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Practical implications of "1992"
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CONFERENCE ON EEC AIR TRANSPORT POLICY AND REGULATION
AND THEIR IMPLICATIONS FOR NORTH AMERICA
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PRACTICAL IMPLICATIONS OF "1992"
FOR THE RE-NEGOTIATION OF BILATERAL
AIR SERVICES AGREEMENTS
WITH THE EUROPEAN COMMUNITY

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43253-922

I PROPOSE TO DIVIDE MY REMARKS IN TWO PARTS.
FIRST, WHAT DO WE MEAN BY "1992", LET ALONE POST-1992? AND
SECOND, WHAT ARE THE PRACTICAL IMPLICATIONS FOR THE
RE-NEGOTIATION OF BILATERAL AIR SERVICES AGREEMENTS WITH THE
EUROPEAN COMMUNITY (EC).

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(A) WHAT DO WE MEAN BY "1992" ?

IN ESSENCE "1992" MEANS THE EC REGIME THAT WILL GOVERN INTERNATIONAL AIR TRANSPORT SERVICES. OF PARTICULAR RELEVANCE IN DETERMINING THE NATURE, SCOPE AND CONTENT OF THIS REGIME ARE:

- (i) THE SINGLE EUROPEAN ACT (LUXEMBOURG, 7 FEBRUARY AND THE HAGUE, 28 FEBRUARY 1986) WHICH SETS DOWN THE MEASURES TO LEAD TO A UNIFIED MARKET IN THE EC BY 31 DECEMBER 1992. THE SINGLE EUROPEAN ACT ACTIVATED ARTICLE 84(2) OF THE TREATY OF ROME AND BROUGHT AIR TRANSPORT WITHIN THE APPLICATION OF ITS PROVISIONS. THIS ENABLED THE COUNCIL OF THE EC TO INITIATE A PROCESS FOR THE COMPLETION OF AN INTERNAL OR COMMON MARKET IN AIR TRANSPORT WITHIN THE EC.

- (ii) THE 14 DECEMBER 1987 PACKAGE - A SERIES OF COUNCIL MEASURES AND DIRECTIVES ON AIR TRANSPORT RELATING

TO FARES, CAPACITY, MARKET ACCESS AND THE APPLICATION OF RULES OF COMPETITION TO AIR TRANSPORT AND PROVISION FOR BLOCK EXEMPTIONS FOR CERTAIN CONCERTED PRACTICES IN BILATERAL OR MULTILATERAL AGREEMENTS. THE PACKAGE PROVIDES FOR TWO PHASES: THE FIRST PHASE FROM 1 JANUARY 1988 TO 30 JUNE 1990; AND THE SECOND, FROM 1 JULY 1990 TO 31 DECEMBER 1992; AND

- (III) THE COMMISSION'S PROPOSALS OF 19 JULY 1989 FOR THE SECOND PHASE OF THE EC COMMISSION AIR TRANSPORT MARKET TO COME INTO EFFECT ON 1 JULY 1990. THESE PROPOSALS ARE IN TWO PARTS: ADJUSTMENTS AND ADDITIONS TO THE 1987 PACKAGE AND AN OUTLINE OF THE COMMISSION'S FUTURE POLICY DIRECTIONS AND INITIATIVES.

IN ADDITION THERE ARE TWO LANDMARK DECISIONS OF THE EUROPEAN COURT OF JUSTICE: (I) THE NOUVELLES FRONTIÈRES CASE OF 30 APRIL 1986: THIS ESTABLISHED

THAT EC COMPETITION RULES APPLY TO AIR TRANSPORT AND TO INTERNATIONAL AIR SERVICES AGREEMENTS BETWEEN MEMBER STATES OF THE EC; AND (II) THE AHMED SAEED CASE, WHICH ESTABLISHED THAT EC COMPETITION RULES WOULD APPLY ALSO TO BILATERAL AIR SERVICES AGREEMENTS BETWEEN EC MEMBER STATES AND THIRD COUNTRIES IN RESPECT OF SERVICES WITHIN THE EC.

(B) IMPLICATIONS FOR BILATERAL AIR AGREEMENTS AND THEIR RENEGOTIATION

IN LIGHT OF THE EC COUNCIL'S AIR TRANSPORT PACKAGE OF DECEMBER 1987 AND THE COMMISSION'S PROPOSALS OF JULY 1989, TOGETHER WITH THE ECJ'S DECISION ON NOUVELLES FRONTIÈRES AND AHMED SAEED, WHAT DOES "1992" PORTEND WITH REFERENCE TO THE RE-NEGOTIATION OF BILATERAL AIR SERVICES AGREEMENTS WITH THIRD COUNTRIES.

(1) FARES

THE 1987 PACKAGE SETS DOWN CERTAIN KEY DEFINITIONS. ASIDE FROM THE STANDARD DESCRIPTIONS OF THIRD, FOURTH AND FIFTH FREEDOM CARRIERS, THE COMMUNITY AIR CARRIER IS DEFINED AS HAVING "ITS CENTRAL ADMINISTRATION AND PRINCIPAL PLACE OF BUSINESS IN THE COMMUNITY, THE MAJORITY OF WHOSE SHARES ARE OWNED BY NATIONALS OF MEMBER STATES AND/OR MEMBER STATES AND WHICH IS EFFECTIVELY CONTROLLED BY SUCH PERSONS OR STATES".

THE 1989 COMMISSION PROPOSALS FURTHER PROVIDE FOR THE ELIMINATION OF THE SINGLE DISAPPROVAL OF FARES. THE REFERENCE PRICE AND ZONES AND FLEXIBILITY SYSTEM ALLOWING AUTOMATIC APPROVAL FOR DISCOUNT FARES ARE ALSO RESCINDED. A DOUBLE DISAPPROVAL SYSTEM IS ESTABLISHED SUBJECT TO TWO SAFEGUARDS: FIRST, THAT FARES PROPOSED THAT ARE 20% HIGHER OR LOWER THAN THE CORRESPONDING FARE FOR THE PREVIOUS CORRESPONDING

SEASON SHOULD BE VETTED; AND SECOND, THAT A MEMBER STATE MAY ASK THE COMMISSION TO RULE WHETHER A PROPOSED FARE COMPLIES WITH COMMUNITY CRITERIA FOR AIR FARES. DURING THE TWO-MONTH TIME LIMIT FOR THE COMMISSION'S REVIEW, A CEASE AND DESIST ORDER WOULD APPLY. ADDITIONALLY, PRICE LEADERSHIP - WHICH HAS BEEN CONFINED TO THIRD AND FOURTH FREEDOM CARRIERS IN 1987 - IS NOW OPEN TO ALL EC CARRIERS (I.E. FIFTH FREEDOM CARRIERS ALSO CAN NOW BECOME PRICE LEADERS).

(11) CAPACITY

UNDER THE 1987 PACKAGE, AUTOMATIC APPROVAL IS GIVEN TO CAPACITY INCREASES IN THE OPERATION OF THIRD AND FOURTH FREEDOM ROUTES BETWEEN THEIR TERRITORIES, PROVIDED THAT RESULTING SHARES DO NOT EXCEED 55%: 45% RATIO FOR THE PERIOD 1 JANUARY 1988 TO 30 SEPTEMBER 1989. FROM 1 OCTOBER 1989, CAPACITY SHARES ARE EXTENDED TO 60%: 40%, AND THE COMMISSION'S JULY 1989

PROPOSALS ADVANCE RELAXATION OF THE RATIO TO 75%: 25%. THE 25% REPRESENTS THE SAFETY NET WITH A STRONGER SAFEGUARD CLAUSE.

(III) RELATIONSHIP BETWEEN A MEMBER STATE
AND ITS OWN AIR CARRIERS

THIS SUBJECT WAS EXCLUDED IN THE 1987 PACKAGE. IN THE 1989 COMMISSION PROPOSALS, TRAFFIC RIGHTS MUST BE GRANTED ON A NON-DISCRIMINATORY BASIS, HAVING REGARD TO SPECIFICATIONS AND PROVIDED ECONOMIC AND TECHNICAL CRITERIA ARE MET, (I.E. ALL COMMUNITY CARRIERS - DULY REGISTERED AND LICENSED - CAN NOW BE DESIGNATED).

(IV) MULTIPLE DESIGNATION

THE 1987 PACKAGE ALLOWED FOR MULTIPLE DESIGNATION ON A CITY-PAIR BASIS ON ROUTES WITH A CAPACITY THRESHOLD OF 250,000 PASSENGERS IN 1988; 200,000 PASSENGERS OR 1200 RETURN FLIGHTS PER ANNUM IN 1989; AND 180,000

PASSENGERS OR 1,000 RETURN FLIGHTS PER ANNUM FOR 1990. THE 1989 COMMISSION PROPOSALS LOWER THE THRESHOLDS FURTHER TO 100,000 PASSENGERS OR 600 RETURN TRIPS PER YEAR AS FROM 1 JANUARY 1992.

(v) MARKET ACCESS

THE 1987 PACKAGE AUTHORIZES EC CARRIERS TO OPERATE THIRD AND FOURTH FREEDOM SERVICES BETWEEN HUB AIRPORTS OF ONE MEMBER STATE AND REGIONAL AIRPORTS IN THE TERRITORY OF ANOTHER MEMBER STATE. THE COMMISSION'S 1989 PROPOSALS ALLOW FOR AN OPEN SKIES REGIME FOR THIRD AND FOURTH FREEDOM CARRIAGE FROM ANY AIRPORT IN ONE MEMBER STATE TO ANY AIRPORT IN ANOTHER MEMBER STATE PROVIDED SUCH AIRPORTS ARE OPEN FOR INTRA-COMMUNITY AIR SERVICES.

(VI) CO-TERMINALING (COMBINATION OF POINTS)

UNDER THE 1987 PACKAGE THIRD AND FOURTH FREEDOM CARRIERS MAY COMBINE SERVICES TO OR FROM TWO OR MORE POINTS IN ANOTHER MEMBER STATE PROVIDED THAT NO TRAFFIC RIGHTS ARE EXERCISED. COMMISSION PROPOSALS REMOVE ALL PREVIOUS CONSTRAINTS AND EXEMPTIONS. A CARRIER MAY NOW LINK SIXTH FREEDOM TRAFFIC RIGHTS WITH THIRD AND FOURTH FREEDOM SERVICES, PASSING THROUGH ITS OWN AIRPORTS WITH OR WITHOUT CHANGE OF AIRCRAFT USING THE SAME FLIGHT NUMBER.

(VII) FIFTH FREEDOMS

UNDER THE 1987 PACKAGE, FIFTH FREEDOM CARRIAGE WAS AUTHORIZED UP TO 30% OF ACTUAL CAPACITY BUT WAS PROHIBITED BETWEEN MAJOR AIRPORTS. UNDER THE COMMISSION'S PROPOSALS, THE LIMIT WAS RAISED TO 50% AND TO 100% FOR AIRCRAFT OF LESS THAN 100 SEATS, WITH NO RESTRICTIONS AS REGARDS AIRPORTS ON A

COMMUNITY-WIDE BASIS. ADDITIONALLY, IT IS PROPOSED TO ALLOW A CARRIER IN A MEMBER STATE TO OPERATE FIFTH FREEDOM SERVICES BETWEEN ANOTHER MEMBER STATE AND A THIRD COUNTRY, SUBJECT TO THE AGREEMENT OF THE THIRD COUNTRY: I.E. ALITALIA CAN OPERATE FIFTH FREEDOM TRAFFIC BETWEEN POINTS IN THE UNITED KINGDOM AND POINTS IN THE USA, IF THE LATTER AGREES.

(VIII) CABOTAGE

THE 1989 COMMISSION PROPOSALS LIFTS THE PROHIBITION ON CABOTAGE, AND AUTHORIZES IT UP TO 30% OF ACTUAL CAPACITY. CABOTAGE IS CONFINED TO THE EXTENSION OF SERVICE FROM POINT OF DEPARTURE OR OF DESTINATION OF THE COUNTRY OF REGISTRY OF THE AIRLINE, E.G. AIR FRANCE SERVICE FROM PARIS TO FRANKFURT MAY BE EXTENDED FROM FRANKFURT TO MUNICH, OR AIR FRANCE SERVICE FROM LONDON TO PARIS MAY BE EXTENDED TO CARRY PASSENGERS FROM GLASGOW TO LONDON. THUS, FOR THE PERIOD 1 JULY 1989 TO 31 DECEMBER 1992 NATIONAL CARRIERS OF MEMBER

STATES WILL BE ABLE TO OPERATE BOTH UNRESTRICTED FIFTH FREEDOM SERVICES AND CABOTAGE, BUT WITH CERTAIN CAPACITY CONSTRAINTS.

(IX) APPLICATION OF RULES OF COMPETITION

THE 1987 PACKAGE LAID DOWN THE LEGAL FRAMEWORK UNDER WHICH THE COMMISSION AUTHORIZED CERTAIN EXEMPTIONS TO BILATERAL AND MULTILATERAL AGREEMENTS. THE COMMISSION ALSO LAID DOWN RULES REGARDING THE PLANNING AND CO-ORDINATION OF CAPACITY, REVENUE-SHARING, CONSULTATIONS ON TARIFFS, THE ALLOCATION OF SLOTS AT AIRPORTS AND CRS. THESE RULES EXPIRE ON 31 JANUARY 1991. AS REGARDS THE APPLICATION OF COMPETITION RULES TO ROUTES WITHIN EACH MEMBER STATE AS WELL AS TO ROUTES BETWEEN MEMBER STATES AND THIRD COUNTRIES, THE COMMISSION PROPOSALS REFER TO RECENT RULINGS OF THE ECJ WHICH CONFIRM THAT THOSE SITUATIONS NOT COVERED BY THE 1987 PACKAGE FALL NONETHELESS UNDER THE

COMPETITION RULES OF THE ROME TREATY, IN PARTICULAR WHERE A CARRIER HOLDING A DOMINANT POSITION PRE-EMPTS COMPETITION ON A NATIONAL OR INTERNATIONAL ROUTE. THE COMMISSION FURTHER PROPOSES THAT THE EC BE AUTHORIZED BY COUNCIL TO EXAMINE ARRANGEMENTS BETWEEN AIRLINES RELATING TO DOMESTIC AND INTERNATIONAL SERVICES, WITH A VIEW TO ENLARGING THE EXEMPTIONS GRANTED IN THE 1987 PACKAGE TO AGREEMENTS AND CONCERTED PRACTICES DESIGNED TO ACHIEVE TECHNICAL IMPROVEMENTS OR COOPERATION (E.G. EXCHANGE, LEASING, POOLING OR MAINTENANCE OF AIRCRAFT AND PARTS; EXCHANGE, POOLING OR TRAINING OF PERSONNEL; APPLICATION OF UNIFORM RULES REGARDING THE STRUCTURE AND CONDITIONS GOVERNING THE APPLICATION OF TRANSPORT TARIFFS, PROVIDED SUCH RULES DO NOT FIX FARES AND RELATED CONDITIONS). AS REGARDS THE IMPLICATIONS OF THE ECJ DECISION ON THE SAEED CASE FOR BILATERAL AGREEMENTS WITH THIRD COUNTRIES THE COMMISSION IS PUTTING FORWARD TO COUNCIL PROPOSALS DESIGNED TO BRING FARES ON ALL SERVICES BETWEEN MEMBER STATES AND THIRD COUNTRIES WITHIN THE AMBIT OF COMMUNITY COMPETITION REGULATIONS.

(x) OTHER MEASURES

IN ITS JULY 1989 PROPOSALS, THE COMMISSION OUTLINES ITS FUTURE POLICY DIRECTION. THE COMMISSION ENVISAGES PROPOSALS FOR (A) THE APPLICATION ON A COMMUNITY-WIDE BASIS OF MINIMUM SOCIAL AND SAFETY STANDARDS; (B) THE HARMONIZATION OF PROFESSIONAL QUALIFICATIONS AS WELL AS NAVIGATION STANDARDS; (C) THE MUTUAL RECOGNITION OF LICENCES SO AS TO ASSURE COMPLETE MOBILITY OF AIRLINES AND AIR CONTROLLERS THROUGHOUT THE COMMUNITY; (D) THE TRANSFER OF AIRCRAFT, PARTS AND SPARES FROM ONE EC AIRLINE TO ANOTHER; (E) TRAINING, MAINTENANCE AND LEASING; (F) URGENT MEASURES TO ESTABLISH A COMMUNITY AIR-CONTROL SYSTEM AND TO ADDRESS PROBLEMS CAUSED BY CONGESTION OF THE AIRWAYS AND AIRPORT INFRASTRUCTURES; (G) MEASURES TO ENSURE THAT REDUCTION IN COSTS DO NOT LEAD TO A RELAXATION OF SAFETY STANDARDS; (H) INITIATIVES TO DEVELOP FURTHER COOPERATION BETWEEN NATIONAL AERONAUTICAL AUTHORITIES; (I) A CODE OF CONDUCT REGARDING THE ALLOCATION OF SLOTS SO AS TO AVOID DISCRIMINATION BETWEEN CARRIERS AND TO MAKE OPTIMUM USE OF RESOURCES; (J) CARGO.

THE COMMISSION NOTES THAT THE EC CRS CODE OF CONDUCT WAS APPROVED BY COUNCIL IN JUNE 1989.

THE COMMISSION'S OUTLINE OF FUTURE POLICY PROPOSALS FURTHER INDICATES THAT THE IMPLEMENTATION OF A COMMON AIR TRANSPORT POLICY AND THE ESTABLISHMENT OF A COMMON AIR TRANSPORT MARKET WILL MEAN THAT HENCEFORTH THE COMMUNITY AS SUCH WILL BE THE INTERLOCUTOR WITH THIRD COUNTRIES ON MATTERS RELATING TO INTERNATIONAL AIR SERVICES AND TO COOPERATION WITHIN INTERNATIONAL ORGANIZATIONS. MOREOVER, THE COMMISSION INTENDS TO SUBMIT PROPOSALS TO COUNCIL BEFORE THE END OF 1989 CONCERNING THE NEGOTIATION OF TRAFFIC RIGHTS WITH THIRD COUNTRIES. THESE NEGOTIATIONS WILL SEEK ACCESS TO MARKETS AND CONDITIONS OF COMPETITION COMPARABLE TO THOSE OFFERED BY THE EC TO CARRIERS OF THIRD COUNTRIES. THE STATEMENT CONTAINS THE INTRIGUING COMMENT THAT RIGHTS ACQUIRED BY THIRD COUNTRIES WILL NOT A PRIORI BE CALLED INTO QUESTION. THESE PROPOSALS WILL ESTABLISH THE RULES AND PROCEDURES AND DEFINE THE COMMUNITY FRAMEWORK FOR NEGOTIATION, AND THE

CONDITIONS UNDER WHICH MANDATES WILL BE SOUGHT FROM COUNCIL. MOREOVER, IN SEPTEMBER 1989, THE COMMISSION WILL EXAMINE THE APPROACHES MADE BY EFTA COUNTRIES.

WHAT DOES ALL THIS ADD UP TO? MUCH WILL DEPEND ON THE OUTCOME OF THE COUNCIL'S CONSIDERATION OF THE COMMISSION'S JULY 1989 PROPOSALS. IT IS WORTH NOTING THAT ARTICLE 78 OF THE ROME TREATY STATES THAT "ANY MEASURE IN THE SPHERE OF TRANSPORT RATES AND CONDITIONS, ADOPTED WITHIN THE FRAMEWORK OF THIS TREATY SHALL TAKE ACCOUNT OF THE ECONOMIC SITUATION OF AIR CARRIERS". IT REMAINS TO BE SEEN WHETHER ALL CARRIERS WITHIN THE COMMUNITY WILL SUPPORT OR CONCUR IN THE COMMISSION'S RECOMMENDATIONS, AND HOW FAR THE MEMBER STATES ACTING COLLECTIVELY AS COUNCIL OF MINISTERS WILL BE PREPARED TO ADOPT DECISIONS FOR LIBERALIZATION WITHIN THE COMMUNITY FOR WHICH THEIR CARRIERS MAY NOT YET BE READY. WE ALSO DO NOT KNOW WHAT PROPOSALS THE COMMISSION PLANS TO SUBMIT TO THE COUNCIL FOR THE COMPLETION OF THE COMMON AIR TRANSPORT

MARKET AFTER 1992. ARE WE TO ENVISAGE THE ABOLITION OF ALL RESTRICTIONS IN FARES, CAPACITY, ROUTES, FIFTH FREEDOMS AND CABOTAGE, SO THAT ALL FLIGHTS WITHIN THE COMMUNITY ARE REGARDED AS INTERNAL OR DOMESTIC?

WHAT SEEMS TO EMERGE FROM THE 1987 PACKAGE AND THE 1989 COMMISSION PROPOSALS, IF ADOPTED BY THE EC COUNCIL OF MINISTERS, IS A MIXED OR HYBRID REGIME. THE MEASURES OF LIBERALIZATION RELATING TO THIRD AND FOURTH FREEDOM SERVICES FROM ANY INTRA-COMMUNITY HUB IN ONE MEMBER STATE TO ANY OTHER INTRA-COMMUNITY HUB, FIFTH FREEDOMS AND CABOTAGE ESTABLISH A PREFERENTIAL AREA WITHIN THE COMMUNITY VIS-À-VIS THIRD COUNTRIES. (IT IS A NICE LEGAL POINT WHETHER ARTICLES 77, 78 AND 79, RELATING TO JOINT OPERATING ORGANIZATIONS AND POOLED SERVICES, IN THE CHICAGO CONVENTION ALLOW FOR THE INSTITUTION OF EXCLUSIVE PREFERENTIAL REGIMES, BUT THIS IS ALMOST A SUBJECT UNTO ITSELF.) THE COMMUNITY HAS A CLEAR OBJECTIVE TO PUT IN PLACE A COMMON AIR TRANSPORT POLICY, A UNIFIED COMMON MARKET IN AIR TRANSPORT BOUND BY COMMON

DIRECTIVES, RULES AND REGULATIONS. AT THE SAME TIME, THE REFERENCES TO NATIONAL TERRITORY OF MEMBER STATES, NATIONAL CIVIL AVIATION AUTHORITIES AND COUNTRY OF REGISTRY SUGGEST THAT THE PRINCIPLE OF COMPLETE AND EXCLUSIVE SOVEREIGNTY IN ARTICLE I OF THE CHICAGO CONVENTION WHICH UNDERPINS THE EXCHANGE OF CONCESSIONS BETWEEN CONTRACTING PARTIES IN BILATERAL AIR SERVICES AGREEMENTS IS RETAINED. THE REFERENCES TO THIRD AND FOURTH FREEDOMS, AND TO FIFTH FREEDOMS CO-EXISTENT WITH CABOTAGE, ALBEIT SUBJECT TO CAPACITY CONSTRAINTS, ALSO IMPLY THAT BILATERAL AGREEMENTS BETWEEN MEMBER STATES WILL REMAIN. THIS ALSO INFERS THAT EACH MEMBER STATE REMAINS A CONTRACTING STATE OF THE CHICAGO CONVENTION. WHILE ANALOGIES BETWEEN TRADE AND AIR TRANSPORT CAN BE MISLEADING, THIS MIXED REGIME MAY BE LIKENED TO A FREE TRADE AREA, WHERE LIBERALISATION MEASURES ARE EXCLUSIVE TO MEMBER STATES AND RELATIONS BETWEEN MEMBER STATES ARE SUBJECT TO COMMON GROUND RULES, BUT EACH MEMBER STATE MAINTAINS ITS OWN EXTERNAL REGIME WITH THIRD COUNTRIES. YET THE DEFINITION OF A COMMUNITY CARRIER IS BASED NOT ON OWNERSHIP AND CONTROL IN A MEMBER STATE BY THE MEMBER STATE

OR ITS NATIONALS. RATHER IT IS DEFINED BY HAVING "ITS CONTROL ADMINISTRATION AND PRINCIPAL PLACE OF BUSINESS IN THE COMMUNITY, THE MAJORITY OF WHOSE SHARES ARE OWNED BY NATIONALS OF MEMBER STATES AND/OR MEMBER STATES, AND SUCH CARRIER IS EFFECTIVELY CONTROLLED BY SUCH PERSONS OR STATES". THIS WOULD SUGGEST THAT ANY AIRLINE IN THE COMMUNITY MAY BE REGISTERED AND LICENSED IN COUNTRY A, HAVE ITS CENTRAL ADMINISTRATION IN COUNTRY B AND MAY BE OWNED BY COUNTRY C AND D AND ITS NATIONALS. BILATERALISM WITHIN THE EC NOTWITHSTANDING, IN ITS EXTERNAL RELATIONS THE COMMUNITY AS SUCH WILL INTERFACE WITH THIRD COUNTRIES AND THE COMMISSION, UNDER A NEGOTIATING MANDATE FROM THE COUNCIL, WILL ENTER INTO NEGOTIATION WITH THIRD COUNTRIES. IT IS NOT, HOWEVER, CLEAR WHETHER THE COMMISSION WILL NEGOTIATE WITH EACH THIRD COUNTRY INDIVIDUAL BILATERAL AGREEMENTS ON BEHALF OF EACH MEMBER STATE, OR A SINGLE BILATERAL AGREEMENT COVERING INTERNATIONAL AIR SERVICES TO THE EC AS A WHOLE. THE REFERENCE TO ACQUIRED RIGHTS OF THIRD COUNTRIES NOT BEING CALLED INTO QUESTION RELATE TO NEGOTIATIONS DEVOLVING FROM INDIVIDUAL BILATERAL

AGREEMENTS BETWEEN A MEMBER STATE AND A THIRD COUNTRY. IT MAY ALSO SUGGEST THAT THE INTERNAL LIBERALISATION MEASURES ARE NOT MEANT TO BE EXTENDED TO THIRD COUNTRIES.

SUCH A SITUATION RAISES A NUMBER OF QUESTIONS WHERE A THIRD COUNTRY PREPARES TO RE-NEGOTIATE ITS BILATERAL AGREEMENTS WITH MEMBER STATES IN THE CONTEXT OF 1992 AND BEYOND.

THE CENTRAL ISSUE IS WHO EXERCISES SOVEREIGNTY OVER THE AIR SPACE COVERING THE NATIONAL TERRITORY OF EACH OF THE TWELVE MEMBER STATES? THIS WILL DETERMINE WHO IS THE CONTRACTING PARTY IN A BILATERAL AIR SERVICES AGREEMENT WITH A NON-EC COUNTRY. WILL THERE BE A COLLECTIVE SOVEREIGNTY EXERCISED BY THE COMMUNITY OVER A COMMUNITY AIR SPACE? OR OVER THE AIR SPACE OF THE TWELVE NATIONAL TERRITORIES? IF SO, WILL THERE BE A COLLECTIVE COMMUNITY SOVEREIGNTY OVER THE TWELVE NATIONAL TERRITORIES? CAN YOU HAVE A COMMUNITY AIR SPACE AND YET EACH MEMBER STATE RETAINS SOVEREIGNTY OVER ITS

NATIONAL TERRITORY? CAN SOVEREIGNTY IN THE GRANT OF OVERFLIGHTS BE SEPARATED FROM THE GRANT OF LANDING RIGHTS? ANSWERS TO THESE QUESTIONS ARE NEITHER OBVIOUS OR YET CLEAR. IF ONE ASSUMES THAT SOVEREIGNTY RESTS WITH EACH MEMBER STATE BUT IS EXERCISED COLLECTIVELY BY THE COMMUNITY, DOES THAT MEAN THAT THE COMMUNITY AS SUCH IS THE CONTRACTING PARTY? DOES THIS THEN MEAN THAT THERE IS A COMMON AIR SPACE FOR PURPOSES OF NEGOTIATION WITH THIRD COUNTRIES? IF SO, LET US CONSIDER THE IMPLICATIONS FOR THE KEY PROVISIONS OF A BILATERAL AGREEMENT. HOW DO WE RECONCILE THE OBLIGATIONS OF MEMBER STATES UNDER CURRENT BILATERAL AGREEMENTS WITH THE PROSPECTIVE MEASURES UNDER AN EC COMMON AIR TRANSPORT POLICY AND COMMON OR UNIFIED AIR TRANSPORT MARKET? THERE ARE MANY QUESTIONS BUT FEW CLEAR ANSWERS, LET ALONE SOLUTIONS.

GRANT OF RIGHTS: THE RIGHT TO FLY WITHOUT LANDING ACROSS ITS TERRITORY. WE WOULD ASSUME "ITS TERRITORY" COVERS THE COMBINED AREA OF THE TWELVE MEMBER STATES. BUT WHO GRANTS THESE RIGHTS (AND WHO CAN SUSPEND OR REVOKE THEM)? IS THE AUTHORITY VESTED IN THE COMMUNITY AND DELEGATED TO THE

COMMISSION? OR IS THE GRANT OF RIGHTS AUTOMATIC BY EACH MEMBER STATE, SO THAT SUSPENSION OR REVOCATION BY ONE DOES NOT EXTEND TO ALL?

DESIGNATION OF AIRLINES: WILL THE TWELVE OR SO COMMUNITY AIRLINES BE DESIGNATED? THIS MAKES FOR MULTIPLE DESIGNATION; WILL THIS BE BY CITY PAIRS ON A COMMUNITY-WIDE BASIS OR COUNTRY PAIRS? WHAT ABOUT THE ISSUE OF SUBSTANTIAL OWNERSHIP AND EFFECTIVE CONTROL OF COMMUNITY AIRLINES?

CERTIFICATES OF AIRWORTHINESS AND COMPETENCY AND LICENCES:

WE WOULD ASSUME THAT THESE WOULD BE ISSUED BY THE COUNTRY OF REGISTRY 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 OR LIBERALIZATION. THIS IS AN EMERGING PROBLEM, AND INDEED ICAO HAS PUT FORWARD GUIDELINES TO DEAL WITH THIS. WE HAVE YET TO SEE HOW THE EC COUNCIL WILL DEAL WITH THE CONSEQUENTIAL IMPLICATIONS OF THE SAEED CASE WHERE THE ECJ RULED AGAINST CONCERTED PRACTICES BETWEEN AIRLINES GOVERNED BY AGREEMENTS BETWEEN A MEMBER STATE AND A NON-MEMBER STATE. AS I UNDERSTOOD THE ADVOCATE GENERAL OF THE ECJ IN HIS ANSWER TO A QUESTION ON THE POSSIBLE EXTRATERRITORIAL APPLICATION OF THE COURT'S RULING, THE COMMUNITY'S COMPETITION LAWS APPLY TO FARES CHARGED BY THIRD COUNTRY CARRIERS IN RESPECT OF SERVICES WITHIN THE COMMUNITY: THAT WOULD MEAN FIFTH FREEDOM TRAFFIC, IF NOT, AS YET THIRD AND FOURTH FREEDOMS. IF CONCERTED PRACTICES ARE DISALLOWED, THIS WILL CERTAINLY RAISE PROBLEMS WHERE THIRD COUNTRIES WISH TO PROTECT THEIR AIRLINES WITH RESPECT TO FARES TO POINTS IN THE COMMUNITY, CAPACITY OR POOLING ARRANGEMENTS. IT WILL ALSO HAVE IMPLICATIONS FOR COUNTRIES SUCH AS CANADA WHICH PREFERS CONSULTATIONS BETWEEN AIRLINES PREPARATORY TO A NEGOTIATION.

TARIFFS: PROVISIONS IN EACH BILATERAL MAY NEED TO BE RE-NEGOTIATED IN LIGHT OF THE PREFERENTIAL DOUBLE DISAPPROVAL REGIME WITHIN THE EC AND OF THE OPTION OF ANY EC CARRIER BEING A PRICE LEADER ON FIFTH FREEDOM ROUTES. THIS ALSO HAS IMPLICATIONS FOR THIRD AND FOURTH FREEDOM TARIFFS MATCHING FIFTH FREEDOM FARES ON PARALLEL OR COMPARABLE SEGMENTS.

CAPACITY: THIS TOO WILL NEED TO BE REVIEWED IN INDIVIDUAL BILATERAL AGREEMENTS AGAINST THE EC PROVISION OF RELATIVE CAPACITY SHARES 75%:25% BETWEEN MEMBER STATES IN 1992.

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 PROBLEM HERE.

EXEMPTION FROM CUSTOMS DUTIES AND OTHER CHARGES: HERE AGAIN NATIONAL TREATMENT OR MOST-FAVoured-NATION TREATMENT PREVAILS 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 NON-EC COUNTRY. WILL NECESSARY DOCUMENTS BE ISSUED BY A COMMUNITY AUTHORITY, OR BY NATIONAL AUTHORITIES? IF THE LATTER, WILL SUCH DOCUMENTS BE VALID AND RECOGNIZED IN OTHER MEMBER STATES?

AVOIDANCE OF DOUBLE TAXATION: TAXATION SO FAR IS STILL VESTED IN NATIONAL AUTHORITIES OF MEMBER STATES WITH WHOM AVOIDANCE OF DOUBLE TAXATION AGREEMENTS ARE CONCLUDED. PROBLEMS MAY ARISE IF SUCH AGREEMENTS HAVE NOT BEEN CONCLUDED WITH EACH OF THE TWELVE MEMBER STATES.

ROUTES: THIS MAY PROVE THE MOST DIFFICULT AND COMPLEX ISSUE. WE WILL REQUIRE A CLEAR DEFINITION OF WHAT CONSTITUTES THIRD AND FOURTH AND FIFTH FREEDOMS. THIS WILL HELP DETERMINE HOW ACQUIRED RIGHTS CAN BE MAINTAINED. AS REGARDS CABOTAGE, IF IT REMAINS A FEATURE OF BILATERAL AGREEMENTS BETWEEN MEMBER STATES, AND MEMBER STATES REMAIN

CONTRACTING STATES AND COMMITTED TO THEIR UNDERTAKINGS IN THE CHICAGO CONVENTION, THEN THE PROVISIONS OF ARTICLE 7 OF THE CONVENTION COME INTO PLAY. IT IS DIFFICULT TO SEE HOW MEMBER STATES, AS CONTRACTING STATES OF THE CONVENTION, CAN EXTEND THIS RIGHT EXCLUSIVELY THEMSELVES.

THIS PROVISION OF THE CONVENTION HAS NEVER BEEN ACTUALLY INVOKED AND TESTED IN SUCH A CONTEXT. IF CONTESTED BY THE COMMUNITY IT WILL BE INTERESTING TO SEE HOW UNDER ARTICLES 84 AND 85, ON DISPUTES AND DEFAULT, OF THE CHICAGO CONVENTION, THE ICAO COUNCIL, OR ON APPEAL, THE AD HOC TRIBUNAL OR THE INTERNATIONAL COURT OF JUSTICE WILL RULE. HOWEVER THE COMMUNITY MAY WELL MAKE CABOTAGE NEGOTIABLE ON THE BASIS OF RECIPROCITY, ALTHOUGH THIRD COUNTRIES CAN BE EXPECTED TO MAINTAIN THAT RECIPROCITY MAY BE NEGOTIABLE IF FIFTH FREEDOMS AND CABOTAGE CONTINUE TO CO-EXIST IN THE COMMUNITY. HOWEVER, IF FIFTH FREEDOMS AND CABOTAGE WERE TO DISAPPEAR WITHIN THE COMMUNITY, THEN CABOTAGE FOR THIRD COUNTRY CARRIERS IN THE COMMUNITY WOULD BE NO MORE THAN THE

CONVERSION OF FIFTH FREEDOMS ALREADY PAID FOR BY THIRD COUNTRIES IN CONTEXT OF THEIR BILATERAL AGREEMENTS WITH INDIVIDUAL EC MEMBER STATES.

IN ANY EVENT, A CASE COULD BE MADE THAT BY VIRTUE OF A PREFERENTIAL SYSTEM WITHIN THE COMMUNITY, ACQUIRED ROUTE RIGHTS OF THIRD COUNTRIES WILL BE DIMINISHED FROM THEIR ORIGINAL VALUE, AND A NEW BALANCE OF RECIPROCITY WILL NEED TO BE NEGOTIATED.

MUCH WILL ALSO DEPEND ON THE KIND OF MARKETING/POOLING ARRANGEMENTS, ALLIANCES, CODE-SHARING AGREEMENTS, CRS AND FREQUENT FLYER PROGRAMME PARTNERSHIPS BETWEEN NATIONAL AIRLINES WITHIN THE EC AND FOREIGN AIRLINES, SUCH AS BRITISH AIRWAYS WITH UNITED AIRLINES, SAS AND TEXAS AIR, ALITALIA AND UNITED, KLM WITH NORTH WEST AIRLINES. THESE WILL AFFECT THE REVIEW OF ROUTES, FIFTH FREEDOMS AND, NO DOUBT, CABOTAGE, IF NEGOTIABLE.

SIGNATURE AND ENTRY INTO FORCE: WHO WILL SIGN THE AGREEMENT? THE TWELVE MEMBER STATES PLUS OR MINUS THE COMMISSION OR VICE VERSA ?

THESE THEN ARE SOME OF THE IMPLICATIONS THAT COME TO MIND FOLLOWING A REVIEW OF WHAT THE COMMUNITY AND THE COMMISSION HAVE SO FAR UNVEILED AS TO THEIR PLANS. UNDER THE PRESENT TIME TABLE NO NEGOTIATIONS ARE CONTEMPLATED BEFORE THE COUNCIL APPROVES THE COMMISSION'S PROPOSALS OF JULY 1989, WHICH ARE INTENDED TO COME INTO EFFECT 1 JULY 1990. WE ALSO UNDERSTAND THAT THE COMMUNITY'S NEGOTIATING AGENDA WILL GIVE PRIORITY TO THE EFTA COUNTRIES (AND NO DOUBT ALSO THE OTHER NON-EC MEMBERS OF ECAC). THIS WILL PROVIDE SOME ANSWERS; BUT IT MAY ALSO COMPLICATE MATTERS FURTHER FOR THIRD COUNTRIES, IF THESE COUNTRIES ARE SUBSUMED FOR AIR TRANSPORT PURPOSES INTO THE COMMUNITY'S COMMON OR UNIFIED MARKET.

WHICHEVER WAY ONE LOOKS AT IT, THE RENEGOTIATION OF 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 NEGOTIATING PROCESS FOR NON-EC COUNTRIES. BUT THE FUNDAMENTAL PURPOSE OF EACH NEGOTIATION IS TO REACH A MUTUALLY SATISFACTORY AGREEMENT REPRESENTING AN OVERALL BALANCE OF RECIPROCITY IN OBJECTIVES, INTERESTS, RIGHTS AND OPPORTUNITIES. THE ESSENCE OF NEGOTIATION IS NEGOTIABILITY: THE TRANSLATION OF THE NEGOTIABLE TO THE MUTUALLY ACCEPTABLE. THIS IN TURN DEPENDS UPON THE RECIPROCAL DISPOSITION TO REACH ACCOMMODATION.

IN VIEW OF THE IMPORTANCE OF AIR TRANSPORT ACROSS THE ATLANTIC, I AM SURE, GIVEN THE WILL, THAT COMPROMISES WILL BE FOUND. THESE WILL BE NEITHER QUICK NOR EASY. IN THIS CONTEXT, HOWEVER, IT IS IMPORTANT TO BEAR IN MIND THAT THE WORLD IS UNLIKELY TO STAND STILL UNTIL 1992. AND THE EVOLUTIONARY PROCESS TOWARD A COMMON OR UNIFIED AIR TRANSPORT MARKET IN THE EC AND DEVELOPMENTS OUTSIDE IN TERMS OF THE TREND TOWARD DEREGULATION, OR STRICTER DISCIPLINES AGAINST ANTI-COMPETITIVE BEHAVIOUR, OR MARKET DECISIONS BY

THE AIRLINES THEMSELVES, SUCH AS ALLIANCES, MERGERS, JOINT VENTURES, PARTNERSHIPS OR TAKEOVERS - ALL ARE LIKELY TO HAVE A SIGNIFICANT BEARING ON THE PROSPECTIVE RE-NEGOTIATION OF BILATERAL AGREEMENTS BETWEEN THE EC AND THIRD COUNTRIES.

AIR AGREEMENTS PROVIDE THE LEGAL FRAMEWORK FOR INTERNATIONAL SCHEDULED AIR SERVICES. AIRLINES CANNOT OPERATE, GIVEN THEIR HEAVY INVESTMENT IN EQUIPMENT AND RUNNING COSTS, IN AN UNCERTAIN ENVIRONMENT WHERE GROUND RULES ARE IN CONTINUOUS PROCESS OF CHANGE. FOR CURRENT OPERATIONS AND STRATEGIC PLANNING, THEY NEED A FRAME OF REFERENCE THAT IS LEGALLY SECURE AND PREDICTABLE. IT IS NOT, THEREFORE, TOO EARLY TO START A CONSULTATIVE PROCESS IF ONLY TO PREPARE THE GROUND AND TEST WHAT IS DOABLE. AN EXCHANGE OF VIEWS ON THE IMPLICATIONS OF THE COMMUNITY'S COMMON AIR TRANSPORT POLICY FOR AIR RELATIONS AND AGREEMENTS WITH THIRD COUNTRIES MAY HELP CONTRIBUTE TO THE FORMULATION OF COMMUNITY POLICY DECISIONS INFORMED BY THE LIKELY EXTERNAL EFFECTS OF ITS POLICY OBJECTIVES. BY THE SAME TOKEN THIRD COUNTRIES WOULD ALSO GAIN A BETTER GRASP OF PROSPECTIVE CHANGES IN DETERMINING THE ADJUSTMENTS THAT WILL BE REQUIRED. SUCH MANAGEMENT OF THE TRANSITION PERIOD TO 1992 AND BEYOND WOULD HELP CALIBRATE THE INEVITABLE TOWARDS THE DIGESTIBLE.

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