the assessment of FFPs depends on the level of competition in the markets concerned, a general legislative approach is currently not considered by the Commission. The Commission will mainly rely on applying Article 86 of the EC Treaty, which allows a case-by-case assessment of whether an abuse is present.¹⁰⁸ They will also consider a code of conduct for FFPs, if it should turn out that the market dominance threshold is too high to preserve competition. In case of pooling FFPs, Article 85 of the EC Treaty applies, since pooling FFPs may be considered an indirect means of price fixing. One must bear in mind that FFPs, as such, are not a barrier to entry, since the size that makes airlines attractive as an FFP operator is theoretically reproducible. They just reinforce the effect of airport congestion. Given the fact that FFPs may have both positive and negative effects on competition, the flexible approach currently adopted by the Commission seems adequate.

E. *Computerized Reservation Systems*

A CRS is an important method to distribute air services, and therefore, plays a key role in competition. Through the CRS, customers are provided with immediate access to information on carriers' schedules and fares, and this system allows instantaneous booking. The CRS can also be used, however, to prevent or inhibit competition. Competition can be prevented through either discriminatory practices that prevent or limit access to the

107. *Id.* at 5.

108. *Id.* at 10.

CRS facilities, or by an architectural bias, which the CRS is designed to provide more reliable information on flights of the carriers owning the CRS than for their competitors. Also, the market for the CRS is very concentrated. A set of rules tries to ensure competition between different CRS types.¹⁰⁹ For example, airlines must not be prevented from participating in other systems. Travel agents must not be prevented from participating in another system, to terminate their participation with due notice, or be exposed to incentives to use a particular CRS instead of others. In order to allow market entry by new providers, the Commission obtained undertakings from major airlines with an interest in CRS to participate on a non-discriminatory basis in competing CRS models. The result was a regulation imposing an obligation on airlines owning a CRS not to interfere with a competing CRS by refusing that CRS to distribute its services under the same conditions as its own. Although both the Code of Conduct and the Group Exemption Regulation aim toward eliminating anti-competitive abuse of the system, a 1997 report by the Council following complaints by companies alleging discriminatory use of CRS by their parent carriers suggests that further amendments may be made to the Code of Conduct.¹¹⁰ Some people also suggest that there should be restrictions on double display of code shared flights, an issue that was also raised by the Commission in the Star Alliance and BA/AA alliance cases. This report has led to a proposal to amend the Council Code of Conduct for CRS.¹¹¹

F. *Discount Schemes to Travel Agents*

In 1996, Virgin Atlantic launched a complaint against discount schemes practiced by BA in favor of travel agents and corporate clients.¹¹² The Commission sent a statement of objections to BA expressing doubt regarding the compatibility with

109. Council Regulation No. 3089/93, O.J. L 278/1 (1993) amending Council Regulation No. 2299/89 on a code of conduct for computerized reservation systems.

110. Report on the Application of Council Regulation No. 2299/89/EEC on a Code of Conduct for Computerized Reservation Systems, COM (97) 246 Final.

111. Proposal for a Council Regulation Amending Council Regulation No. 2289/89 (1997) on a Code of Conduct for Computerized Reservation Systems COM (97) 246 final (July 1997).

112. *Business Brief, No. 2307*, EUROPEAN REP., Apr. 10, 1998, at 5; *Business Brief, No. 2268*, EUROPEAN REP., Nov. 15, 1997, at 3; *Europe No. 7062*, AGENCE EUROPE, Sept. 20, 1997, at 11.

Article 86 of the EC Treaty. In July 1998, BA introduced an even more aggressive performance reward scheme providing agencies a means to allow it to maintain its previous level of revenues on a month-by-month basis by outperforming the sales of BA flights in the corresponding month of the previous year. The Commission insisted that binding agents to an airline on a year-by-year basis amounted to discriminatory incentives when applied by a dominant company. Since distribution is an important factor in an airline's success and can be used to render market access to new entrants more difficult, the Commission must monitor anti-competitive behavior regarding CRS and travel agent incentive schemes closely.

G. Abuses Under Article 86 of the EC Treaty

In addition to the above-mentioned defensive strategies of incumbent airlines, there have been several individual cases of anti-competitive behavior in which the incumbent airlines made use of their dominant position in the home market against new entrants. One example of such behavior is the refusal to interline, which was one of the controversial issues in the British Midland/Air Lingus case.¹¹³ In this case, Air Lingus terminated an interlining agreement with British Midland after the latter entered the Dublin-London route. The Commission found that there was an abuse of a dominant position, since Air Lingus' refusal to interline constituted a significant handicap on competitors by raising their costs, depriving them of revenue, and causing damage to the new entrant's image. National carriers have, due to their privileged positions that date back to times of regulatory protectionism, a variety of options to harm competitors. Only a resolved application of Article 86 of the EC Treaty can counteract such anti-competitive behavior.

CONCLUSION

Air transport liberalization in the Community has so far been a step in the right direction, but a single aviation market is far from being accomplished. In part, liberalization has been a success already, as seen in the introduction of many discount fares and a network of additional routes offered. In some re-

113. Commission Decision No. 213/92/EEC, O.J. L 96/34 (1992); *see* Crocioni, *supra* note 43, at 121 (explaining Commission's decision).

spects, however, improvements are desirable. National carriers' monopolies over many routes have not really been challenged so far. There may be routes that cannot accommodate an additional operator, since traffic density is low. For many routes, however, that argument does not apply. Given this situation, it is the Commission's task to identify and remove barriers to entry and supersede national regulation, such as in the ground handling sector, which protects the incumbent airlines. Member States' authorities should join in such an attempt, although so far, most have been rather supportive of their own national carriers. As far as the infrastructure problem of airport congestion is concerned, the Community institutions will have to find a way to ensure that sufficient slots are available for new entrants on monopoly or duopoly routes in Europe. The Commission should continue its practice to try to ensure market access by potential competitors in the framework of mergers and alliances, and review earlier experiences in earlier cases with commitments by the parties to the merger and Member States.

One central goal that must be pursued in the next phase of liberalization of European air transport is the application of EC competition law. National carriers continue to pursue all kinds of different strategies to preserve their privileged position, some of which have been outlined above. At least some of these defensive measures by national carriers can be countered by uncompromised enforcement of the EC competition rules. The goal of making airlines fit for competition can be best achieved by exposing them to a competitive environment in Europe.