COMMENTS

INTRODUCING COMPETITION TO THE EUROPEAN ECONOMIC COMMUNITY AIRLINE INDUSTRY

The air transport industry relies upon international coordination more than any other international transportation service.[1] The coordination of regulations and procedures between countries all over the world makes it possible for vacationers and businessmen to take advantage of the swiftest means of travel. However, every passenger must weigh the advantages of speed against concerns about cost. Air travel is expensive.[2]

The cost of air travel is a major concern for people living within the European Economic Community (EEC), or, as it is also called, the Common Market.[3] European travelers are subjected to airfares which are extremely high, especially when compared to fares paid by United States travelers.[4] Although Europeans have been complaining about airfares for years, the recent United States deregulation policy[5] has generated considerable support for the development of a similar policy for the EEC.[6]

Extensive regulation of the EEC airline industry has produced many anti-competitive features. First, most EEC countries have a national airline company which occupies either a dominant or mo-

1. 1980-1981 EUR. PARL. DOC. (No. 469) 15 (1980).

2. According to figures published by the International Civil Aviation Organization, Europe has the highest revenue/cost ratio of twelve regions investigated throughout the world. (Revenue Cost ratio = Total revenue/total costs x 100). COMMISSION OF THE EUROPEAN COMMUNITIES, NO. 398 (FINAL), SCHEDULED PASSENGER AIR FARES IN THE EEC 13 (1981) [hereinafter cited as REPORT 1981].

3. EUROPEAN DOCUMENTATION SERIES, STEPS TO EUROPEAN UNITY 15 (May 1983) [hereinafter cited as EUROPEAN UNITY].

4. In the United States, where the airlines have been deregulated, average airfares (per mile) are 35% below European fares. *How To Cut Europe's Air Fares*, ECONOMIST, Dec. 4, 1982, at 49 [hereinafter cited as *Europe's Air Fares*].

5. Pub. L. No. 96-192, 94 Stat. 35 (1980). *See also* Dagtoglou, *Air Transport and the European Community*, 6 EUR. L. REV. 335, 338 (1981). The deregulated airline industry in the United States "has made U.S. skies the most competitive in the world and turned the once orderly American airline industry into a survival of the fittest battleground." Greenwald, *Battling It Out In The Skies*, TIME, Oct. 8, 1984, at 56.

6. *See* Unsworth, *Can Aviation Decontrol Work in Europe*, J. COM., Dec. 8, 1982.

nopolistic market position within that country.[7] Such national airlines are generally either wholly or substantially government owned and controlled.[8] Second, individual EEC governments, which create and coordinate international regulations for their airlines, curtail competition by establishing fare fixing procedures and severely limiting market access to privately owned airline companies.[9] Finally, competition is restricted by both government subsidization of unprofitable nationally owned airlines and unprofitable routes.[10] Consequently, the competitve market forces of supply and demand are disrupted, which in turn leads to high airfares.[11]

The growing need to formulate a common air transport policy for the EEC airline industry has been the subject of considerable discussion for the past decade.[12] It has been proposed that deregulating the EEC airline industry, using the United States deregulation as a model, will overcome its inefficiencies.[13] The focus of the deregulation issue revolves around the Treaty of Rome[14] and the competition laws contained therein.[15] If these laws are applied and enforced, the

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7. Percentage of capital held by States in the main EEC scheduled airlines:

Air France	98.80%
Air Inter	49.90%
Alitalia	99.00%
British Airways	100.00%
KLM	78.00%
Aer Lingus	100.00%
Lufthansa	82.16%
Luxair	25.57%
Sabena	100.00%

BULL. EUR. COMM. SUPP. 35 (May 1979).

8. *Id.*

9. Tyrell, *Evolution or Revolution-A Review of Progress on the Abolition of Restrictions in the Air Transport Sector*, 2 EUROPEAN COMPETITION L. REV. [ECLR] 91, 92-93 (1981).

10. *Id.*

11. For an overview of how regulation defeats the competitive forces of the market, see Council of Economic Advisers, *Regulation of Monopoly and Competition*, in MICROECONOMICS, SELECTED READINGS 256-62 (E. Mansfield 3rd ed. 1979).

12. Dagtoglou, *supra* note 5, at 335.

13. *Opening Europe's Skies*, ECONOMIST, Aug. 1, 1981, at 12.

14. The Treaty of Rome binds the ten Member States together. Treaty Establishing The European Economic Community (Treaty of Rome), Mar. 25, 1957, 298 U.N.T.S 3.

15. Articles 85 and 86 are the definitive competition laws contained in the Treaty of Rome. Article 85(1) reads in pertinent part:

> "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market. . . ."
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> Article 86 reads in pertinent part: "Any abuse by one or more undertakings of a dominant postion within the common market or in a subtantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."

airlines would have to be deregulated. Deregulation would reintroduce competition into the entire EEC airline industry and lead to lower prices.[16] However, the prospect of applying the competition laws to the EEC's airline industry raises two important issues. First, it is necessary to determine exactly *how* the competition laws should be applied and enforced. Second, deregulation must be implemented in a way which will not severely disrupt existing airline services.

This Comment will analyze the international legal issues raised by the prospect of applying the competition laws of the Treaty of Rome to the EEC airline industry. First, the administrative framework within which EEC law is applied will be described.[17] Second, the effects of EEC law on the present airline industry will be examined. This discussion will explain the difficulty of introducing competition into the EEC.[18] The effects of the competition laws on EEC airlines within the world aviation community will then be investigated.[19] Penultimately, a combined factual and legal analysis of the arguments in favor of and opposed to deregulation will be discussed.[20] Finally, a proposal is made which suggests one method of incorporating free competition into the EEC air transport industry, thus promoting a common air transport policy.[21]

I. The Creation and Government of the EEC

Before examining the role competition may occupy in the future of the EEC's airline industry, it is necessary to understand this international organization and how it functions. In this way it may be demonstrated that the purpose behind the EEC's creation actually supports a deregulation policy. On the other hand, an overview of the interaction between the EEC governing bodies will demonstrate the procedural difficulty of implementing such a policy. These institutions will be responsible for examining the treaty and the air transport environment. Most importantly, these bodies will determine how the competition laws should be applied to the industry in light of the purposes and goals of the Common Market.

Id.

16. Note that within the EEC, the adoption of a regulation which will describe how the competition laws are to be applied and enforced is necessary in order to deregulate existing anti-competitive regulations in the airline industry. *See infra* text accompanying note 34.

17. *See infra* text accompanying notes 22-55.

18. *See infra* text accompanying notes 56-92.

19. *See infra* text accompanying notes 93-157.

20. *See infra* text accompanying notes 158-201.

21. *See infra* text accompanying notes 202-64.

A. The Four Governing Institutions of the EEC

The EEC was created in an effort to promote harmony in a relatively small geographic area where a great deal of economic interaction existed without coordination.[22] As a result of the desire of certain European countries to mutually promote their economies, the Treaty of Rome was adopted in 1957.[23] Member States who have signed the Treaty of Rome are bound by its laws and regulations.[24] Today there are ten EEC Member States.[25] The general objectives of the EEC are described in Article 2 of the Treaty of Rome:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.[26]

Enforcement of the Treaty of Rome is the responsibility of four EEC governing bodies described in Articles 137-209.[27] These governing bodies are the Council, Commission, Parliament and Court of Justice.[28] Each has powers in either the legislative, administrative and judicial areas, which enables them to render direct and binding orders on Member States and their nationals.[29]

The Council is primarily responsible for carrying out the objectives of the Community.[30] It is composed of representatives from the Member States who must act in accordance with instructions re-

22. Treaty of Rome, [1972 Transfer Binder] COMMON MKT. REP. (CCH) ¶¶ 100-01 [hereinafter cited as COMMON MKT. REP.]. To further illustrate the small geographic area of the EEC, compare the total United States land area of 3,675,547 square miles with the 587,214 square miles of the European Economic Community. The difference in area between the two regions is particularly significant when comparing the effects of United States airline deregulation to those foreseeable under the proposed deregulation of air transport in the EEC. *Id.* at ¶ 101.

23. *Id.* ¶ 101.

24. Treaty of Rome, *supra* note 14.

25. The Members of the EEC are Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, Great Britian, Ireland, Denmark and Greece. COMMON MKT. REP., *supra* note 22, ¶ 101.46; EUROPEAN UNITY, *supra* note 3, at 66.

26. Treaty of Rome, *supra* note 14, art. 2.

27. *Id.* arts. 137-209.

28. *Id.*

29. *Id.*

30. "In many respects, the EEC Treaty is only a framework, leaving agreement on concrete provisions to the future. It was essentially left to the Council to fill in these details." COMMON MKT. REP., *supra* note 22, ¶ 4402.01.

ceived from their respective governments.[31] While individual Member States retain control over their individual economic policies, coordination of these policies is conducted through the Council.[32] This coordination function is executed either by way of Council recommendations, (which are not binding on Member States), or by Council decisions, directives and regulations (which are binding).[33]

In order to apply the competition laws to the EEC airline industry, it will be necessary for the Council to officially adopt a regulation which will delineate how the competition laws of the Treaty of Rome are to be applied.[34] The Council, however, does not generally render official decisions or adopt regulations without either a recommendation or advisory opinion from the Parliament or the Commission.[35]

The Commission plays an important role within the EEC.[36] This relatively non-partisan body is composed of thirteen members who function in close contact with the Council and act independently of their home country's desires.[37] Generally, the Commission has the closest contact with Member States because of its duty to oversee Community development and to ensure that such growth is formulated in conformity with the provisions of the Treaty of Rome.[38] The Commission renders recommendations and opinions to the Council on Community issues which fall within the purview of the Treaty.[39] In addition, the Commission has some power to render certain other authoritative decisions, exclusive of the Council, on matters specifically designated by the Treaty of Rome.[40]

The EEC Parliament is composed of Members who represent the citizens of their particular States, as opposed to their governments.[41] The Parliament, like the Commission, functions in close

31. *Id.* ¶ 4406.02.

32. *Id.* ¶ 4402.04.

33. *Id.* ¶ 4900.

34. *Draft Regulation on Air Transport*, 2 ECLR 259 (1981); Treaty of Rome, *supra* note 14, art. 84(2).

35. COMMON MKT. REP., *supra* note 22, ¶ 4402.01.

36. *Id.* ¶ 4472.

37. The personal independence of Commission Members is a prerequisite to serving on this governing body. Commission Members are obligated not to act at the direction of the government they represent, and Member State governments are likewise obligated not to exert any influence on Commisssion Members. *Id.* ¶ 4482.

38. *Id.* ¶ 4472.

39. *Id.*

40. For example, Article 189 gives the Commission the power to make regulations and issue directives in accordance with the other provisions of the Treaty. However, these powers are somewhat limited because the Treaty confers ultimate power upon the Council. *Id.*

41. European Parliament Members are named by the respective Parliaments of the Mem-

contact with the Council.[42] This particular institution occupies the role of advising upon issues of importance to the development of the Community.[43] Generally, when the Commission renders a recommendation to the Council, the issue or subject matter is then referred to the Parliament for an additional opinion.[44] These advisory opinions address areas of either significant political impact or important legal interpretations for change.[45] Thus, while the Council has the final word on the application of the competition laws to the airline industry, the Commission and the Parliament must be consulted before such a major decision is made.

The final governing body of the EEC is the European Court of Justice. This body is composed of nine judges who render decisions concerning the application of the Treaty of Rome to Member States.[46] The Treaty defines intra-Community disputes which come within the jurisdiction of the Court.[47] All other disputes remain within the exclusive jurisdiction of the individual sovereign States.[48] Technically, the Court will not participate in the procedural adoption of the competition laws.[49] However, the Court has already rendered certain decisions which concern the competition laws. These decisions have had a substantial impact and will likely influence any future adoption of competition laws.[50] Moreover, in the wake of both growing support and opposition for the laws, it is highly probable that the Court may be placed in a position whereby it must render a decision concerning monopolistic conditions in the EEC airline industry.[51] This probability makes the adoption of a Community air transport policy and a defined method of applying the competition laws more imminent.[52]

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ber States. Parliament Members are not permitted to accept instructions from their governments or political parties and they are obligated to act for the benefit of the European Community as a whole. *Id.* ¶ 4302, 4306.

42. *Id.* ¶ 4302.

43. *Id.*

44. *Id.*

45. *Id.*

46. In general, the function of the Court of Justice is to interpret the law of the Treaty of Rome and ensure that its provisions are observed. *Id.* ¶ 4600.

47. Treaty of Rome, *supra* note 14, arts. 169-188.

48. COMMON MKT. REP. *supra* note 22, ¶ 4602.

49. The Council, Commission and Parliament are assigned the tasks of procedurally modifying the Teaty in terms of new regulations, directives and orders. *Id.* ¶ 4300.

50. *See infra* text accompanying notes 73-82.

51. *See infra* text accompanying notes 162-81.

52. *Id.*

B. The Difficulty of Integration

The fact that the EEC governing bodies are comprised of representatives from all the Member States demonstrates the problem of developing a policy of deregulation for the EEC. Member State representatives of the Council are naturally concerned with the viability of their own country's national airline.[53] Consequently, developing an air transport policy of deregulation must overcome distinct political and nationalistic obstacles in addition to being developed in conjunction with the law of the Treaty of Rome. In order to overcome these obstacles the underlying purpose of the EEC will need to be given precedence. The Treaty of Rome calls for efficient economic integration.[54] It is therefore necessary to develop an air transport policy which will achieve the goal of the EEC by increasing economic efficiency, discouraging waste and promoting the opportunity to travel for individuals living within the Community.[55]

II. THE TREATY OF ROME: A SPECIAL ATTITUDE TOWARD AIR TRANSPORT

The institutional bodies of the EEC have recognized the growing problems within the air transport sector for many years.[56] In light of the problems caused by lack of competition in the airline industry, it is difficult to understand why the competition laws have not yet been officially enforced.[57] The answer lies in the Treaty of Rome itself.

A. The Transport and Competition Articles

One of the goals of the EEC is to promote a harmonious and economical transport system.[58] The Treaty of Rome contains a com-

53. Council Members act at the direction of their governments which partially or wholly own national airlines. *See supra* note 7.

54. Treaty of Rome, *supra* note 14, art. 2. See also art. 3, which lists the general activities of the Community. These general activities include:

> (e) the adoption of a common policy in the sphere of transport;
> (f) the institution of a system ensuring that competition in the common market it not distorted;
> (g) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied;
> (h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market.

Id. art. 3.

55. Tyrell, *supra* note 9, at 93.

56. Dagtoglou, *supra* note 5, at 335.

57. *See infra* text accompanying notes 158-201.

58. Article 75 of the Treaty of Rome provides in part that the Council shall, in coordination with the other EEC governing institutions, lay down "common rules applicable to interna-

plete title devoted to defining and implementing community transport objectives.[59] The title's prominence is explained by the fact that the draftsmen of the treaty "were aware not only of the integrating function of transport but also of its special position and its problems."[60] Transport occupies such a position because it must be coordinated through the efforts of ten economically united, but nonetheless independent nation States and their governments.[61]

One of the major means by which a harmonious and economical transport system is promoted is through adherence to the competition laws.[62] "The competition laws of the Treaty of Rome are designed to ensure fair competition in the EEC under uniform conditions."[63] On June 30, 1968, eleven years after the Treaty was first adopted, the Council decided that the competition laws should be made applicable to transport by rail, road and inland waterway.[64] The competition laws, however, have never been made applicable to air transport because a special attitude was adopted toward air and sea transport when the Treaty of Rome was signed in 1957.[65]

This attitude is specifically found in Article 84(2) of the transport articles. Article 84(2) states that: "The Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport."[66] As a result, not only are the competition laws inapplicable to air transport, but the provisions of the transport articles are likewise inapplicable.[67]

The most significant reason why air transport was treated differently is the air industry's international character.[68] Unlike transport by rail, road and inland waterway, air transport involves coordination of sovereign rights both within and outside the boundaries of the

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tional transport to or from the territory of a Member State or passing across the territory of one or more Member States." Treaty of Rome, *supra* note 14, art. 75.

59. *Id.* arts. 74-84

60. *See* 1980-81 EUR. PARL. DOC., *supra* note 1, at 14.

61. The importance of transport in the EEC cannot be understated. It serves a vital integrating function because of its role in transporting persons and goods acrosss national frontiers. "The national economies can be unified only if there is an efficient system for moving people and goods." COMMON MKT. REP., *supra* note 22, ¶ 1802.

62. 1980-81 EUR. PARL. DOC., *supra* note 1, at 14.

63. *Id.*

64. COMMON MKT. REP., *supra* note 22, ¶ 2401-2634 (Reg. No. 17).

65. *Id.* ¶¶ 1945.01, 1945.05.

66. Treaty of Rome, *supra* note 14, art. 84.2.

67. Dagtoglou, *supra* note 5, at 348.

68. *Id.* at 352.

EEC.[69] Moreover, when the Treaty was drafted in 1957, many bilateral and multilateral agreements which addressed international airline coordination throughout the world already existed.[70] In addition, it was unclear to the founders of the EEC how to design a Community air transport policy that would benefit the EEC as a whole, while not interfering with the relations of members with other non-EEC countries.[71] Thus, the difficult task of developing a coordinated policy for air transport was left to be decided in the future.

The special attitude toward air transport has created problems for EEC institutional bodies. Both the Commission and the Court of Justice have been called upon either directly or indirectly to exercise their authority under the Treaty in connection with air transport issues.[72] Resolving air transport issues becomes exceedingly difficult in the absence of specific community laws for air transport regulation.

B. The Court of Justice and the Competition Laws

Although there are no regulations by which to enforce the competition laws, the Court of Justice held, in *Commission v. French Republic*, that all other general provisions of the Treaty of Rome apply to sea and air transport.[73] Based upon the holding of this 1974 decision it is argued that air transport is subject to the comptetition laws even in the absence of an official Council regulation.[74] However, there has been no definitive ruling to date as to whether this is in fact true, and it is clearly a debatable issue. *Da Costa en Schaake N. V. and others v. Nederlands Belastingadministratie*, a 1963 Court of Justice decision, illustrates this point.[75]

In *Da Costa*, the Court held that, "a judgment of the Court is binding only within the bounds of the action which has led to the judgment."[76] This holding suggests that when the issue in a new case

69. 1980-81 EUR. PARL. DOC., *supra* note 1, at 15.

70. *See infra* text accompanying notes 98-103.

71. COMMON MKT. REP, *supra* note 22, ¶ 1945.05; COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, REPORT ON THE EXECUTION OF THE TREATY 51-60, 64-66 (July 1962).

72. *See infra* text accompanying notes 73-82, 171-80.

73. "While under Article 84(2), therefore, [sic] sea and air transport, so long as the Council has not decided otherwise, are excluded from the rules of Title IV of Part 2 of the Treaty relating to the common transport policy, they remain, on the same basis as the other modes of transport, subject to the general rules of the Treaty." Commission v. French Republic, 1974 C.J. Comm. E. Rec. 359, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8270.

74. Dagtoglou, *supra* note 5, at 349.

75. Da Costa en Schaake N. V. and others v. Nederlands Belastingadministratie, 1963 C.J. Comm. E. Rec. 224.

76. *Id.*

is similar to a previously decided issue, but the subject matter, parties and circumstances are different, the Court is not bound by a prior judgment.[77] Hence, it is debatable whether the *French Republic* case unequivocally established a general rule that the competition laws apply to air transport. At that time the Court did not consider all the implications of such a decision, nor did it take into account the special attitude adopted toward air transport in 1957.[78]

The economic and legal ramifications of such a holding would be considerable. Individual Member States would have to administer the competition laws in the absence of a Council regulation detailing specific enforcment procedures.[79] Member States would be free to interpret the competition laws to their individual benefit. As a result, the laws would not be applied uniformly.[80] Moreover, the competition laws would only be invoked when convenient, and would have little significant impact in promoting a more competitive EEC airline industry.[81] Such inconsistent application of the competition laws is not compatible with the promotion of an "economic and harmonious transport system" for the Community as a whole.[82]

Article 84(2) of the Treaty provides that the Council is the only institution authorized to adopt an official policy for the economic harmonization of air transport.[83] For this reason, it is unlikely that the Court would render a decision unequivocally stating that the competition laws apply to air transport. Such a decision would

77. *Id.*

78. The issue of the 1974 decision is similar to one which might develop if the general application of the competition laws to the air transport sector was challenged in the European Court of Justice. That issue is whether all general provisions of the Treaty apply to the air and sea transport sectors. However, the Court would not necessarily be bound by its 1974 decision because the subject matter, circumstances and parties to a decision with respect to air transport are drastically different from those of the prior decision.

The 1974 case dealt with the French Employment Sea Code of December 13, 1926, which was held to be in contravention of the general rules of the Treaty on Freedom of Movement for Workers. The court ruled that even though sea transport was undefined by the Transport Articles, all other general provisions of the Treaty (in this case Article 48-Free Movement of Workers) applied to air and sea transport. The factual circumstances of the 1974 case which led to that ruling are entirely different from the factual circumstances utilized in making a determination of whether competition laws apply to air transport. The 1974 case did not require the Court to consider or weigh any of the extremely complex legal and economic problems which would arise if the competition laws were made applicable to air transport. *Id.*

79. Letter from Knut Hammarskjöld, Office of the Director General, IATA to G. Contogeorgis, Commissioner, European Economic Communities, Attachment A, at 6 (Dec. 28, 1981).

80. *Id.*

81. *Id.*

82. Treaty of Rome, *supra* note 14, arts. 74-84.

83. *Id.* art. 84(2).

clearly infringe upon the Council's authority. However, the likelihood that a party will request the Court to hear a case concerning the monopolistic practices of air transport increases daily.[84] The type of judgment the Court would be inclined to render is unknown. The Court, however, is not the only EEC governing body which may be placed in an awkward position as a result of the Counsil's delay. The Commission also faces potential conflicts of authority in the absence of a specific ruling on the role of the competition laws.

C. The Commission and the Competition Laws

The EEC Commission has certain investigatory powers to oversee reported competition infringements even in the absence of the direct application of the competition laws to air transport.[85] These investigatory powers are explained in Article 89, which provides that the Commission may investigate cases of suspected infringement on its own initiative, or upon the request of a Member State.[86] If the Commission finds an infringement of the laws, Article 89 authorizes them to propose appropriate remedial measures.[87] This authority appears to be one of form, however, because substantively the Commission is limited in its control over competition infringements for two reasons. First, the investigatory powers of the Commission are dependent upon the cooperation of Member State governments. Member States must not only report suspected infringements of competition, but must also coordinate their elimination.[88] However, few complaints have been forthcoming from Member State governments because it is the governments themselves who have created national airline monopolies.[89] Second, in the event an infringement was reported and the Commission submitted proposed measures to eliminate the infringement, there is no mechanism to ensure that the proposed measures would be enforced.[90]

An independent decision by either the Commission or the Court

84. *See infra* text accompanying notes 163-80.

85. Treaty of Rome, *supra* note 14, art. 89.

86. *Id.*

87. Article 89, which gives the Commisssion its investigatory powers, is one of the competition laws of the Treaty of Rome. In utilizing its investigatory powers under this article, the Commission acts under the authority of the 1974 European Court of Justice's decision which states that all general provisions of the Treaty of Rome apply to air transport. Treaty of Rome, *supra* note 14, art. 89; Commission v. French Republic, 1974 C.J. Comm. E. Rec. 359.

88. "This dependence is detrimental to the effective and consistent operation of competition policy in this sector of the economy." 1982-1983 EUR. PARL. DOC. (No. 1-286) 7 (1982).

89. *Id.*

90. 1979-1980 EUR. PARL. DOC. (No. 1-724) 17 (1980).

of Justice with regard to the application of the competition laws would not achieve the community goal of adopting a common air transport policy.[91] Such haphazard decision making would undermine the special attitude adopted toward EEC air transport. This attitude was adopted precisely because it is so complex in terms of its international character.[92] Thus, any application of the competition laws requires meticulously planned coordination through the efforts of all EEC governing bodies. However, continued delay in adopting a policy for air transport has compounded the problem of unraveling its international character.

III. AIRLINE COMPLEXITY AND THE TREATY OF ROME

The existing airline system within the EEC is extremely complex.[93] Several bilateral agreements between Member States which address considerations such as landing rights, tariffs and flight arrangements in general are primarily responsible for this complexity.[94] Additionally, there are a host of international airline organizations to which some or all of the Member States belong.[95] The purpose of these organizations is to facilitate cooperation at the government level between individual States and the various airlines.[96] As a result of the special attitude toward air transport and the delay in formulating an air transport policy, EEC airline coordination, through bilateral agreements and international airline organizations, has developed free from the competition laws of the Treaty of Rome.

91. There are two predominant reasons why the goals of the Community cannot be achieved by an independent institution's application of the competition laws. First, the uncoordinated application of these laws would thrust the entire Community airline system into a state of uncertainty. *Id.* at 16. Second, it is the responsibility of the Council to coordinate a comprehensive air transport policy in conjunction with the input from the other EEC governing institutions. *See supra* text accompanying notes 30-45.

92. 1979-80 EUR. PARL. DOC., *supra* note 90, at 16.

93. *Id. See also* 1980-81 EUR. PARL. DOC., *supra* note 1, at 18-19.

94. 1982-83 EUR. PARL. DOC., *supra* note 88, at 8.

95. For example, Association for European Airlines (AEA), International Air Carriers Association (IACA), European Air Carriers Association (EURACA). Of particular importance is the European Civil Aviation Conference (ECAC). This organization is without regulatory power, but plays an important role in the development of air transport in Europe. It makes recommendations and resolutions, which are addressed to its Members. These are often implemented by the countries concerned in the same way as regulations because they are agreed upon by the directors-general of the national civil aviation administrations. BULL. EUR. COMM. SUPP., *supra* note 7, at 25, 26.

96. Cooperation in setting regulations at the government level is largely conducted by the International Civil Aviation Organization (ICAO) and the ECAC. Cooperation and coordination of activities between airlines is largely conducted by the International Air Transport Association (IATA) *Id.*

Consequently, an immediate and direct application of the competition laws would open the door to a host of problems not only within, but also outside the EEC.[97] A review of the role which bilateral agreements and international organizations play within the EEC will help demonstrate the extreme difficulty of applying the competition laws to the air transport sector.

A. The Problem with Bilateral Agreements

Before the signing of the Treaty of Rome, individual European countries, now members of the EEC, were negotiating air rights.[98] These countries originally asserted complete sovereignty over their national airspace for reasons of security and protection from surface damage.[99] This protectionist attitude influenced the negotiations during two of the most significant conventions for the regulation of the airline industry: the Paris Convention of 1919[100] and the Chicago Convention of 1944.[101] The notion of sovereignty influenced States' claims to economic control over air transport activities in and over their national territories.[102] These interests were deemed to include the interests of a country's own national airline.[103]

The bilateral agreements which have evolved over the years between EEC Member States and other countries establish mutual conditions which must be met before air rights will be exchanged.[104]

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97. 1980-81 EUR. PARL. DOC., *supra* note 1, at 14-15.

98. For an overview of the beginnning of Nations' negotiations for air rights see generally Salacuse, *The Little Prince and the Businessman: Conflicts and Tensions in Public International Air Law*, 45 J. AIR L. & COM. 807 (1980).

99. Gertler, *Nationality of Airlines: A Hidden Force in the International Air Regulation Equation*, 48 J. AIR L. & COM. 51, 54 (1982).

100. "The Convention for the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173 (Paris Convention). . . was prepared by the Aeronautical Commission of the 1919 Paris Conference and approved by the Supreme Council of the Conference. The draft was presented for signature to thirty-two allied and associated states on October 19, 1919. At the outbreak of the Second World War, thirty-four States had agreed to the Convention." *Id.* at 54 n.10.

101. "In 1944, the International Civil Aviation Conference (The Chicago Convention) was held in Chicago upon invitation of the United States Government with the participation of representatives of 54 States in order to make arrangements for the immediate establishment of provisional world air routes and services and to set up an interim council to collect, record and study data concerning international aviation and to make recommendations for its improvement. The participants were to discusss the principles and methods to be followed in the adoption of a new aviation convention." *Id.* at 52 n.4.

102. *Id.* at 54.

103. *Id.*

104. The Chicago Convention gives the following definitions of the freedoms of the air:

(1) the right to fly across the territory of a foreign country without landing; (2) the right to land for non-commercial traffic purposes (technical operations relating to the aircraft, the crew, refuelling, etc.) in the territory of a foreign country; (3) the right to

Important conditions concern agreements which relate to capacity, market access and revenue sharing.[105] For example, a typical capacity sharing agreement fixes the number of seats which can be offered by two different national airlines on a fifty-fifty basis.[106] As a result of these agreements, the type of aircraft which may be utilized is restricted because only a certain number of seats may be offered.[107] In addition, such agreements place artificial disadvantages on those airlines that could otherwise operate more efficiently if they were able to determine their own capacity levels.[108]

Bilateral agreements also restrict market access.[109] Governments often negotiate to determine which airlines will be granted particular air rights.[110] Member State governments naturally favor their own national airlines and grant the most desirable routes or air rights to them.[111] Member States also give special concern to other considerations such as mutual reciprocity and parity when determining which airlines will be able to operate which routes.[112] Because market access is so strictly regulated by bilateral agreements, competition and efficiency have been effectively neutralized.[113]

Bilateral agreements between EEC Member States and con-

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an air company to put down, in the territory of a foreign country, passengers, freight and mail taken in the country of registration; (4) the right to an air company to take on, in a foreign country, passengers, freight and mail, for off loading in its country of registration; (5) the right to an air company to undertake the commercial air transport of passengers, freight and mail between two third countries.

Dagtoglou, *supra* note 5, at 336 n.9.

105. Capacity sharing agreements are agreements between airlines which fix the number of seats aircraft from two different Member States will offer. Revenue sharing agreements are agreements between airlines which may equalize the revenue between two airlines based upon the capacity offered. COMMISSION OF THE EUROPEAN COMMUNITIES, NO. 72 (MEMORANDUM NO. 2), CIVIL AVIATION: PROGRESS TOWARDS THE DEVELOPMENT OF COMMUNITY AIR TRANSPORT POLICY 32-33 (1984) [hereinafter cited as EUROPEAN COMMISSION MEMO].

106. *Id.*

107. When an airline carrier is only permitted to offer a certain number of seats pursuant to a capacity sharing agreement, it is thereby also limited in the size aircraft which may be operated. *Id.*

108. *Id.*

109. 1980-81 EUR. PARL. DOC., *supra* note 1, at 17.

110. For example, Article 6 of the Chicago Convention states: "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization." Gertler, *supra* note 99, at 54 n.13.

111. The fact that EEC governments bilaterally exchange air rights on an economically intertwined basis lends itself to possible friction between Member States. The goals of each sovereign are naturally "[v]iewed from different perspectives and what may be perceived as a legitimate, economically desirable measure in one country may be considered unfair or discriminatory by another county." *Id.* at 82.

112. 1980-81 EUR. PARL. DOC., *supra* note 1, at 17.

113. *Id.*

tracting third parties have developed a "customary law" which further restricts competition.[114] At one time Member States were allowed to exercise discretion in setting the conditions necessary for foreign carriers which operated in their countries. As a result, even when airlines failed to comply with certain ownership control conditions they were sometimes allowed to operate.[115] Today, however, such conditions have risen to the level of binding legal norms, and as such, customary law.[116]

If the competition laws are suddenly applied to the air transport sector, these bilateral agreements would probably no longer be valid.[117] Most of the agreements negotiated by the Member States which contain provisions on capacity and revenue sharing would violate the competition laws.[118] These violations would extend not only to agreements between EEC Member States, but also to agreements with other non-EEC countries.[119] Therefore, the entire EEC airline industry would be thrust into a state of uncertainty.[120]

The negative effect of bilateral agreements on competition, however, is only one aspect of the problem. International airline organizations have also created various multilateral agreements to which EEC Member States are signatories.[121] Accordingly, Member States possess certain obligations under these agreements which further complicate the EEC airline industry and the prospects of directly applying the competition laws.

B. The International Air Transport Association—Obligations and Conflicts

The International Air Transport Association (IATA)[122] is one

114. Customary international law is created by the habitual or long established practice of Nation States. *See* H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW (1966).

115. Gertler, *supra* note 99, at 70.

116. *Id.*

117. 1980-81 EUR. PARL. DOC., *supra* note 1, at 18-19.

118. Capacity and revenue sharing agreements would be prohibited by Article 85 in that they "[h]ave as their object or effect the prevention, restriction or distortion of competition within the common market. . . ." Treaty of Rome, *supra* note 14, art. 85.

119. Under Article 234, para.2, Member States are obligated to free themselves by any legal means from all agreements that are not compatible with the Treaty of Rome. If a Member State is unable to renegotiate such a prior agreement, it must consider denunciation of that prior agreement. COMMON MKT. REP., *supra* note 22, ¶¶ 5322.01-.05.

120. 1980-81 EUR. PARL. DOC., *supra* note 1, at 19.

121. See the treaties discussed in Salacuse, *supra* note 98.

122. The IATA is an organization of airline companies. At present, IATA's membership covers over 100 airline companies. "The airlines represent about 80 countries including all

of the most influential airline organizations in the world.[123] One of the major functions of IATA is the organization of traffic conferences for coordination of tariffs.[124] After these conferences the airlines file a set of proposed tariffs with their respective governments.[125] Each government must approve the proposed tariff before it becomes integrated into the system.[126] Recently, the tariff coordinating activities of IATA have been accused of potentially infringing on the competition laws of the Treaty of Rome.[127]

According to Article 85(1) of the Treaty, arrangements which "directly or indirectly fix purchase or selling prices or any other trading conditions are prohibited."[128] However, Article 85(3) provides an exception for certain agreements which "contribute to improving the production or distribution of goods . . . while allowing consumers a fair share of the resulting benefit . . . ."[129] Thus, it is arguable whether IATA tariff coordination and the participation of individual airline carriers contravenes Article 85(1) of the Treaty.

The participation of air carriers at tariff conferences neither sets nor decides rates and fares.[130] The air carriers are only instruments of their governments,[131] and simply implement the procedures which are accepted in bilateral agreements between individual States.[132] In this sense air carriers do not "directly" fix purchase or selling prices. The EEC Commission has indicated that EEC air carriers are not acting in contravention of Article 85 of the Treaty.[133] The Commission has stated: "[i]nsofar as the airlines tariff practices merely carry out government instructions, Article 85 and 86 cannot be applied directly to the airlines."[134] A strict application of the Treaty, however,

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Community Member States excluding Luxembourg." BULL. EUR. COMM. SUPP., *supra* note 7, at 25.

123. While IATA is purportedly an organization of airline companies, these companies are actually "[i]nstruments of their Governments in carrying out negotiations mandated by a procedure agreed in bilateral air agreements between States." Letter from Knut Hammarskjold, *supra* note 79, Attachment A, at 7.

124. BULL. EUR. COMM. SUPP., *supra* note 7, at 26.

125. *Id.*

126. *Id.*

127. Letter from Knut Hammarskjöld, *supra* note 79, Attachment A, at 6.

128. Treaty of Rome, *supra* note 14, art. 85(1).

129. *Id.* art. 85(3).

130. Letter from Knut Hammarskjöld, *supra* note 79, Attachment A, at 7.

131. *Id.*

132. *Id.*

133. COMMISSION OF THE EUROPEAN COMMUNITIES, TENTH REPORT ON COMPETITION POLICY OF THE COMMISSION OF THE EUROPEAN COMMUNITIES 22, 23 (1981).

134. *Id.*

indicates that IATA fare fixing does in fact violate Article 85(1). IATA unequivocably fixes airfares and consequently consumers are not collecting a fair share of the resulting benefit.[135] Likewise, the adoption of IATA fares does not appear to fall within the exception of Article 85(3) because airfares remain artificially high.[136] Additionally, it is hard to deny that EEC national airlines do not at least "indirectly" set the price of airfares since they routinely adopt the prices agreed upon.[137]

The Commission will likely acquiesce to IATA practices because it is the government participation of Member States which is actually at issue.[138] In the absence of a definitive ruling on the application of the competition laws the Commission cannot effectively render an opinion on the anti-competitive practices of Member State governments.[139] Moreover, IATA officials maintain that even if the competition laws were made applicable to the air industry, IATA tariff setting procedures would still be exempt under Article 90(2) of the Treaty of Rome.[140] Article 90(2) provides that public undertakings "entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition. . . ."[141] However, the Treaty further provides that the competition laws shall only be enforced upon such undertakings "insofar [sic] as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them."[142] Therefore, if EEC air carriers qualify as exempt, they could continue to fix airfares through the IATA forum.

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135. *See supra* text accompanying notes 122-26. *See also Europe's Air Fares*, *supra* note 4; Dagtoglou, *supra* note 5, at 337.

136. *Europe's Skies*, *supra* note 13, at 12.

137. *See supra* text accompanying notes 122-26.

138. *Competition in Air Transport*, 2 ECLR 159 (1981).

139. Note, however, that the Commission has submitted a draft regulation to the Council on the application of the competition laws to air transport. *Draft Regulation on Air Transport*, *supra* note 34, at 259. For an analysis of the draft regulation and the power it would confer upon the Commission, see generally COMMISSION OF THE EUROPEAN COMMUNITIES, No. 590 (FINAL), PROPOSAL FOR A COUNCIL DIRECTIVE (EEC) ON TARIFFS FOR SCHEDULED AIR TRANSPORT BETWEEN MEMBER STATES (1981).

140. Treaty of Rome, *supra* note 14, art. 90(2), provides for an exemption to the general rule described in Article 90(1). Article 90(1) states: "In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94." *Id.* art. 90(1).

141. *Id.* art. 90(2).

142. *Id.*

EEC air carriers may qualify for the Article 90(2) exemption if they are classified as public undertakings to which Member States grant special or exclusive rights.[143] Governments often grant specific air carriers certain rights and impose certain obligations for the operation of international air services.[144] In addition, air carriers provide a vital service to tourism, international commerce and the traveling public in general.[145] From this perspective, EEC airlines may be classified as "entrusted with the operation of services of general economic interest." Thus, if the EEC administrative bodies wish to allow EEC airline affiliation with IATA to continue, the Treaty of Rome can be read to achieve this result. However, under such an interpretation, competitive pricing is eliminated.[146]

One further consideration should be noted with respect to the role of IATA in the EEC. Most of the existing bilateral agreements between Member and non-Member States provide that "airline fares and rates shall, where possible, be established with account taken of the recommendations of the International Air Transport Association."[147] A fundamental principle of international law is that treaties or agreements between States are legally binding and States must refrain from acts inconsistent with their treaty obligations.[148] "If airline negotiations on fares and rates were held to be in violation of the Rome Treaty the carriers would be unable to continue to consult or agree on tariffs . . . ."[149] Member State governments would be forced to breach those bilateral agreements which require the airlines to engage in negotiations prior to any government intervention.[150] The Treaty, however, provides a possible solution to the problem of conflict between the competition laws and the IATA forum for negotiation of air tariffs.

Although EEC interests[151] cannot be replaced by national interests, Article 234 states that existing obligations entered into prior to

143. Weber, *Air Transport in the Common Market and the Public Air Transport Enterprises*, 5 ANNALS AIR & SPACE L. 283, 290-92 (1980).

144. Airline carriers are permitted to operate only after they have been granted licenses by their governments. Furthermore, the governments determine which routes each carrier will be permitted to operate. Letter from Knut Hammarskjöld, *supra* note 79, Attachment A, at 8.

145. *Id.*

146. The competition laws would not apply to these public undertakings, and governments could control pricing. Treaty of Rome, *supra* note 14, art. 90.

147. Letter from Knut Hammarskjöld, *supra* note 79, at 9.

148. KELSEN, *supra* note 114.

149. Letter from Knut Hammarskjöld, *supra* note 79, at 9.

150. *Id.*

151. 1980-81 EUR. PARL. DOC., *supra* note 1, at 16.

the signing of the Treaty of Rome will only be honored within certain limits.[152] In the case of IATA, those bilateral agreements which existed prior to the application of the Treaty's competition laws would be at issue. EEC governing bodies could feasibly devise a plan whereby the competition laws could be strictly enforced within the community and liberally enforced in regard to non-Member States.[153]

The importance of IATA and other international airline organizations which coordinate the relations of States and their airline carriers should not be understated. Such organizations and their functions are deeply rooted in bilateral agreements between countries all over the world.[154] The coordination of air rights between Member States is largely dependent upon these organizations.[155] It is understandable why the EEC airline industry would be thrust into a state of confusion and uncertainty if their activities are held to infringe the competition laws of the Treaty of Rome.[156]

If the competition laws are immediately applied to the air transport sector, the applicability of the competition laws will have to be redefined with regard to Member States and organizations like IATA. Member governments oppose the immediate application of the competition laws because they naturally wish to protect their national airlines and the rights and privileges that they have obtained through treaties.[157] Nevertheless, there are strong arguments that support the immediate implementation of these laws which are equally well founded.

IV. FREE COMPETITION: SUPPORT AND OPPOSITION

Those who favor a competitive environment believe that competition should provide the groundwork for a future air transport policy.[158] Those opposed to competition maintain that it simply cannot

152. Treaty of Rome, *supra* note 14, art. 234.

153. "Article 234 does not apply to agreements among the Member States. As between them, the EEC treaty will take precedence in all cases. In multilateral agreements to which third countries are parties in addition to one or more of the Member States, the Member States may in relations with each other invoke provisions of other agreements as against the EEC Treaty only if more compelling demands are made." COMMON MKT. REP., *supra* note 22, ¶ 5322.01.

154. EUR. COMM. BULL. SUPP., *supra* note 7, at 24-27.

155. 1980-81 EUR. PARL. DOC., *supra* note 1, at 15.

156. *Id.*

157. Dagtoglou, *supra* note 5, at 347, 351.

158. *Europe's Air Fares*, *supra* note 4.

work within the EEC, at least not immediately.[159] In order to fully understand the positions of these groups, a factual analysis of the situation and perspective of both is necessary.

A. Competition Advocates

Competition advocates are largely comprised of airline users and independent airline carriers who are attempting to enter the market.[160] For example, airline users often compare European fares to those charged in the United States and focus attention upon the large disparity between the two.[161] Likwise, independent airlines which attempt to offer lower competitive fares are frustrated by overcoming the obstacles created by excessive regulation.[162] One of the most highly recognized advocates of free competition who has tried to enter the European airline market is Sir Freddie Laker.[163]

In 1980 Laker's application for a license from the United Kingdom Civil Aviation Authority (CAA) was rejected.[164] The license would have permitted Laker to operate scheduled low fare services for more than 640 routes between thirty-five European cities.[165] Pursuant to the denial of a license, Laker sought review by the High Court of London, invoking the law of the Treaty of Rome.[166] Laker argued that the Treaty calls for EEC transport competition which directly includes the air transport sector,[167] and any restrictions on competition imposed by the authorities in the United Kingdom were superceded by the authority of the Treaty.[168] The London Court was expected to refer the controversy to the Court of Justice, with the

159. *Id.*

160. Tyrell, *supra* note 9, at 92.

161. Unsworth, *supra* note 6.

162. *See infra* note 170.

163. Weber, *Laker Airways vs. The Ten Governments of the EEC-Comments on a Pending Case*, 6 ANNALS AIR & SPACE L. 257 (1981).

164. *Id.*

165. *Id.* Laker wanted to undercut existing IATA fares, and to create a demand large enough to enable him to operate wide body jets on these routes. "A major reason for the denial was that most of the routes applied for required fifth freedom rights from foreign governments. . . ." *Id.* at 258. The fifth freedom right allows an air company to undertake the commercial air transport of passengers, freight and mail between two countries. Dagtoglou, *supra* note 5, at 336 n.9. EEC individual governments were unwilling to grant these rights because of the impact which the "low-fare, high capacity concept would have had on the existing competitive environmment." Weber, *supra* note 163, at 258. Moreover, the recognition of an additional carrier on certain routes was seen as unnecessary because individual governments felt that adequate services were already provided. Weber, *supra* note 163, at 258.

166. Weber, *supra* note 163, at 260.

167. *Id.* at 258.

168. *Id.*

hope that it would render a decision interpreting the Treaty's competition laws.[169] Unfortunately, Laker Airlines collapsed before its owner was able to bring the case before the Court of Justice.[170]

The Court of Justice, however, may still be forced to rule on this issue. Lord Bethell, a British member of the EEC Parliament, is making private attempts to pursue a definitive court ruling on the application of the competition laws to air transport.[171] Bethell has led a campaign against what he refers to as the EEC airline price fixing "cartel."[172] He contends that a cartel is being operated by those aviation companies who are coordinating airfares.[173] In a letter addressed to the EEC Commission on May 13, 1981, Lord Bethell complained that the Commission had done nothing to terminate the situation.[174] On September 10, 1981, he lodged an action against the Commission in the Court of Justice.[175] Bethell asked the Court to find that the Commission had failed to put an end to the airlines' alleged infringements of the competition laws,[176] arguing that competition between EEC airlines is limited not just by the fixing of fares,

169. *Id.* at 260.

170. Unsworth, *supra* note 6. An additional example of the frustration experienced by independent air carriers is found in the case of Sterling Airways. During 1975 and 1979, Sterling Airways, an independently owned company, registered a number of complaints against the Scandinavian Airline System (SAS)(a joint operating organization of three airlines: Danish, Swedish and Norwegian) and the Danish Government. *Sterling Airways/SAS*, 2 ECLR 10 (1981). Sterling Airways made two allegations. First, the company asserted that as a result of SAS's monopoly it had been denied entry into the international scheduled flight market in general, and the Copenhagen/London route in particular. Second, Sterling maintained that the Danish government had permitted SAS to abuse its dominant position by charging and approving excessive fares. Pursuant to its limited authority, the Commission conducted an investigation into these allegations and concluded that in light of fares charged for equal distances elsewhere, SAS's rates might be a prima facia breach of Article 86 on the basis of excessive pricing. After the Commission announced its report to the Danish authorities, the fare for the Copenhagen/London route suddenly dropped. *Id.*

171. Unsworth, *supra* note 6.

172. *Lord Bethell vs. Commission of the European Communities*, 7 ANNALS AIR & SPACE L. 599 (1982).

173. *IATA: Air Transport and the Treaty of Rome*, 7 ANNALS AIR & SPACE L. 501 (1982) [hereinafter cited as *IATA: Air Transport*].

174. *Id.* In addition, he also complained that the Commission should take steps to terminate the situation by requesting information and explanations from the aviation companies. *Id.* The Director General for competition informed Lord Bethell that in most cases the final fixing of air fares is the sole responsibility of the State governments. Thus, there was no ground for scrutinizing the activities of the airline companies under Article 85. *Lord Bethell vs. Commission of the European Communities*, *supra* note 172. Lord Bethell was dissatisfied with the written response of the Commission and continued his efforts. *Bethell v. Commission*, 2 ECLR 267 (1981).

175. *IATA: Air Transport*, *supra* note 173.

176. *Id.*

but also by the allocation of routes.[177] Furthermore, he accused EEC governments of refusing independent carriers permission to operate routes that would inconvenience their own national airlines.[178] All of these accusations were well founded.[179] Unfortunately, Lord Bethell's action was dismissed on procedural grounds.[180]

The lack of competition is creating problems for both airline users and independent airlines. However, both the EEC Commission and the Court of Justice have managed to avoid making a definitive ruling in regard to monopolistic practices.[181] Although the instances of anti-competitive practices would apparently favor the application of the competiton laws, there are opposing arguments which indicate the contrary.

B. Competition Opposition

The greatest obstacle to the immediate implementation of the competition laws is the protectionist attitude firmly rooted in Member State relationships with their national airlines.[182] This obstacle includes the disrupting effects that are likely to occur to both the complex network of bilateral agreements[183] and the international airline organizations.[184] Additionally, it is argued that in a competitive environment less profitable routes which are currently subsidized by more profitable ones would be in danger of being closed.[185] Advocates of this argument focus on the experience of United States deregulation.[186]

EEC government officials suggest that the United States experience illustrates how air service patterns can change in the wake of

177. Wall St. J., Mar. 10, 1982, at 35, col. 1.

178. *Id.*

179. Tyrell, *supra* note 9.

180. The defendants to the action (Air France, Alitalia, British Airways, British Caledonian, Aer Lingus, KLM, Lufthansa, Olympic, SABENA and SAS) claimed that the case was inadmissible because Lord Bethell could not demonstrate a sufficient personal interest to justify his case against the Commission.

Private cases in the European court of Justice against EEC institutions are rare, but not altogether prohibited. In order for Lord Bethell to maintain his action, he will have to prove that the prior decision of the Commission has had an effect on him. *Competition: European Court Hears Complaint on Air Fares,* INTERNAL MKT., Mar. 20, 1982, at 2.

181. *See supra* text accompanying notes 165-80.

182. *Europe's Air Fares, supra* note 4, at 50.

183. *See supra* text accompanying notes 98-121.

184. *See supra* text accompanying notes 122-57.

185. 1980-81 EUR. PARL. DOC., *supra* note 1, at 7.

186. For a review of the ramifications of United States deregulation, see generally Greenwald, *supra* note 5.

deregulation.[187] United States deregulation has permitted airline companies to pursue operations on all available routes.[188] This, in turn, has produced a scramble for routes which entail air travel over long distances where air carriers perceive an opportunity to earn greater profits.[189] However, when the large United States airline carriers abandoned their shorter routes, new regional carriers filled in the gaps and began making profits.[190] Likewise, free competition in the EEC is likely to promote the operation of such regional carriers.[191] However, whereas regional carriers in the United States are experiencing financial success as a result of deregulation, several of the larger airline companies have experienced substantial financial losses. Some have gone out of business altogether.[192]

IATA has been quoted as stating that deregulation in the United States has resulted in "uneconomic pricing, fare distortions, subsidy payments, interruption of services to more than two hundred communities and three disastrous financial years."[193] This is evidenced by the fact that American operating losses totaled over one billion dollars from January to June of 1982. The United States Civil Aeronautics Board (CAB) confirmed these and other developing problems of United States airlines.[194] EEC Member governments fear that their national airlines may experience similar operating losses if deregulation is imposed.[195]

Moreover, those opposed to competition maintain that competition "United States style" simply cannot work within the EEC.[196] This proposition may be well founded in light of the inherent difference between the United States and European airline industries. The United States airline industry deals with basically one country and

187. For an overview of how United States air service patterns have changed in the wake of deregulation, see generally CIVIL AERONAUTICS BOARD, AIRLINE DEREGULATION: A REVIEW AFTER TWO YEARS (1981).

188. *Id.* at 16.

189. *Id.*

190. "Since (the United States) Congress passed the Airline Deregulation Act of 1978, the number of interstate airlines has increased from 36 to 125. They range from no-frills discounters like People Express, the fastest-growing company in aviation history, to tiny Regent Air, which plies its passengers on flights from Los Angeles (California) to Newark (New Jersey) with caviar, lobster and French champagne." Greenwald, *supra* note 5, at 56.

191. *See infra* notes 232-42 and accompanying text.

192. For example, Braniff and Air Florida went bankrupt as a result of attempting to expand their routes too quickly. Greenwald, *supra* note 5, at 56.

193. Unsworth, *supra* note 6.

194. CIVIL AERONAUTICS BOARD, *supra* note 187.

195. *Europe's Air Fares, supra* note 4, at 50.

196. *The Regulated Skies of Europe*, EUROPE, Nov.-Dec. 1981, at 18.

one domestic market.[197] The EEC, on the other hand, is comprised of ten different domestic markets which work toward the international and economic coordination of each country.[198] Thus, even if free competition were introduced into the EEC, "it is never going to be quite as cheap to fly around Europe as it is to fly in the United States."[199] This is because European airlines have to bear extra costs. For example, European landing and navigation charges (either authorized or imposed by governments) are five to ten times higher than those in the United States. Marketing can cost 150 percent more because of the complications of dealing in many countries and with several languages. Night flying restrictions mean that European aircraft have a working day 24 percent shorter than in United States; aircraft on the ground earn no money.[200] These are only a few of the differences.[201] Nevertheless, regardless of the state of competition in the United States, those who support and oppose free competition in the EEC are still left with the problem of how to solve the EEC air transport problem.

V. A "PHASED PLAN" FOR COMPETITION

The arguments in favor of applying the competition laws to the air transport sector are strong.[202] Apparently, however, the immediate introduction of these laws will not solve the problems of the airline industry.[203] Similarly, the EEC immediately needs an air transport policy in order to help achieve the primary goal of creating

197. *Id.*

198. *Id.*

199. *Europe's Air Fares*, *supra* note 4, at 50.

200. *Id.*

201. *Id.* Other differences include the following:

> (1) Fuel is up to 50% more expensive because of higher taxes; (2) labor costs are up to twice as high (although this is partly because the cartel has allowed low-productivity airlines to survive); (3) military and political restriction make European air routes, on average, 15% (and in extreme cases 47%) longer than the distance a crow would fly; (4) operating aircraft over Europe's short distances has the same effect on fuel efficiency as stopping and starting a car in a traffic jam.

Id.

202. *See supra* text accompanying notes 160-81.

203. In addition to those problems already highlighted, the European Parliament has identified the following ramifications if the competition laws are immediately applied:

> (1) any airline would be free to introduce or discontinue any service, at any time and at any fare, as far as the air sovereignty of the Member States extends; (2) any airline operator could, by virtue of cost advantages prevailing in his country, oust from a particular route any other company that did not have these cost advantages; (3) shifts in employment would occur to the benefit of countries with the lowest cost levels; (4) less profitable routes would be in danger of being closed and the Community would thus no longer be able to fulfill its socio-economic responsiblities and obligations.

1980-81 EUR. PARL. DOC., *supra* note 1, at 7.

a harmonious and *economical* EEC air transport system. It appears that application of the competition laws can play an important role in achieving these desired results.[204] One desirable approach for the integration of competition into the industry is a "phased plan,"[205] which entails the slow introduction of competition into the system. Such a plan gradually provides the groundwork for a more competitive air transport environment which ultimately can be policed by the competition laws.

A. The "Phased Plan" Approach

Several characteristics of the existing air transport system need to be changed prior to the implementation of the competition laws. The changes recommended in the ensuing discussion will require cooperation from Member State governments in order to alter the anti-competitive atmosphere which has developed over the past twenty-five years.[206] Moreover, to create a more competitive environment voluntary measures need to be suggested, coordinated and implemented through the combined efforts of EEC administrative bodies and Member State governments.[207] This is not an unrealistic expectation since Member State governments are not anxious to deal with the repercussions of the immediate implementation of the competition laws.[208] A phased plan would safeguard the viability of nationally owned airlines, and would therefore be more attractive to Member State governments whose national airlines would otherwise be placed in financial jeopardy.[209]

Modification of the existing system appears necessary on two levels.[210] First, a more competitive environment needs to be introduced into the air transport sector of the EEC itself. Restructuring certain aspects of the bilateral agreements between Member States which relate to air rights can achieve this result.[211] Second, EEC relations with international airline organizations need to be modified

204. 1982-83 EUR. PARL. DOC., *supra* note 88.

205. 1980-81 EUR. PARL. DOC., *supra* note 1, at 19.

206. Cooperation of Member State governments will be necessary and the contents of bilateral agreements which presently neutralize competition will need to be modified. *See infra* text accompanying notes 214-41.

207. EUROPEAN COMMISSION MEMO, *supra* note 105, at iii.

208. Dagtoglou, *supra* note 5, at 354.

209. *Europe's Air Fares*, *supra* note 4, at 50.

210. Realistically, the problems of the EEC transport system need to be approached from several different angles. For a comprehensive approach to the problem, see EUROPEAN COMMISSION MEMO, *supra* note 105.

211. *Id.* at 32-34.

in order to coordinate the creation of a more competitive environment within the EEC, while protecting individual Member States' interests.[212] This particular objective will require greater study of both existing and desired relations in order to formulate an appropriate policy.[213]

B. Building Flexibility Into the System

Increasing flexibility within the existing regulatory system would allow more room for airlines to effectively compete with one another.[214] Renegotiating existing bilateral agreements which now promote the non-competitive status quo is therefore necessary. Optimally, negotiations between Member States would take place on a multilateral level, which would ensure the harmonious development of all transport throughout the Community.[215] Multilateral negotiations could be achieved by creating an EEC airline organization with the sole function of coordinating the resolution of air rights between Member States.[216] Under the present system, however, full cooperation on a multilateral level cannot be expected due to the deeply rooted self interests of the Member States.[217] Thus, it is more realistic to consider renegotiation of bilateral agreements as a starting point.

As previously discussed, bilateral agreements between Member States establish mutual conditions which must be met before air rights will be exchanged.[218] The two most important conditions involved are agreements concerning capacity and revenue sharing.[219] In renegotiating bilateral agreements, conditions which concern capacity and revenue sharing should be modified.[220] The typical capacity sharing agreement fixes the number of seats which can be offered by two different airlines on a fifty-fifty basis.[221] If Member States were not permitted to ensure that their national airline is guaranteed fifty percent of the traffic coming to and going from their country, more desirable results could be achieved.[222] Similarly if no capacity

212. *Id.* at 50.
213. *Id.*
214. *Id.* at 21.
215. 1983-1984 EUR. PARL. DOC. (No. 1-386) 3 (1983).
216. *Id.*
217. *See supra* text accompanying notes 98-103.
218. EUROPEAN COMMISSION MEMO, *supra* note 105, at 32-34.
219. *Id.*
220. *Id.* at 30.
221. *Id.* at 32.
222. *Id.* at 30.

or revenue sharing guarantees were permitted, capacity and revenue would be determined by consumer demand for the most desirable service available. On the other hand, most Member States would be unwilling to completely surrender their capacity and revenue guarantees,[223] as a complete surrender could lead to the premature financial demise of inefficient airlines.[224] In order to survive, some national airlines would need the opportunity to cure their inefficiencies and restructure the services they offer.

The renegotiation of capacity and revenue sharing agreements could involve a downward readjustment of guaranteed shares over a period of time.[225] For example, such readjustment could be implemented by decreasing the guaranteed market share by ten percent every two years for a total period of ten years.[226] Many variations to such a downward readjustment could be offered in order to accomodate the particular needs of individual national airlines. As the guarantees of capacity and revenue decrease, it would be necessary for airlines to readjust to changes in market share.[227] Yet, at the same time, airlines would be given a definite time span within which to work toward greater efficiency. If operation efficiency cannot be attained, competition would force the airline out of the market.[228]

A further consideration in regard to renegotiating bilateral agreements concerns the problem of limited market access. As previously noted, market access to independent airlines is severely restricted by governments who favor their national airlines and accordingly negotiate the best air rights for those airlines.[229] Additionally, governments are very reluctant to grant operating licenses to independent airlines.[230] To remedy the limited market access

223. This would open the door to the possibility that one airline could dominate a large share of the entire EEC airline market, which would be unacceptable to Member States. *Id.*

224. *Europe's Air Fares*, *supra* note 4, at 50.

225. In its 1984 Memorandum to the Council, the Commission recommends that national airlines should not be guaranteed any more than 25% of the market. EUROPEAN COMMISSION MEMO, *supra* note 105, at 30.

226. *Id.*

227. Eliminating the guarantee of market share held by national airlines would also enable independent airlines to enter the market and to offer competitive services. This would shift the airline industry within each Member State from a "monopolistic" one to one of "monopolistic competition." Those airlines who wish to survive in a state of monopolistic competition will need to (a) cut costs below those of other airlines and (b) differentiate their services in a way which will attract consumers. For an overview of these economic principles, see generally ECONOMICS, PRINCIPLES, PROBLEMS, DECISIONS 555-82 (E. Mansfield 2d ed. 1977).

228. *Id.*

229. Dagtoglou, *supra* note 5, at 343.

230. *Id.* at 337.

problem Member States should liberalize their policy of granting operating licenses to independent airline operators.[231] However, this need not be done haphazardly. The influx of independent airlines could be regulated by establishing certain requirements which must be complied with before an operating license would be granted.[232] For example, a potential new carrier could be required to furnish profitability plans and designate the resources they have available to perform their expected operations.[233] Moreover, Member State governments could place temporary limits on the number of traffic rights granted to new carriers, which would in turn safeguard their own national airlines.[234] As the forces of competition begin to operate and certain airlines prove their efficiency, traffic rights could be granted more liberally. Consumer demand would determine which airlines survive.

Presently, some rights to operate routes negotiated through bilateral agreements remain unused.[235] In general, these rights relate to less profitable airline routes in thinly populated areas.[236] If governments are initially unwilling to grant rights to carriers who want to pursue more heavily traveled routes, special allowances could be made for operators who develop the less profitable routes. These less popular routes could be pursued by independent carriers without threatening the operations of nationally owned airlines.[237] Smaller air carriers should be permitted to operate the shorter routes without "detailed justification or the insistence on a reciprocal operation," because smaller airlines do not pose a significant threat to the larger carriers.[238] Thus, the smaller carriers should be permitted to pursue the shorter routes if the national airlines opt not to do so.

There is an additional alternative to the above scenario which promotes the utilization of the low capacity, low-profit, short haul routes. This alternative involves abandoning all restrictions[239] on aircraft operating with a seat capacity of twenty-five or less.[240] Low capacity air carriers do not exert a significant impact on the existing

231. EUROPEAN COMMISSION MEMO, *supra* note 105, at 43.
232. 1979-80 EUR. PARL. DOC., *supra* note 90, at 13.
233. *Id.*
234. *Id.*
235. EUROPEAN COMMISSION MEMO, *supra* note 105, at 43.
236. *Id.*
237. *Id.*
238. *Id.* at 44.
239. However, restrictions in regard to the maintenance of safety should clearly not be abandoned.
240. EUROPEAN COMMISSION MEMO, *supra* note 105, at 44.

system, yet have excellent potential for development.[241] By abandoning restrictions on smaller carriers, services on low profit routes would be stimulated, thus creating a wider variety of services to European travelers.

C. *Modification of State Aids*

Relaxing the regulatory system structured by bilateral agreements will also increase competition. However, such increased competition will be short lived if State aids[242] are not adequately restricted. Otherwise, increases in competition might lead to a subsidies race and financing competition.[243]

The Commission has certain investigatory and proposal rights with regards to State subsidies.[244] Article 93(1) provides that the Commission, in conjunction with the proper authorities of the Member States, shall review all granted State aid on a regular basis. More specifically, Article 93(1) states that if the Commission finds that the subsidies offered are contrary to the promotion of competition, it shall propose appropriate remedial measures to the Member State granting aid. The purpose of such a measure is to ensure the progressive development of the common market.[245]

Presently, Member States grant monies to their airlines as they see fit. In order to introduce competition into the airline industry, Member States must give special attention to their obligation under Article 92 to grant only realistic State aids.[246] Ideally, Member States should be required to notify the Commission in advance of proposed State subsidies to airlines.[247] In this way the Commission

241. *Id.*

242. Article 92 of the Treaty of Rome suggests permissible and impermissible state aids, but does not specifically define them. "[H]owever, the wording of the article indicates that, generally, every type of allowance given by the State, directly or indirectly, to individual enterprises or sectors of the economy is included. Thus, the term covers non-repayable money payments, i.e., true subsidies, as well as interest reductions, payments in kind and any other benefits. . . ." COMMON MKT. REP, *supra* note 22, ¶ 2922.10.

243. Government subsidization would eliminate any competition which would otherwise be integrated into the airline industry. EUROPEAN COMMISSION MEMO, *supra* note 105, at 36.

244. Treaty of Rome, *supra* note 14, art. 93(1). These investigatory and proposal rights may be exercised when the provisions of Article 92(1) are violated. Article 92(1) provides that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring [sic] certain undertakings or the production of certain goods shall insofar [sic] as it affects trade between Member States, be incompatible with the Common Market." *Id.* art. 92(1).

245. *Id.* art 93(1)

246. EUROPEAN COMMISSION MEMO, *supra* note 105, at 37.

247. *Id.*

could make an investigation of the proposed aid.[248] Member States would then need to comply with Commission proposals, or at least make every effort to comply with the recommendations.[249] Such a procedure would require the institution of some general guidelines by the Commission as to what constitutes permissible or impermissible State aids.[250] Over a period of time, State aids to national airlines could be completely eliminated except in extreme cases.

At the onset of the phased plan the determination of permissible or undesirable State aid will likely have to be done on an ad hoc basis.[251] The primary inquiry will be whether the proposed aid is objectively warranted. An example of permissible State aid is the case where the subsidy is granted in order to promote less profitable routes to rural regions.[252] A more difficult determination involves the example where State aids are granted in order to revive a failing airline operator.[253] In this situation there are several factors to weigh. Consideration must be given to whether the particular operator is capable of revival.[254] If the operator is merely experiencing a temporary downswing, temporary aid may be in order. On the other hand, if the operator is at the end of its growth cycle, aid should not be permitted.[255] An additonal consideration is whether one airline should be subsidized at the expense of another. This could promote a subsidies race which should be avoided.[256]

D. International Integration

Each of the preceeding recommendations can be implemented within the international boundaries of the EEC. Once these measures are implemented the competition laws can be directly applied to the air transport sector within the ECC. In the meantime, however, the relationship of EEC Member States to various international organizations will need to be studied extensively.[257]

It is apparent that certain agreements between Member States and international airline organizations will need to be modified.[258]

248. Treaty of Rome, *supra* note 14, art. 93(1).
249. *Id.* at 93(2).
250. EUROPEAN COMMISSION MEMO, *supra* note 105, at 37.
251. *Id.*
252. *Id.* at 38.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* at 50-51. *See supra* text accompanying notes 100-01, 122-53.
258. *Id.*

For example, the relationship of EEC airlines with IATA must be redefined.[259] The United States experience with IATA and conflicting antitrust considerations should serve as an example to the EEC.[260] At one time, United States airlines rejected the IATA "cartel."[261] Later, United States airlines found that negotiations between airlines serve a vital international purpose in the coordination of international air carrier services.[262]

Although it is unclear what the future relationship between the EEC air transport system and international airline organizations should be, one general guideline needs to be followed in redefining this relationship: the interests of the EEC as a whole must be given precedence over the interests of individual Member States.[263] By defining the goals to be achieved for the EEC as a whole, negotiations with international airline organizations will be more meaningful to both the Common Market and the international airline community outside the EEC.[264]

VI. CONCLUSION

The EEC does not have an air transport policy to coordinate this international segment of its economy.[265] At present, the EEC airline industry is characterized by monopolies and high airfares.[266] Consequently, very little competition among EEC airlines exists.[267] The direct application of the Treaty of Rome's competition laws to the airline industry will arguably promote competiton, which will lead to a more cost efficient industry.[268]

The competition laws of the Treaty of Rome have been indirectly applied to air transport through the authority of the EEC governing institutions[269] on a very limited basis. The powers of these institutions to oversee competition infringements have been largely ineffective,[270] as the Treaty limits their authority in the absence of an

259. *See supra* text accompanying notes 122-57.
260. For a discussion of U.S.-IATA relations, see generally *IATA Flies*, EUROPE, Mar.-Apr. 1982, at 12.
261. *Id.*
262. *Id.*
263. 1980-81 EUR. PARL. DOC., *supra* note 1, at 16.
264. EUROPEAN COMMISSION MEMO, *supra* note 105, at 51.
265. *See supra* text accompany notes 58-72.
266. *See supra* text accompanying notes 7-11.
267. *Id.*
268. *See supra* text accompany notes 160-81.
269. *See supra* text accompany notes 73-92.
270. *See supra* text accompany notes 160-81.

officially adopted air transport policy.[271]

Because there has never been a common air transport policy for the EEC, the industry has developed at the prerogative of the individual sovereigns.[272] Protectionist attitudes towards territorial air space have resulted in permeative regulation.[273] Today, these regulations are coordinated through bilateral agreements and the conference forums of international airline organizations.[274] The present coordination procedures have provided a highly regulated, complex and expensive airline system.[275] Moreover, competition among EEC airlines has been effectively neutralized.[276]

The lack of competition in the EEC airline industry has prompted considerable debate over the last decade.[277] This debate concerns whether or not free competition should be the focal point of a common air transport policy for the EEC. An analysis of the arguments in favor of introducing free competition reveals the many deficiencies of the existing industry.[278] On the other hand, the arguments opposed to free competition demonstrate that the immediate introduction of such a policy would upset the equilibrium of the present system, which would have a disrupting effect on the range of air travel services offered in the Community.[279] The optimal way to attack the problems of the EEC airline industry is with a "phased plan" for free competition, which would introduce competitive measures gradually.[280]

If the EEC airline industry is permitted to operate as it presently does, the purpose behind the Community's creation will be ignored.[281] The Treaty of Rome mandates the economic integration of transport and the promotion of the social well being of all people living in the Community.[282] Free competition will benefit both European travelers and promote the economic integration of the airline industry. If prompt action is not taken to remedy the inadequacies of

271. Treaty of Rome, *supra* note 14, art. 84(2).
272. *See supra* text accompany notes 93-121.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. Dagtoglou, *supra* note 5, at 335.
278. *See supra* text accompany notes 160-81.
279. *See supra* text accompany notes 182-201.
280. *See supra* text accompany notes 202-64.
281. Treaty of Rome, *supra* note 14, arts. 2, 3.
282. *Id.*

the present system, the EEC airline industry will continue to stagnate in its maze of excessive regulation.

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