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THE EUROPEAN COMMUNITY'S COMMON AIR TRANSPORT POLICY AND IMPLICATIONS FOR BILATERAL AIR SERVICES AGREEMENTS BETWEEN MEMBER STATES AND THIRD COUNTRIES

By

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This is an introduction to a large subject. It is also complex and rather technical but fascinating. The Community's air transport policy and its impact on bilateral air services agreements cannot be considered in the abstract. It must be seen in the broader context of the movement towards deregulation of air transport which started in the USA in 1978. This movement is spreading world-wide. The greater play of market forces has led to increased competition, new products, cheaper fares and an exponential increase in air travel. The development of computer reservation systems and frequent flyer programmes are all part of the progress of deregulation. Globalization — trans-national alliances, mergers and agreements between and among airlines — may be seen as the logical extension of market-driven deregulation world-wide towards "open skies" and the market determination of fares, routes, capacity and ownership and management of airlines.

The development of the Community's air transport policy in turn may be seen as part of the movement of deregulation — liberalization of national rules and of intra-community air agreements within an internal market in process of integration.

In their different and separate ways, each with its own dynamic, these developments impinge on and challenge the concept and role of national sovereignty over air space and the national ownership and designation of airlines, as well as the regulation of fares, capacity and routes. These have been the fundamental underpinnings of bilateral air agreements which have

governed civil aviation under the Chicago Convention since the end of the last war.

Against the perspective of these broader considerations I propose to outline the statutory background, elements, direction and scope of the European Community's (EC) common air transport policy. I will then point to the multilateral (Chicago Convention)[1] and bilateral agreement implications and to related economic aspects, and to developments in civil aviation environment including globalization.

Air Transport, Rome Treaty and Single European Act

It should be recalled at the outset that the Treaty of Rome,[2] which entered into force on 1 January 1958, specifically excluded air transport from the establishment of a common transport policy within the European Economic Community Market. Under Article 61, the free movement of services in respect of air transport was governed by Article 84. Under Article 84 of the Treaty, the common transport policy would apply to rail, road and inland transport; whether and to what extent provision might be made for sea and air transport was to be decided by unanimous vote of the Council. The required unanimity was met with the adoption of the Single European Act.[3] Article 13 of the Act provides for the addition of a new Article 8a of the Rome Treaty whereby "The Community should adopt measures with the aim of progressively establishing the internal market over a period expiring

31 December 1992" in accordance with the provisions of Article 84 relating to air transport. This was underlined in an appended Declaration, which expressed the political will of the Member States to take the necessary decisions to complete the internal market by then. However, this was followed in a subsequent paragraph by an intriguing sentence to the effect that 31 December 1992 was not automatically binding.[4]

The new Article 8a defines the internal market as "comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty". A new paragraph was also added on the application of procedures[5] for the establishment of common rules on air transport. The Declaration on the new Article 8a of the Treaty, was further endorsed by the European Council of Heads of State and Government by its agreement on 26-27 June 1986 in Madrid that the internal market for air transport should be completed by the end of 1992 in the context of measures "to strengthen the economic and social cohesion" of the EC.

First Phase—1988-1990

This laid the basis for the formulation of Commission proposals and adoption by the Council on 14-15 December 1987 of a series of directives comprising the First Phase of the liberalization of scheduled air services, which came into effect on 1 January 1988. These directives covered fares,

the sharing of passenger capacity between air carriers operating between Member States and access to routes between Member States.[6] The Council also adopted directives regarding the application of rules of competition — Articles 85 and 86 of the Treaty — to undertakings in air transport services[7] and to the application of Article 85(3)), which allows the exemption of certain categories of agreements and concerted practices[8] such as fare setting, market/capacity sharing, exchange, leasing or pooling of aircraft which may be authorized under bilateral air agreements between Member States. The application of the Treaty's competition provisions to air transport was already foreshadowed in the European Court of Justice (ECJ) decision of 30 April 1986 in the Nouvelles Frontières Case. The Court's subsequent decision of 11 April 1986 on the Ahmed Saeed Case allowed for the possible application of these provisions to concerted practices authorized under bilateral air services agreements between Member States and third countries, but only with respect to air services between Member States. However, given the network of international and bilateral agreements between Member States and between their carriers, these directives relating to Article 85(3), authorized block exemptions from the application of competition rules to concerted practices in order to allow time for adjustment. These block exemptions were to be reviewed by the Council by 30 June 1990 and in any event to expire on 31 January 1991. By extension, block exemptions would also apply to concerted practices authorized under bilateral agreements between Member States and third countries.

Second Phase — 1990-1992

In preparation for the Second Phase, the Commission submitted to the Council on 7 September 1989 its proposals[9] for the further liberalization of fares, access to intra-Community routes and capacity-sharing, as well as on the application of competition rules to undertakings and concerted practices. Consideration of these proposals by EC Transport Ministers at their meeting on 5 December 1989 led mainly to conclusions of agreements in principle.[10]

The Council of Ministers of Transport at their meeting on 29 March 1990 did not adopt any new Regulations concerning the Second Phase or decide on Commission proposals of February 1990[14], regarding the Community's external air relations. The Council did, however, agree in principle to the opening of negotiations with the six EFTA countries on fares, market access and capacity-sharing and rules of competition: the 1987 package. This negotiating mandate would be confirmed at the Council's meeting on 18/19 June.

On 18/19 June, 1990 the Council of Transport Ministers finally took key decisions on the Second Phase. These decisions were translated into three Council Regulations of 24 July 1990, to enter into force on 1 November 1990.

Two regulations relate to air fares[14] and to market access and capacity-sharing[15], and the third to competition[16]. The first two contain common provisions in the Preamble on the progressive establishment of the internal market by 31 December 1992. These two regulations also confirmed the definition of "Community Carrier" in the 1987 package. A Community carrier is defined as having "its central administration and principal place of business in the Community, the majority of whose shares are and continue to be owned by Member States and by nationals of Member States and which is and continues to be effectively controlled by such States or persons." This departs from the established definition of a scheduled carrier which is based on the nationality of the state of registration and in turn on "substantial ownership and effective control" vested in that state and/or its nationals;

Air Fares Regime

The Regulation on scheduled air fares confirms that a double disapproval regime "remains an objective to be achieved" by 1 January 1993; this is less definitive language than, for example, "shall be established", and would suggest a margin of tolerance, if not a nuance of uncertainty. Until 31 December 1992, the 1987 system of zones of flexibility is retained based on a reference fare which is the annual one-way return economy fare on 1 September 1990 for the 1990/1991 season, and on 1 September 1991 for the 1991/1992 season. Three zones are established: a normal economy fare zone, which ranges from 95 to 105% of the reference fare; the discount zone, from

90 to 80%; and the deep discount zone from 79 to 30%. Within each of these zones, air fares meeting the required criteria would qualify for automatic approval. Member States can disallow fares where conditions are not met, and to ensure against excessively high or predatory pricing. Economy fares proposed at levels above the 105% level of reference price will be approved unless both Member States involved disallow them. The regulation, however, does not preclude Member States from entering into more liberal or flexible pricing arrangements.

One interesting provision affecting non-Member States concerns agreements between a Member State and a third country involving the exercise of fifth freedom rights which may be incompatible with the provisions of the Community regime on fares. Member States are required to remove such inconsistencies, pending which the Regulation will not affect the rights and obligations of Member States toward third countries.

Market Access and Capacity-Sharing

The Preamble to the Regulation relating to both market access and capacity-sharing states: the desirability of introducing more liberal provisions in the Second Phase in respect of multiple designation, third-, fourth- and fifth-freedom rights; that bilateral restrictions on capacity should be progressively relaxed and their removal accelerated so as to encourage inter-regional services; that capacity-sharing is incompatible with the principles of the

internal market, which should be completed by 1 January 1993; and the desirability of adopting further measures, including cabotage in respect of market access and capacity by 30 June 1992. It is important to note that in the Second Phase, Member States still continue to retain the right to license and designate their own air carrier(s), and to regulate market access and capacity-sharing. However, the Regulation states that by 1 July 1992 Community rules will apply to the licensing and regulation of both carriers and air routes.

On third- and fourth-freedom traffic rights, Community carriers shall be permitted to exercise third- and fourth-freedom rights between airports or airport systems open for international traffic between two Member States. Additionally, once a Member State has licensed its own carrier to exercise third- and fourth-freedom rights on a certain route within the Community, that Member State shall authorise air carriers licensed in another Member State to exercise third- and fourth-freedom rights on the same route and to use same flight number for combined third- and fourth-freedom services within the Community. This would allow qualified open third- and fourth-freedom traffic rights: e.g. France cannot deny BA's application to exercise third- and fourth-freedom traffic rights between Paris and Frankfurt, once Air France has been licensed on that route, and can use the same flight number on a London/Frankfurt route. An interesting question arises in the case of Luxembourg: having no scheduled air carrier operating passenger services on third- fourth-freedom routes within the Community, can Luxembourg deny a

carrier, licensed in another Member State (e.g. Belgium), the exercise of third- fourth-freedom services from Luxembourg to any other member State (e.g. Greece)?

As regards multiple designation, the principle in the 1987 Package that Member States shall accept it on a country- or city-pair basis is enshrined. For the Second Phase, the thresholds have been lowered with effect from 1 January 1991 to over 140,000 passengers carried in the preceding year, or to more than 800 return flights per annum; and from 1 January 1992, to over 100,000 passengers in the preceding year, or to more than 60 return flights per annum.

In the operation of scheduled service to or from two or more points in another Member State other than the State of registration, Community carriers shall be permitted to combine scheduled air services and use the same flight number.

On fifth-freedom operations, Community carriers shall be allowed to operate these traffic rights between combined points in two different Member States provided that:

— such services are scheduled as an extension from, or a preliminary of a service to the State of registration;

— air carriers cannot use more than 50% of its seasonal capacity in the third- and fourth-freedom service to or from which the fifth-freedom service extends;

— air carriers supply to Member States involved all relevant data concerning seasonal third- and fourth-freedom operations to or from which fifth-freedom services extend, as well as seasonal capacity on such services.

The liberalisation of market access, however, is made subject to a number of conditions. First, Member States retain the right to regulate, albeit without discrimination on grounds of nationality, the distribution of traffic between or among airports within an airport system (i.e. Heathrow, Gatwick, Stansted). Second, notwithstanding the qualified open third- and fourth-freedom operations, the exercise of traffic rights is subject to established Community, national, regional or local rules regarding safety, protection of the environment and not least the allocation of slots. Airports should also have necessary facilities and navigational aids to accommodate scheduled services. Where such conditions are not met, Member States may impose conditions on, limit or refuse such operations, but must advise the Commission and provide required data. Third, pending the institution of a Community code of conduct on slot allocation, a Member State shall not authorize, except with the agreement of the other Member State(s) concerned, a new service or increase frequencies on an existing service so long as a carrier licensed in

the other Member State(s) is not permitted to do so by the airport in question. This is subject to review by the Commission at the request of any Member State, and to subsequent advice to the Council which within one month may take a different decision.

Shares of Capacity

Under the 1987 package, the shares of capacity as from 1 October 1989 were set at 60%:40%. From 1 November 1990, Member States may raise the capacity of their carriers for any season by 7.5 percentage points compared with the previous corresponding season. On the basis of Commission proposals to be submitted by 31 December 1991, the Council will decide on provisions for the abolition of capacity sharing between Member States to come into effect on 1 January 1993. The Regulation permits the conclusion of more flexible arrangements between regional airports. If a carrier has sustained serious financial loss, the licensing Member State may ask the Commission to review the situation and decide whether capacity sharing should be stabilized for a limited period, or whether the annual increase of 7.5 percentage points should be reduced in the event of substantial competition from charter carriers on a bilateral route. Such decisions are appealable to the Council.

Competition

In order to provide more time for Community carriers to adjust to the more competitive and liberalized market, the Council extended to 31 December 1992 block exemptions from the application of the Treaty's competition rules (Article 85(3)) to intra-Community air transport, including cargo. On the basis of Commission proposals to be submitted by 1 July 1992, the Council will decide on the definition of categories of agreements and concerted practices and specify in particular those kinds of restrictions or clauses which may or may not be permitted in agreements, decisions and concerted practices.

It should be noted that the Council received a Communication from the Government of the Federal Republic of Germany recalling that its instrument of ratification of the European Community Treaties exempted their application to Land Berlin and that, therefore, the above Regulations concerning air fares, market access a capacity sharing and competition rules also do not apply. This may be subject to change following the Agreement on the reunification of the Federal Republic of Germany signed in Moscow on 12 September 1990.

Negotiations with EFTA

Finally, the Council confirmed the Commission's mandate to open negotiations on behalf of the Community with Norway and Sweden on air transport services, in particular air fares, market access and capacity.[13]

Again no decision was taken on the Commission's proposals of February 1990 concerning negotiations with third countries.[11]

Issues Outstanding

Aside from Council decisions to be taken by 1 July 1992 on the further measures of liberalization including cabotage (with respect to capacity sharing and market access), and rules governing the licensing of carriers and air routes, there are a number of other key issues oustanding which still await Council determination. In the main, these include: the mutual acceptance of licences and certificates relating to flying crew, air traffic controllers, aircraft maintenance personnel; licensing procedures and requirements concerning air traffic control, flight operations and aeronautical station operations; the harmonization of social legislation with respect to the right of establishment of air carriers e.g. flight times, air service hours, rest periods for flight crews, working hours for traffic controllers, compensation for accidents; and the harmonization of airworthiness of aircraft maintenance standards etc. These are central to the right of establishment of air carriers in other

Member States and to the free movement of personnel for the completion of the internal market by 31 December 1992. No less important issues of particular concern to third countries include the Commission's competence to negotiate with third countries; and the application of Community competition rules to third country carriers in respect of concerted practices. All the above issues are politically sensitive in national capitals within the Community. While Member States are agreed to achieve an internal market by the end of 1992, and are also agreed in principle on its necessary elements, it remains for them to agree to the Community subsuming their national sovereignty in the conduct of bilateral air relations and conclusion of air agreements with third countries.

Also by 1993, the geographical configuration of the Community's air transport policy may also be affected by the outcome of the Commission's negotiations initially with Norway and Sweden and later with the other EFTA countries, Austria, Switzerland, Finland and Iceland.

In considering the possible international implications of the Community's air transport policy, it is important to take account not only of existing legislation, regulations and directives for the completion of the internal market, but also of the direction of Commission policy thinking, which may well foreshadow future Community policy. In its Communication of February 1990 to the Council, the Commission put forward proposals relating to consultation and authorization procedures on "commercial aviation relations"

between Member States and third countries and on the negotiation of Community agreements. This is a significant document, in that it sets out clearly the Commission's view on the Community's competence in international air relations both with respect to international organizations and bilateral air services agreements, and how such competence should be exercised.

The external effects of existing Community legislation were outlined as follows:

— ex post consultation on developments in the relations between Member states and third countries and on the functioning of significant elements of bilateral or multilateral agreements;

— on the implementation of the general provisions of the Treaty on air transport policy, the Commission sent a letter in September 1989 requesting Member States to amend all their bilateral agreements in conformity with Community law, particularly the designation by a Member State of Community (rather than national) carriers, whose substantial ownership and effective control is broadened to cover nationals of other Member States and/or Member States themselves;

— Member States are required to eliminate incompatibilities between provisions of both the Rome Treaty and Community law and provisions in bilateral Agreements with their countries; and

— Council regulations on competition in the 1987 package provided for their application to fifth-freedom carriers with the EC. Following EJC ruling on the Ahmed Saeed case, the 1987 package proposed that: Article 86 of the Treaty should apply to concerted practices on routes between the Community and third countries; rules need to be established and applied to concerted practices on third country routes; procedures should be provided for the resolution of conflicts of international law and also for block exemptions. The 1987 proposals also included rules concerning fifth-freedom traffic rights for Community air carriers between Member States and third countries.

Community Competence

— Drawing on the ECJ opinion 1/78 of the European court of Justices that commercial policy as laid down in Article 113 is of "an evolutive nature" and "embraces all that, in an international framework, is considered to form part of such a policy", then Article 113 on the Common Commercial policy in the Treaty affords the legal basis for Community competence in this sector. Furthermore, as transport forms part of services — to wit their inclusion in the Uruguay Round of

Multilateral trade negotiations — then the commercial aspects (market access, capacity, tariffs and related provisions) of air relations with third countries fall within the ambit of Article 113.

— Under Article 113, the Community delegates exclusive competence to the Commission for the conduct of commercial agreements with third countries. Member States, therefore, are not authorized to negotiate or conclude agreements on matters subject to the Community's commercial policy. Other important considerations adduced in support were the Community's common air transport policy within the single internal market, jointly owned and operated computer reservation systems, trans-national airline alliances, mergers and commercial marketing arrangements that overtake national boundaries within the EC. Thus, the Community as a single entity becomes the appropriate partner and interlocutor with third countries and international organizations. Because of the Community's common air transport policy, air regulations and agreements with third countries cease to be exclusively bilateral matters as they begin to impinge on Community interests. Such exercise of collective Community competence would also not be without its bargaining leverage.

The Commission further states that under Article 228 of the Treaty, supported by ECJ decisions[17], the Community is also endowed with exclusive competence in non-commercial issues for negotiations with third countries,

bilaterally or multilaterally or in multilateral organizations, on matters subject to Community jurisprudence or negotiation. In such cases the Commission also has the competence to negotiate on behalf of the Community. Even in areas where the competence of Member States is retained, the Council may decide on Community action if the common air transport policy is affected. When a situation of mixed or joint competence arises, negotiations are conducted and agreements concluded by the Commission on behalf of the Community and the invididual Member States. For all these reasons, the Community has and should exercise its competence. The Commission's first priority is the negotiation of arrangements with the Scandinavian and other EFTA countries. Next the Community needs to address the reconciliation of the common air transport policy requirements with the provisions of the 609 individual bilateral air services agreements between Member States and third countries. The Commission considers that the internal market of the Community for air transport constitutes a single collective entity without internal borders and therefore, a cabotage area: i.e. flights from Dublin to Athens would have the same domestic service character as from Halifax to Vancouver or Anchorage to Miami. This is the cornerstone of the Community's air transport policy. The Community, therefore, would need to address fifth-freedom operations of third country activities within the Community, which the Commission, in light of cabotage, would regard as a Community asset; such fifth-freedom operations are now outside Community legislation. In view of difficulties experienced by certain Member States in securing comparable fifth-freedom rights in the markets of "some very large

aviation partners", a cabotage area provides the Community with the bargaining leverage to redress such imbalances. The Commission indicates that fifth-freedom rights within the Community by third country carriers, albeit cabotage, would not be withdrawn. Rather, Member States would no longer grant fifth-freedom rights to third countries without prior consideration of the Commission under Article 113 procedures.

The Commission also addressed in an Annex the question of cabotage between Member States and its compatibility with Article 7 of the Chicago Convention. The Commission agreed that if the provisions of Article 7 are read to extend cabotage on the same or equivalent conditions to non-Member States, the non-exclusivity principle would be met. In view of the number of bilateral agreements between Member States and third countries, the Commission recognizes that the resources, skills and expertise of national capitals would have to be used in a transition period. During such a transition, Member States would be authorized to negotiate within Community guidelines; where Community interests are involved, the Community as such would exercise its competence. In international negotiations the Commission would gradually assume its role as spokesman for the Community.

International Implications

Let us now consider the possible international implications of the Community's air transport policy and its development. First, how the Community's policy conforms with the Chicago Convention of 1944 which established the frame of reference for bilateral air agreements; and second, how can it be reconciled with current bilateral agreements with third countries.

Chicago Convention

As regards the Chicago Convention, the situation obtaining in the Community between now and the end of 1992, would not unduly infringe its provisions. Article 77 of the Convention does not "prevent two or more contracting States from constituting air transport operating organizations or international operating agencies and from pooling their air services among routes or in any regions"; and under Article 78, "the Council may suggest to contracting States that they form joint organizations to operate air services among routes or in any regions". Such arrangements are not deemed to be exclusive. A question arises as to whether the preferential character of the Community's air transport policy would be regarded as exclusive. It could be so regarded if the Rome Treaty prescribed closed membership of the Community. But Article 237 of the Treaty allows for the accession of other European States, (to wit, the enlargement of the Community); and Article 238 allows for

association agreements between the Community and third countries (to wit, the agreement with Turkey), a union of states or an international organization (to wit, the agreement with countries of the Lome Convention).

Where the situation becomes unclear is in the matter of sovereignty which is the cornerstone of the Convention and of bilateral air services agreements. Article I of the Convention states that "every State has complete and exclusive sovereignty over the airspace above its territory", and, therefore, the right to grant or deny access to its airspace. In view of the provisions envisaging the operation of cabotage services by Community carriers, in January 1993, Member States would appear to retain their external sovereignty in 1993, and possibly beyond. Moreover, there is no reference in existing regulations or in the policy objectives in their preambles, which indicate the abolition of third-, fourth- and fifth-freedom services. This would suggest that they would not, therefore, be ceding their individual status as Contracting States of the Chicago Convention, or their sovereignty over national airspace, at least by 1 January 1993. Here the question arises whether under the Chicago Convention cabotage once extended by one to the other Member States, can be confined within the Community. Article 7 of the Convention states that "each Contracting State undertakes not to enter into any arrangements which specifically grant any such privilege or an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State". While this provision has not yet been tested in this specific context, under the Dispute

and Default provisions of Articles 84 and 85 of the Convention, perhaps a case could be made that cabotage within the Community would not contravene the Convention, again on the grounds that the Rome treaty does not necessarily exclude a priori membership to European states and accession to others. Membership or association would seem open to those countries who are prepared to qualify, pay the admission fee and are accepted by the Council. As the Commission has argued in its proposals, cabotage could be made available subject to reciprocity and, therefore, would not be exclusive. It will be interesting to see what, if any, cabotage provisions are included in the proposed arrangements with the EFTA countries. If and when, as the Commission contemplates, the Community as a whole becomes "a cabotage area" for air services both intra-Community and originating in third countries, Article 7 may no longer be relevant. For all practical purposes, the Community would then have one common air space. Rather, the issue will be whether the Community as a supra-national political entity becomes a Contracting State of the Convention, and assume the rights and obligations of its Member States.

Bilateral Air Services Agreements with Third Countries

Let us now turn to the possible implications for bilateral air services agreements between Member States and third countries. First, until the end of 1992, the regulations covering air fares, market access and capacity-sharing and the block exemption from the application of competition rules on

concerted practices will not likely require legal changes to bilateral agreements. In economic terms, there would be little or no impact, as the majority of these agreements provide for a single disapproval (or double approval) regime on third- and fourth-freedom services. On fifth-freedom services within the Community, Member States are required to remove at the earliest opportunity "incompatibilities" in bilateral agreements with the Regulation, but pending such removal, the existing provisions in these agreements will stand. This would afford Member states the option to bring the bilateral tariff provisions on fifth-freedom services into line with the flexible zonal system in the Community, if Community carriers were constrained by a single disapproval regime or by restricted matching provisions. Prospects are, however, that Community carriers would prefer to retain price flexibility for themselves as possible protection against third country carrier competition. There will be certain economic effects for third country carriers in respect of third- and fourth-freedom services and fifth-freedom services within the Community. The open third- and fourth-freedom services within the Community and the ability to combine points as well as fifth-freedom points should enable Community carriers to develop and mobilize an even more efficient sixth-freedom network — or an enlarged domestic market — to supplement local passengers and enhance the payload on their international routes. Additionally, Community carriers can provide same plane service to points beyond the gateway in the Community. Canadian carriers are likely to be particularly exposed to intensified sixth-freedom operations by Community carriers because Canada's population base

is only 8 percent that of the Community and is sparsely spread over an area that is almost five times larger. Also, the use of Canada's natural sixth-freedom base, the United States, is largely pre-empted by the extensive number of direct, non-stop flights operated by several US carriers to all the main cities in the Community. Some protection is provided, however, in those bilateral agreements where capacity is pre-determined.

Also, Member States have already been enjoined to amend the designation of national to "Community" carriers in bilateral air services agreements. Member States have not so far acted, presumably because a number of key decisions have yet to be taken in respect of licensing by a Member State of carriers registered in another Member State. France has yet to license, say, Lufthansa registered in Germany, to be a designated carrier operating routes under the France/Canada bilateral air agreement. Also, much will depend upon whether the bilateral agreement provides for multiple designation.

Post-1992

The more critical issues affecting bilateral air services agreements of Member States with third countries are more likely to arise after 1992. What we know from Council decisions and Regulations so far is that an internal market in air transport with the free movement of goods capital, services and persons "remains an objective" to be achieved by the end of 1992, although "setting the date of 31 December 1992 does not create an automatic legal

effect". ...[18] However, whether or not that date becomes a moveable feast, decisions have already been taken to establish a double disapproval tariff regime throughout the Community, that is, fares will be determined by the market place, subject to constraints against excessive or predatory pricing. Because of exchange rate variations much will depend on progress towards full economic and monetary union. On third- and fourth-freedom services, there will be an "open skies" regime, that is, a Community carrier will be able to fly from any hub or regional airport in one Member State to any other hub or regional airport in another Member State without route or capacity restrictions; intra-Community fifth-freedom services will also be open but likely still subject to capacity constraints; and cabotage, as between one Member State and another will be subject to route and capacity limitations. Block exemptions from the application of competition rules to concerted practices are likely to be withdrawn. It is possible also that some or all of the EFTA countries may be associated with or integrated into the Community's air transport policy. While the combination of these measures may be greater than the sum of the individual parts, they would not constitute, in a strict sense, a single unified market. The provisions for fifth-freedom services or cabotage, if only because of route and capacity constraints, would not normally apply to carriers operating domestic services. This would also not suggest a single, central aeronautical authority governing civil aviation in the Community and its relations with the outside world. The Commission, however, in its February 1990 Communication to the Council on the Community's air relations with third countries does look to such an

eventuality. As has been the case throughout the life of the Community, there is a constant tug-of-war between the Commission which tends to pull towards greater integration and the Member States who seem to resist the complete transfer of power, if not national sovereignty, to a central authority. There is, however, a growing political will towards further integration, if not political unification, of the Community as affirmed in the Single European Act of 1987. In light of the cumulative progress of the Community since its inception and developments in Eastern Europe including the re-unification of Germany, the possibility of political integration cannot be overlooked or minimized. It is not inconceivable that by the turn of the century, the Heads of State and of Government of the Member States may decide on broad political grounds that the time had come to unify the Community. If so, all the time-tables and proposals for the progressive movement towards an effective single internal market in air transport would be converted to actual implementation, and there would be a unified common external policy in civil aviation.

An interesting consequence is the determination of the point of entry for customs and immigration. Would a Canadian passenger arriving at Heathrow be cleared for customs and immigration for entry into the United Kingdom and beyond to other points within the external common boundary of the Community?

For third countries, therefore, the situation after 1992 is neither entirely obvious nor yet clear. For bilateral agreement purposes the central issue is who exercises sovereignty over the air space covering the territory of each of the Member States. This should determine who is the Contracting Party in a bilateral air services agreement with a third country, and who negotiates on behalf of a Member State, or whether the Community will negotiate as one. To reconcile the external impact of the Community's air transport policy with the existing provisions of bilateral air agreements with third countries, will involve either the re-negotiation of agreements with each Member State, or the negotiation by each third country of one agreement with the Community. That is the question posed by the Commission in its February 1990 Communication to the Council. The Commission argued that air transport is a service; services are a commercial matter subject to the Community's common commercial policy; therefore, the Commission, under Article 113 of the Rome Treaty, is authorized to conduct negotiations on behalf of the Community and represent the particular interests of the Member States. This is the situation for example, in the GATT, where the Commission, flanked by representatives of Member States, speaks for the Community. In bilateral trade relations, the Commission, always under Council mandate, conducts negotiations on its own. The Commission recognized, however, that as it did not yet have the necessary resources and expertise to undertake the re-negotiation of over 600 bilateral air services agreements, there would be some transitional "ad hocery". This would allow Member States to negotiate under a Community mandate. There is a sort of

precedent for this in the European Civil Aviation Conference where its twenty-two Member States, under a President elected from one of its representatives, conduct negotiations on trans-Atlantic fares with the United States. The Council, however, has yet to decide on the conduct of the Community's external air relations. Unlike trade, where access to the Community's customs union is governed by a common external tariff applied along a common customs border, access to air space involves national sovereignty. While access to national air space may become completely open to Community air carriers for intra-community air services, there are delicate political issues to be addressed before access to the air space of a Member State may be authorized by a central Community authority. For example, trade sanctions being largely a commercial policy matter, albeit influenced by political considerations, have been implemented on a Community-wide basis. Can the same be said, for example, in the case of the severance or establishment of air links? Even under the Single European Act of 1987 political cooperation and coordination would fall short of a Community common foreign policy. Air links have traditionally been closely related to national foreign policy and security considerations. The mandate given to the Commission to open negotiations with Norway and Sweden, and eventually with the other EFTA countries, would not necessarily set a precedent for third countries. In the former case, the negotiations will in the main deal with the terms and transition period for the association or integration of these countries with the Community's common air transport policy in the broad political context of a European Economic Space. That is, the extension of the

individual free trade agreements of EFTA countries with the Community to cover civil aviation. This would not be the case with third countries.

Bilateral Air Services Agreements

Looking through the glass darkly to the situation which may be faced some time post-1992, let us review the sorts of questions that arise in the context of the key provisions of bilateral air services agreements with third countries, including Canada.

Grant of Rights: the right granted by a Contracting Party to fly without landing across its territory. Does "its territory" refer to the Member State? If so, there would be no real change. Or does it cover the combined area of the twelve Member States? If so, who in the Community grants these rights? Who can suspend or revoke them? Does suspension or revocation of rights apply on a Community-wide basis? Is the authority exercised by the Commission on behalf of the Community as a whole, or is it vested in the Community and delegated to the Commissin and/or the Member States?

Designation of Airlines: Will the twelve or so Community airlines be designated to each third country? Single destination could be retained, but where multiple designation is provided, will this be by city-pairs? In Canada's case, there are five agreements with Member States that allow for multiple designation on a country-pair basis; three agreements that allow

multiple designation but with single designation on a city-pair basis where the change to a Community Carrier designation would not allow for more than one carrier and make no practical difference. While each of the Member States now has its own designated carriers flying to a third country under individual bilateral agreements, multiple designation of Community carriers on a Community country-pair or a city-pair basis, with the combination of all their current traffic rights to a third country, would significantly alter the existing balance of benefits and opportunities in favour of Community carriers. There is also the related issue of "substantial ownership and effective control" of the designated Community airlines, whereby the nationality of a carrier is no longer identified with its state of registration.

Certificates of Airworthiness and Competency and Licences: We would assume that these would continue to be issued by the country of registration in the Community.

Competition: Standard bilateral agreements do not include provisions on competition or, more correctly, on possible conflicts between national competition laws or codes of conduct. The affirmation of competition rules is becoming concomitant with deregulation an liberalization. This is an emerging problem, and indeed ICAO has put forward guidelines to deal with this. We have yet to see how the Community Council will deal with the consequential implications of the Saeed case where the EJC ruled against concerted practices between airlines governed by agreements between a

Member State and a third country. To avoid the possible extra-territorial application of the Court's ruling, the Community's competition laws would apply to fares charged by a third country carriers in respect of services within the Community: that would mean fifth-freedom traffic, and not, as yet third- and fourth-freedom services. If, as envisaged in the Council's recent Regulation on competition, block exemptions on the application of competition rules to concerted practices are replaced by regulations on 1 January 1993, this would raise problems where third countries wish to protect their airlines with respect to fares to points in the Community (including fifth-freedom services), capacity or pooling arrangements. It will also have implications for countries, such as Canada, which prefer inter-airline consultations on these matters preparatory to negotiations at government level.

Fares: Bilateral agreements providing for the pre-determination of fares may need to be re-negotiated. The Community's preferential double disapproval regime and the option of any Community carrier being a price leader on fifth-freedom routes will no doubt affect the competitive position of a third country carrier's fifth-freedom operations within the Community and its ability to match parallel or comparable intra-Community third- and fourth-freedom fares, e.g. Air Canada's fifth-freedom service from London to Duesseldorf would need to match BA's or Lufthansa's fares on the same route. Much will also depend upon the Community's competition rules as

they may affect concerted practices between Community carriers and third country carriers.

Capacity: This too will need to be reviewed in the light of the Community's abolition of capacity-shares between Member States by 1993. While constraints on capacity may not be precluded by the Community in agreements with third countries, subject to competition rules, the elimination of capacity-shares for Community carriers on intra-Community services should sharpen competition among Community carriers, and by extension between Community carriers and third country carriers on fifth-freedom segments within the Community.

Use of Airports and Airport Facilities: This Article usually provides for the extension of national treatment to the designated airline(s) of the other Contracting Party. There should be no legal problem here. However, IATA has already registered its concern that existing facilities and infra-structures within Western Europe cannot accommodate any further increase in air traffic. Present congestion is such as to impose definite physical limits. With the competition of the internal market, duty-free shopping facilities will be abolished for passengers travelling within the Community as well as on aircraft operating intra-Community services. This will cut airport revenues and no doubt affect airport plans for expansion and improvement of facilities.

With the growing affirmation environmental concerns, particularly for stricter noise abatement regulations, the Community will no doubt want to protect its airport communities. This will affect third country carriers which still maintain the older, chapter 2 noise level aircraft.

Exemption from Customs Duties and Other Charges: Here again, under existing bilateral agreements, national treatment or most-favoured-nation-treatment prevails on a reciprocal basis and no difficulty should arise.

Airline Representatives: The issue here is who will issue employment authorization and visas to representatives, and commercial, operational and technical staff of airline(s) designated by a third country. Will necessary documents be issued by a Community or national authority? If the former, will these be valid Community-wide. If the latter, will such documents be accepted in other Member States?

Avoidance of Double Taxation: To date taxation is still vested in national authorities of Member States with whom avoidance of double taxation agreements are concluded. In the event of a single air agreement with the Community as a whole, problems may arise if double taxation agreements have not been concluded with each of the twelve Member States. If existing double taxation agreements are maintained or "grand-fathered" this should present no problem for Canada.

Routes: This may prove the most difficult and complex issue. A clear definition will be required as to what routes constitute third- and fourth- and fifth-freedoms. This will help determine how acquired rights can be maintained. Additionally, will the Community become a cabotage area for third countries? If so, there is the issue of fifth-freedom traffic rights. The Commission has stated in its February 1990 Communication that third country fifth-freedom traffic rights under existing bilateral agreements with Member States will be safeguarded, but that the Community will want to redress its perceived imbalance in better reciprocity, i.e. "you may retain your fifth-freedom rights and exercise them as cabotage, but you owe us!" Third countries, such as Canada, would maintain that these rights have already been bought and paid for, and the value added by conversion to cabotage remains to be seen. Where there may be real value added however, is in the complementary operation of services by third country carriers between points in a Member State, i.e. the extension to third countries of cabotage rights to be exchanged between Member States in 1993. If prospects are for a liberalized Community market for third country carriers, there will be a need for a change of aircraft provision for increased fifth-freedom (or cabotage) operations.

Signature and Entry into Force: Who will sign the Agreement? The twelve Member States plus or minus the Commission?

These then are some of the implications that come to mind following a sketchy review of what the Community and the Commission have so far unveiled as to their plans. Under the present time table no negotiations with third countries are contemplated before the Council determines whether third country access to Community air space continues to remain divisible Member States, or becomes a single Community air space. This should also indicate how the Community proposes to conduct its relations with third countries. The outcome of the Community's negotiations with the EFTA countries may provide some answers; but it may also complicate matters further for third countries, if EFTA countries are co-opted or absorbed for air transport purposes into the Community's internal market.

Whichever way one looks at it, the re-negotiation of over 600 bilateral agreements will represent an interesting if formidable intellectual challenge for both sides of the negotiating table. The negotiating agenda for the Community will be massive and awesome. It will also be quite a cumbersome process for third countries: how to reach an overall balance of reciprocity in objectives, interests, benefits and opportunities.

Other Developments in Civil Aviation Environment

While the Community is working its way through the completion of the internal market in air transport, the world environment in civil aviation is unlikely to stand still until 1993. The evolutionary process toward an internal

air transport market in the Community cannot overlook developments outside. Technological advances in aircraft such as the B-747-400, with a 7000 mile 14/15 hour range will favour non-stop long-haul services. Competition resulting from the trend towards deregulation and liberalization has brought air travel within the reach of over 1 billion passengers in 1989. The airlines themselves continue to enter into commercial alliances, mergers, joint ventures, code-sharing and computer reservation system agreements, marketing/pooling and frequent flyer program arrangements, partnerships or takeovers. By the same token, there is a growing movement for stricter disciplines against anti-competitive behaviour; barring the improvement in infra-structure and facilities, air traffic and airport congestion world-wide is now such as to inhibit any increase in traffic. There are environmental concerns. All are likely to have a significant bearing on the prospective re-negotiation and future of bilateral agreements between the Community and third countries.

Additionally, there is a gathering momentum towards globalization. Unlike other multinational enterprises which establish themselves in several national markets and nationalize their operations on a world-wide basis, with the particular exception of SAS, BWI Airlines and Air Afrique, there is no multinational passenger airline as such, because of national sovereignty over air space and the designation of national carriers based on national control and ownership. But within the parameters of existing bilateral agreements, several air carriers, not a few from Member States, have concluded important

mergers, alliances and marketing arrangements with partners across the Atlantic, and in the Asian and Pacific regions. Using existing traffic rights, Community carriers such as SAS have entered into arrangements with Texas/Continental airlines in the USA and Thai International, dovetailing their services so as to gain access to 514 new destinations. By mutually reinforcing each other's strengths, it becomes equally, if not more profitable for airlines to transfer passengers than to carry them. SAS has also entered into equity arrangements with British Midland, Swissair, Lan Chile and Finnair. Commercial arrangements have been concluded by KLM with Sabena, World Airlines and North West in USA, by BA with United in the USA and with Singapore airlines; Al Italia and US Air.[20] Canadian carriers have also not been backward. The Globe and Mail of 8 September announced Canadian Airlines International pooling and marketing agreements with Air New Zealand, and that similar deals are in prospect with Air France, Al Italia, in addition to those already in place with Lufthansa and Japan Air Lines. Air Canada too has an extensive network of cooperative commercial arrangements. Such arrangements between third country and Community carriers may well diminish for third country carriers the importance of cabotage or fifth-freedom services in the Community. With an enlarged domestic base Community carriers could become attractive partners to third country carriers in other continents. Indeed, the trend towards globalization may overtake regionalization or integration of markets as planned by the Community's air transport policy. Globalization, if pursued and extended to its logical conclusion, could lead to revisiting the principle

of sovereignty of air space, national ownership of carriers, and the need for bilateral air agreements as we have know them. Governments will have to consider whether "open skies" with market detgermination of routes, fares, capacity and trans-national ownership of airlines can be reconciled with bilateral agreements or will require some new form of multilateral regulation or agreement.

In sum, the implications of the Community's air transport policy for third country carriers have to be assessed in the context of developments in three concentric circles: the creative tension between the Commission and the Member States towards liberalization versus greater integration of the Community market; the movement towards political integration or unification of the Community; and globalization of airline services. In the unfolding of these events, it would be foolhardy and presumptious for an air negotiator and civil servant to second-guess the inner processes of decision-making of the Community or of the corporate board rooms of the airlines. So long as bilateral agreements continue to govern air relations, it remains the responsibility of governments to make the best of bilateral agreements to serve the travelling and shipping public, the airlines as well as the economic and environmental interests of airport communities.

NOTES

1. Convention on International Civil Aviation, Chicago, 7 December 1944.

2. Treaty governing the European Economic Community, Rome 25 March 1957.

3. Single European Act adopted by the Representatives of the Governments of the Member States in Luxembourg, 17 February 1986 and in The Hague, 28 February 1986.

4. A Declaration on Article 8a of the EEC Treaty appended to the Single European Act states that: The Conference wishes by means of the provisions in Article 8a to express its firm political will to take before 1 January 1993 the decisions necessary to complete the internal market defined in those provisions, and more particularly the decisions necessary to implement the Commission's programme described in the White Paper on the Internal Market. A second paragraph adds that: Setting the date of 31 December 1992 does not create an automatic legal effect."

5. Article 75(1) and (3) of the Rome Treaty.

6. Council Directive 87/601/EEC and 87/602/EEC OJ No. L 374, 31 December 1987.

7. Council Directive 3975/87 OJ No. 374 31 Dec. 1987.

8. Council Directive 3976/87 OJ No. 374 31 Dec. 1987.

9. Com(89) 373, 7 September 1989.

10. Council conclusions on the development of Civil Aviation in the Community resulting from its discussions on 4 and 5 December 1989, SN 3778/89. 6 December 1989.

11. Communication à la Presse. 1395 Session du Conseil – Transports – Bruxelles le 29 mars 1990. 5572/90. (Presse 38)

12. Community Relations with Third Countries. Proposal for a Council Decision COM (90) 17 February 1990.

13. EC Commission paper: The opening of negotiations between the EEC And EFTA Countries on scheduled air passenger services, January 1990.

14. Council Regulations (EEC) No. 2342/90 of 24 July 1990 on fares for scheduled air services. OJ L 217, Vol. 33, 11 August 1990.

15. Council Regulations (EEC) No. 2342/90 of 24 July 1990 an access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States. OJ L 217. Vol. 33, 11 August 1990.

16. Council Regulation (EEC) No. 2344/90 of 24 July 1990 amending Regulation (EEC) No. 3976/87 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector.

17. Case 22/70 "AETR", ECL, 1971 p. 274; Cases 3,4,6/76 "Kramer", ECL 176 p. 1279 et seq.

18. See Note No. 4.

19. Kjell Fredheim (Vice President, Intercontinental, SAS): "One in Five in 95". Address to 15th US FAA Conference, Washington, D.C., 2 March 1990.

20. Air Transport World, November 1989; Avmark Aviation Economist, December 1989; and Flight International, March 1990.

Simplified definitions of the Basic Freedoms of the air Exchanged in bilateral Air Services Agreements

Transit rights

First freedom: Over-flights

Second freedom: Technical or landing stops for non-traffic purposes

Traffic rights

Third freedom: Air services, by national carrier of country A, from Country A to Country B.

Fourth freedom: Air services, by national carrier of country A, from Country B to country A.

Fifth freedom: Air services, by national carrier of country A, from Country A (i) to country C (as intermediate point) en route to country B, or (ii) to country B and from there to country C (as beyond point).

Other Freedoms

Sixth freedom: Behind the gateway traffic from other States feeding third- and fourth-freedom services.

Seventh freedom: Air services by national carrier of country A operated between Country B and C.

Eighth freedom: Cabotage: air services, by national carrier of country A, from Country A to two (or more) consecutive points in country B.

Ninth freedom: Air services by national carrier of country A operating from country B on same basis as national carriers of country B.

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