New Frontiers in EEC Air Transport Competition

Virginia J. Clarke
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I. INTRODUCTION

From its very inception in 1957, the European Economic Community ("Community" or "EEC") has sought, through the EEC Treaty, "to promote throughout the Community a harmonious development of economic activities." \(^1\) This development is to be accomplished, among other means, through "the adoption of a common policy in the sphere of transport" \(^2\) and "the institution of a system ensuring that competition in the common market is not distorted." \(^3\) It has never been clear, however, whether the competition rules set out in the EEC Treaty specifically apply to "a harmonious development" of the EEC air transport industry and its pricing procedures. \(^4\)

Since 1974, the European Court of Justice ("Court" or "Court of Justice") has held air transport subject to general treaty rules. \(^5\) Several commentators maintain that such general rules include the competition

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\(^2\) Id., art. 3(e).

\(^3\) Id., art. 3(f). The EEC Treaty competition provisions are set forth in Articles 85 and 86. For the text of these articles, see infra note 6.

\(^4\) Article 84(2) makes an exception from rules affecting general transport for sea and air transport, subject to any implementing rules put out by the Commission; no such implementing rules have ever been formulated. Implementing rules for competition in other sectors have been previously specified in Council Regulation Number 17, First Regulation Implementing Articles 85 and 86 of the Treaty, 5 J.O. COMM. EUR. (No. 13) 204 (1962), O.J. COMM. EUR. 87 (special 1959-1962 English ed.) (1972), as amended, and Regulation Number 141, 124 J.O. COMM. EUR. 2751 (1962). Regulation 141 specifically exempts sea and air transport from the provisions of Regulation 17.


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provisions set forth in Articles 85 and 86. However, attempts to obtain an explicit ruling from the Court of Justice were unsuccessful until the

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6 See Dogtoglou, *Air Transport and the European Community*, 6 EUR. L. REV. 335 (1981); Weber, *Laker Airways v. The Ten Governments of the EEC—Comments on a Pending Case*, 6 ANNALES AIR & SPACE L. 257, 267 (1981). Others feel that the issue has not been resolved, a position which prompted the European Court of Justice ("Court" or "Court of Justice") to hand down the *New Frontiers* ruling, the subject of this Note. See infra note 8 and accompanying text. See also Comment, *Introducing Competition to the European Economic Community Airline Industry*, 15 CAL. W. INT'L L.J. 364, 372 (1985).

The text of Article 85 is as follows:

1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:
   (a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;
   (b) the limitation or control of production, markets, technical development or investment;
   (c) market-sharing or the sharing of sources of supply;
   (d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
   (e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

2. Any agreements or decisions prohibited pursuant to this Article shall be null and void.

3. Nevertheless, the provisions of paragraph 1 may be declared inapplicable in the case of:
   - any agreements or classes of agreements between enterprises,
   - any decisions or classes of decisions by associations of enterprises, and
   - any concerted practices or classes of concerted practices;
   which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which:
   (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;
   (b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

**EEC Treaty, supra note 1, art. 85.**

Article 86 provides as follows:

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited. Such improper practices may, in particular, consist in:

(a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;
(b) the limitation of production, markets or technical development to the prejudice of consumers;
(c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
(d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

**EEC Treaty, supra note 1, art. 86.**

7 Sir Freddie Laker, upon denial of a license by the British Civil Aviation Authority, tried to bring to the attention of the London Court and the Court of Justice the monopolistic tendencies of the aviation system. His business collapsed prior to any consideration of whether Articles 85 and 86 applied. Weber, *supra* note 6, at 258-60; Comment, *supra* note 6, at 383-84.

Lord Bethell, a Member of the British House of Lords and a leader in airline cartel breakup
New Frontiers case, when the Court addressed the issue directly.

In New Frontiers, the Court held that Member States’ approval of air fares contravened their treaty obligations when the fares resulted from agreements or concerted practices prohibited by Article 85. Thus, the Court asserted the applicability of EEC competition rules to air transport and specifically to price-fixing procedures within the EEC airline industry. The Court of Justice further found that the responsibility for determining violations of the competition rules lies with the authorities in Member States, and that Member States have a duty to refrain from adoption or maintenance of practices that could render Articles 85 and 86 ineffective.

This Note will examine the import of the New Frontiers decision, from a theoretical and practical viewpoint, as it relates to the EEC air transport industry. The decision, while rendering future deregulation of the EEC air transport industry possible, fails to assure a smooth or effective change. First, the development of bilateral and multilateral agreements upon which the airline industry now relies will make it exceedingly difficult for the Community to apply pure competition rules to rate-making. In particular, rates have a tradition of regulation by the International Air Transport Association (“IATA”), acting in conjunction with the individual Member States. Since most airlines within the EEC are nationalized, Member States risk loss of considerable profit attempts, also brought suit against the Commission of the European Communities (“Commission”) for allowing price-fixing to continue in violation of Article 85. The case was dismissed on grounds that Lord Bethell had no direct interest in the outcome. See Leading Cases, Lord Bethell v. Commission of the European Communities, 7 ANNALS AIR & SPACE L. 599-600 (1982).


9 New Frontiers, 4 Common Mkt. Rep. (CCH) at 16,781. See infra notes 63-76 and accompanying text.

10 New Frontiers, 4 Common Mkt. Rep. (CCH) at 16,780. See infra notes 75-76 and accompanying text.

11 New Frontiers, 4 Common Mkt. Rep. (CCH) at 16,780. See infra notes 75-76 and accompanying text.

12 Aer Lingus and Sabena are wholly owned by Ireland and Belgium, respectively. Air France, Alitalia, KLM, and Lufthansa are also held primarily by the Member States in which they are located. See Comment, supra note 6, at 365 n.7. Until its recent privatization, British Airways was
and security in a free market. As a practical matter, Member States will not be eager to implement the *New Frontiers* decision.

Further, the machinery of the EEC Commission ("Commission"), which is ultimately responsible for the behavior of the Member States, is not known for its quick or efficient operation; it may be years before standards for rate competition are established.

After explaining the framework of international agreements and general policy governing civil aviation in the EEC, and discussing prior competition cases, this Note will then analyze the *New Frontiers* decision. The groundwork for an exploration of the difficulties in applying and enforcing the decision is seen in this case's progress through the French court system and the various issues discussed by the Court of Justice. This Note will end by examining the situation of private airlines in the aftermath of the decision.

II. AIR TRANSPORT IN THE EEC

A. The International Origins

The foundations of the modern international airline industry were laid at the Chicago Convention in 1944 ("Convention"). Those countries attending agreed to legal principles and institutional provisions by which to standardize and develop civil aviation on a world scale. The Convention recognized the basic "right for each country to control flights in its territory," but left other details to agreements between participating countries.

This agreement led to the creation of bilateral systems for "the exchange of commercial rights" between countries. Rate-wholly owned by the British government; the airline continues as a national "flag carrier" and still identifies closely with the government.

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13 The Commission is one of four bodies governing the EEC. The other organizations are the Parliament, the Council, and the Court of Justice. See infra notes 92-102 and accompanying text.

14 Formulating a written policy for air transport occurred within the bureaucratic offices of the EEC over several years. See infra notes 35-47 and accompanying text; see also *No Policy*, supra note 8.

15 See infra notes 20-54 and accompanying text.

16 See infra notes 55-62 and accompanying text.

17 See infra notes 63-76 and accompanying text.

18 See infra notes 77-131 and accompanying text.

19 See infra notes 132-143 and accompanying text.


22 Hammarskjold, *supra* note 20, at 80.
making was an area in which multilateral agreement at the Convention was impossible; rates were therefore left to bilateral agreements.\textsuperscript{23}

The present form of the IATA, created in Havana in 1945,\textsuperscript{24} further defined the nature of the modern international airline industry. Coordinating international air tariffs was one of the IATA’s primary functions, subject to approval by participating governments. Through such carefully regulated and “mutually supported protectionism,” a “reliable” international aviation system has developed.\textsuperscript{25}

The Bermuda I Agreement between the United States and the United Kingdom was the first major bilateral agreement following the Convention, and one on which many subsequent agreements have been modeled.\textsuperscript{26} Concluded in 1946, this agreement combined elements of both bilateralism and multilateralism. It served as witness to the United States “recognition of the need for overall coordination of rate-making by airlines, which implied granting of antitrust immunity”—a major achievement.\textsuperscript{27}

This mixture of negotiated air traffic rights and standardized pricing procedures was the basis for the development of international aviation. More recent agreements preserved state air fare approval and usually involved the IATA rate-making procedures. The 1977 Bermuda II Agreement is an example.\textsuperscript{28}

In 1978 the United States, long a proponent of competition in the marketplace,\textsuperscript{29} passed the Airline Deregulation Act in an attempt to in-

\textsuperscript{23} Id. at 81. The significance lies in the failure of participating countries to agree on an established procedure for determining rates. The resulting bilateralism means that a country may have a separate (and separately negotiated) rate agreement with every country with which it exchanges air traffic rights; no uniform standards are necessarily applied.

\textsuperscript{24} See INT’L AIR TRANSP. ASS’N, THE FIRST THREE DECADES, 102 (1945). Headquartered in Geneva, the IATA is a free association of airlines which operates international commercial air services. It serves the needs of airlines and customers by coordinating airline procedures to provide safer, more regular, and more economic air transport.

\textsuperscript{25} Dagtoglou, supra note 6, at 337. This regulation has also been responsible for the industry’s maintenance of prices. Id.

\textsuperscript{26} Air Services Agreement Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, Jan. 15-Feb. 11, 1946, 60 Stat. 1499, T.I.A.S. No. 1507 [hereinafter Bermuda I Agreement].

\textsuperscript{27} Market entry was governed by a bilateral system that allowed the states to retain a degree of control over competition; multilateralism resulted in standardized traffic rights and coordinated ratemaking. Hammarskjold, supra note 20, at 81-82.

\textsuperscript{28} Agreement between the United States of America and the United Kingdom of Great Britain and Northern Ireland Concerning Air Services, July 23, 1977, 28 U.S.T. 5367, T.I.A.S. No. 8641 [hereinafter Bermuda II Agreement]. The IATA coordinates various air fares between states and standardizes these fares to the extent possible. Recently, this role has emphasized lowering fares. Hammarskjold, supra note 20, at 83.

\textsuperscript{29} The United States first official position discouraging monopoly and advocating competition
roduce competition into its domestic market. The sudden discrepancy between its free market domestic policy and controlled international policy led the United States to seek a more open market for international aviation as well. Pursuit of deregulation in the EEC, however, may involve conflicts between the policies of the Community as a whole and the Member States as independent entities.

This complex tangle of bilateral agreement, multilateral regulation, and “open skies” policy sets the stage for the New Frontiers case. Resolution of these issues rests upon the formulation of a coherent air transport policy.

B. The Present EEC Policy

In 1977 the EEC Council (“Council”), in response to the Court’s ruling that general treaty rules apply to sea and air transport, created a group to study and report on Community air transport. In the following years, a formal Community policy on air transport evolved, especially with respect to its competitive position. Two official memoranda detail that policy.

The First Memorandum, published by the Commission in 1979, advocated immediate development of a “common air transport market” and suggested measures covering pricing, employment policies, safety rules, traffic rights, and competition. On the basis of this Memorandum, the Council requested that the Commission develop proposals for interregional air services and air fares.

The Commission subsequently made two proposals which met with


32 See infra notes 81-114 and accompanying text.

33 The United States approach to free competition and a minimum of regulation is often referred to as “open skies” policy. See U.S. v. Federal Communications Commission, 1978-2 Trade Cas. (CCH) ¶ 62,205, at 75,358 (D.C.Cir. Aug. 29, 1978).


37 Id. ¶ 1, at 7.
resistance in the Council. The first proposal advocated opening the market to new airlines.\textsuperscript{38} The second proposal dealt with air fares and the application of competition rules.\textsuperscript{39} These proposals never emerged from the Council as official policy because "[n]o Member State wanted its dealings with its own airlines to become subject to Community rules."\textsuperscript{40}

The Second Memorandum,\textsuperscript{41} published in 1984, reflects the concerns currently facing the EEC. Specifically, the Second Memorandum discussed the impact of deregulation and concluded that a Community air transport system was "not necessarily suitable for application to third countries."\textsuperscript{42} It also recognized the need for rendering the present air transport system "sufficiently flexible so as to contain within itself enough pressure to ensure that airlines increase their productivity and provide their services at the lowest possible cost."\textsuperscript{43}

The three measures proposed by the Commission to maintain such flexibility included: "a) Community rules on certain points affecting the content and method of application of the bilateral agreements and arrangements which Member States conclude; b) action to amend the machinery for the settlement of air tariffs; c) action to limit the effect of commercial and tariff agreements between airlines."\textsuperscript{44}

As these three measures illustrate, the Commission's basic aim was to apply the competition rules to air transport in the Community, but exempt those Member States who indeed implemented such measures during a period of adjustment.\textsuperscript{45} However, the Commission never officially adopted these proposals as regulations. The \textit{New Frontiers} decision emerged as the most definitive statement of these objectives.\textsuperscript{46}

Although the EEC governing bodies debated many of the issues discussed in the \textit{New Frontiers} decision, nothing binding on either the Commission or the Member States ever emerged from the debate. The situation was finally resolved by proceedings under Articles 85 and 86.

\textsuperscript{38} Id. \textsuperscript{52}, at 17.
\textsuperscript{39} Id. \textsuperscript{68}, at 19.
\textsuperscript{40} Id.
\textsuperscript{41} \textit{Progress Towards the Development of a Community Air Transport Policy}, BULL. EUR. COMMUNITY (3/84)(Memorandum of the Commission).
\textsuperscript{42} Id. Summary, at I.
\textsuperscript{43} Id. \textsuperscript{44}, at 27.
\textsuperscript{44} Id. \textsuperscript{46}, at 29.
\textsuperscript{45} Id. \textsuperscript{59}, at 35.
\textsuperscript{46} The Court, in its examination of Article 74, stressed that the "objectives of the Treaty . . . namely the institution of a system ensuring that competition in the Common Market is not distorted, are equally applicable to the transport sector." \textit{New Frontiers}, 4 Common Mkt. Rep. (CCH) at 16,777. Air transport is therefore to be included in the competition rules along with "other modes of transport . . . ." Id. at 16,778.
Resolution under these articles seemed appropriate since “[i]n the development of Community policies the greatest progress has come from the impetus provided by the provisions of the EEC Treaty.”

C. Prior Court of Justice Decisions

No previous decisions by the Court of Justice directly addressed the issue of whether air transport was subject to EEC competition rules. Several decisions, however, indicated a willingness by the Court of Justice to extend application of these rules to such situations. This willingness paralleled a similar trend found in the formal statements of EEC policy by the Commission in recent years.

The initial step came in 1974 with what is commonly referred to as the French Seaman case. There the Court of Justice considered Article 84(2) of the EEC Treaty, which defines the scope of treaty provisions relating to transport policy in general. The Court held that “sea and air transport . . . remain, on the same basis as the other modes of transport, subject to the general rules of the Treaty.” Under this rationale, the competition rules of Articles 85 and 86 may be interpreted as applying to sea and air transport, despite their inclusion from other transport provisions, because they are part of the general treaty provisions.

Additional support for the application of Articles 85 and 86 to air transport is found in Commission v. Belgium. In this case, the Court of Justice held that aid to transport cannot be exempted “from the general system of the treaty concerning aid granted by the States and from the controls and the procedures laid down therein.” Application of this decision to the air transport sector would make any aid from a Member State to an airline subject to Articles 85 and 86, which prohibit abuse of a dominant position in the marketplace. Since state-owned airlines are usually the largest airlines in a given Member State, any subsidy to the airline could be construed as a violation of Community competition law.

Articles 85 and 86 are not always determinative of competition violations. Where “purely national systems” are involved, the Court has

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47 Stanbrook, supra note 35, at 56.
48 See supra notes 34-47 and accompanying text.
held that Community competition rules do not apply.\textsuperscript{53} The airline industry, despite its close ties with national governments, depends on international networks to such an extent that it is clearly not a "purely national system."

The nature of the air transport industry within the EEC, confined as it is by its international origins and present status of bilateralism,\textsuperscript{54} throws the protectionist interests of the Member States into sharp conflict with the Community's stated competitive goals. Interpretation and application of the \textit{New Frontiers} decision will help resolve these conflicts.

III. THE \textit{NEW FRONTIERS} CASE

A. The French National Court Decisions

1. \textit{Tribunal de Police}

In a criminal proceeding brought in the Tribunal de Police (the local criminal court), several airlines and their directors, as well as several travel agencies and their directors, were charged with violating certain provisions of the French Civil Aviation Code.\textsuperscript{55} The relevant statutes provided that all proposed air fares be submitted and approved by the French Minister for Civil Aviation.\textsuperscript{56} The defendants were charged with offering unapproved air fares that undercut those officially approved.

The Tribunal de Police interpreted the relevant provisions of the Civil Aviation Code as applicable to the airlines, but not to the travel agencies or their directors.\textsuperscript{57} It then found that compliance with the statutes required each airline to "draw up tariffs for each individual route and submit them to the Minister for approval on pain of criminal penalties."\textsuperscript{58}


\textsuperscript{54} An estimated 325 separate bilateral agreements among 26 countries currently govern European air travel. \textit{EC Ministers Fail to Reach Accord on Measures to Liberalize Air Travel}, 52 Antitrust & Trade Reg. Rep. (BNA) 754 (April 16, 1987).

\textsuperscript{55} \textit{New Frontiers}, 4 Common Mkt. Rep. (CCH) at 16,774. \textit{See also id.} at 16,781 (Opinion of the Advocate Gen.).

\textsuperscript{56} \textit{Id.} at 16,774. Article L 330-3 of the French Civil Aviation Code requires that the Minister of Aviation approve all undertakings engaged in air transport. The various items that the Minister must approve are specified in Article R 330-9. These items include air tariffs, which will be considered approved if, within one month, the Minister makes no objections. Article R 330-15 provides for penalties including fines and imprisonment for violations.

\textsuperscript{57} \textit{New Frontiers}, 4 Common Mkt. Rep. (CCH) at 16,781-82 (Opinion of the Advocate Gen.).

\textsuperscript{58} \textit{Id.} As the Court pointed out, "A decision approving the tariff proposed by an airline therefore has the effect of rendering that tariff binding on all traders selling tickets of that company in respect of the journey specified in the application for approval." \textit{Id.} at 16,774. It is this effect that the defendants contended contravened EEC competition rules.
The significance of the Tribunal de Police decision lies in its comments on the compatibility of the French Code provisions with the competition provisions of the EEC Treaty. The Tribunal de Police first determined that “those provisions [of the Civil Aviation Code], which call for a concerted practice between airlines, undoubtedly have as their effect the prevention, restriction, or distortion of competition within the Common Market” in violation of Article 85. Based on this finding, the Tribunal concluded that the validity of the French laws in this context “can be settled only by the Court of Justice of the European Economic Community.” The case was thus referred to that body for a preliminary ruling on the issues.

2. Cour d'Appel

The Ministère Public (Public Prosecutor's Department) appealed to the Cour d'Appel (Court of Appeal) seven days after the Tribunal de Police decision. The Cour d'Appel refused to determine the admissibility of the appeal immediately, “since that was not necessary in the interests of the proper administration of justice.” All criminal proceedings at the national level were stayed pending the outcome of the case in the Court of Justice.

B. The Court of Justice Decision

In concluding that each Member State has an obligation to ensure that no aviation concern or group of concerns prohibits, restricts, or distorts competition as provided in Article 85, the Court considered five issues: 1) jurisdiction; 2) international air transport rules; 3) applicability of treaty competition rules to air transport; 4) consequences of absence of implementing legislation for air transport competition rules; and 5) compatibility with Community law of national tariff approval procedures.

After upholding its jurisdiction to decide the case, the Court summarized the history of air transport from the Convention to the present, emphasizing the tradition of price-fixing in bilateral agreements. In
considering "whether Community law entails obligations for the Member States under Article 5 of the treaty regarding competition in the air transport sector," the Court found that a number of treaty provisions, including Articles 85 and 86, provided no bar to the application of the competition provisions to air transport.\textsuperscript{67}

In considering whether the national authorities or the Commission should determine violations of the competition rules,\textsuperscript{68} the Court found that the "appropriate authorities" of each Member State must make these determinations in the absence of any regulations approved by the Commission. Relying on its prior decisions, the Court held that these "authorities," as used in Article 88, refer to administrative authorities subject to review by competent courts, as well as to courts in Member States that traditionally have applied domestic competition law.\textsuperscript{69} The Court questioned—and found wanting—the competence of a criminal court (such as the Tribunal de Police) to perform such a function.\textsuperscript{70}

Proper implementation of EEC competition law would be governed by the principle of "provisional validity."\textsuperscript{71} This principle states that agreements predating official regulation are presumed valid "unless and until" Member State authorities or the Commission decide that an infringement of Article 85 has occurred.\textsuperscript{72} Under the Court's application of the provisional validity principle, air transport agreements cannot be ruled automatically void under Article 85(2) by a national court "unless and until" a decision establishing an Article 85(1) violation emerges from the appropriate Member State authorities or the Commission.\textsuperscript{73} Absent

\textsuperscript{66 Id. at 16,776. Article 5 of the EEC Treaty provides that:

Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims.

They shall abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty.

EEC Treaty, supra note 1, art. 5.


68 \textit{Id.} at 16,778. Article 88 of the Treaty indicates that in the absence of any measures implementing Articles 85 and 86, responsibility falls on the Member States; Article 89 indicates that the Commission has concurrent authority in such a situation.


70 \textit{Id.} at 16,778-80.


72 Burnside, \textit{Cheaper Air Fares in Europe—The European Court's New Frontier}, L. Soc'y Gazette, July 9, 1986, at 2167. The Member States would act under their power in Article 88 to make such a decision; the Commission's power to do so lies in Article 89.

implementing rules, a national court has no jurisdiction to find violations of Article 85.74

The Court also contemplated the practical effects of its decision to apply the treaty competition rules to the air transport sector and its pricing procedures. Given the network of bilateral and multilateral agreements among nations accustomed to directing and subsidizing their airlines, the Court attempted to delineate how treaty competition rules should affect existing practices and laws. The Court noted the duty imposed on Member States "not to adopt or maintain in force any measure that could deprive [Articles 85 and 86] of their effectiveness,"75 and concluded that where the Commission or competent national authorities determined fare pricing procedures violated Article 85, approval of such procedures would be "contrary to the obligations of the Member States in the field of competition."76 Thus, the Court gave responsibility to the Member States first to determine violations, and then to conform pricing approval procedures accordingly.

IV. IMPACT ON THE EEC AIRLINE INDUSTRY

Although the Court's opinion stresses deregulation of the air transport industry in Europe, whether true competition is actually introduced remains to be seen. Imperfectly and incompletely structured enforcement procedures,77 anticipated reluctance by Member States,78 and the absence of definitive substantive rulings may thwart implementation of the decision.79 Furthermore, attempts may be made to channel this reluctance through exemptions under Articles 85(3) and 90(2).80 For small private airlines, these conditions may well render the New Frontiers decision an exercise in tokenism, effectively preventing a notable improvement in their competitive positions in the Community.

A. Enforcement Difficulties

Enforcement of the competition rules may prove far more difficult than the mere announcement of their applicability to air transport. The

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74 Id. at 16,780.
76 Id. at 16,780.
77 See infra notes 92-114 and accompanying text.
78 See infra notes 83-91 and accompanying text.
79 The holding of the case evades a substantive determination of whether or not a violation did in fact occur. See infra note 132.
80 See infra notes 115-31 and accompanying text.
Member States' conflicting national and Community duties\(^{81}\) and restrictions on the governing EEC institutions\(^{82}\) may hinder reporting and investigation of prohibited practices. Those practices could conceivably continue, despite their contravention of Article 85.

1. **Member State Interests**

Member States have a vested interest in avoiding strict application of the competition rules. From a Member State's point of view, competition could adversely affect not only the terms of bilateral agreements and the functioning of international organizations like the IATA, but could also force closure of unprofitable, subsidized routes. Since every Member State owns all—or at least a significant part—of its national airline,\(^{83}\) each Member is often involved in fixing tariffs and subsidizing unprofitable routes.\(^{84}\) In addition, Member States view United States deregulation as encouraging regional airlines at the expense of larger, established carriers. This assessment contributes to their reluctance to apply any competition law strictly.\(^{85}\)

To date, the Member State practices of subsidy and tariff-fixing have effectively barred smaller private airlines from entering or surviving in the European market.\(^{86}\) By disrupting "the competitive market forces of supply and demand," national airlines have succeeded in maintaining artificially high air fares.\(^{87}\) These fares would be threatened by competition. In addition to these anti-competitive practices, changing the current air transport regime has political costs. The operation of most national European airlines by overstaffed management and unions\(^{88}\) dims the prospects for increased competition. These groups, obviously opposed to deregulation, are not easily overcome.\(^{89}\) Further, Member States wish to maintain the stability and prominence of their "national flag carriers."\(^{90}\)

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81 Community duties of Member States include a variety of activities designed to integrate Member States' markets and abolish barriers to trade. See EEC Treaty, supra note 1, art. 3.

82 See infra notes 92-108 and accompanying text.

83 See supra note 12 and accompanying text.

84 Comment, supra note 6, at 365.

85 Id. at 385-86.

86 Id. Sir Freddie Laker, for example, was unable to compete successfully. In addition, Virgin Atlantic does not foresee any concessions that might allow it a better chance at competing. See infra note 140 and accompanying text.

87 Comment, supra note 6, at 365.

88 Dagtoglou, supra note 6, at 340.

89 Id.

90 Id. Dagtoglou also points to arguments against deregulation based on issues such as flight safety, general social policy, financial risks, and potential breaches of international agreements. Id. at 351-52. For arguments against the introduction of competition to air transport, see Comment,
Member States, while bound on the one hand by a duty to the Community to promote harmonious economic development under Article 5 of the EEC Treaty, find themselves bound on the other hand by obligations to their own national interests. The Court of Justice has placed these two duties in direct conflict. It is only through the determination and execution of enforcement procedures that the New Frontiers decision can have an effective impact on the European airline industry.\(^9\)

2. Community Government Structure

The EEC's bureaucratic structure increases the difficulties of enforcement present in the difficult situation described above. Four bodies govern the European Economic Community: the Council, the Commission, the Parliament, and the Court of Justice.\(^9\) The Parliament and Commission act as advisers to the Council, which bears ultimate responsibility for setting official policies and regulations that bind members of the Community.\(^9\) With respect to air transport policy, Article 84(2) of the treaty exclusively authorizes the Council to adopt an official policy.\(^9\)

The Court is not technically responsible for "procedural adoption" laws.\(^9\) Nonetheless, the Court declared in New Frontiers that the competition laws apply to air transport, even though no procedural rules governing their application exist.\(^9\) Absent such procedural rules, there is no enforcement mechanism to compel application of the decision. Moreover, there is little likelihood that these necessary procedures will be adopted promptly. The Commission has reserved its opinion on how far to extend liberalization of air transport policy, and the Member States continue to disagree on matters of pricing, capacity, and market access.\(^9\) Meetings of the European transport ministers in June 1987 failed to produce agreement on air transport deregulation policy.\(^9\) While the Com-

\(^9\) supra note 6, at 385-87. For more information on the safety factors, see Mr. Clinton Davis Announces Conference in 1987 on Airline Safety, Europe, No. 4405, Oct. 9, 1986, at 8.

\(^91\) See infra notes 95-114, 132-42 and accompanying text.

\(^92\) Comment, supra note 6, at 367 (citing EEC Treaty, supra note 1, arts. 137-209).

\(^93\) Id. at 367-69.

\(^94\) See id. at 373.

\(^95\) Id. at 369.

\(^96\) See supra note 68. The Commission, while reserving its opinion as to general air transport developments, has found some of the airlines' agreements incompatible with the treaty provisions despite the lack of Council-approved regulations on the subject. Transport: The Twelve Have Made Considerable Progress Toward a Compromise on Gradual Liberalization of Air Transport, Differences Persist and Commission Reserves an Opinion, Europe, No. 4405, Oct. 9, 1986, at 7 [hereinafter The Twelve Have Made Progress].

\(^97\) For a discussion of EEC air transport policy, see supra notes 34-47 and accompanying text.

\(^98\) Commission to Pursue Airline Reforms, Fin. Times, July 2, 1987, at 3, col. 1 (int'l ed.). This failure stemmed from Spain's refusal to approve a package of proposals. The defeated package fea-
mission has renewed efforts to bring the airlines into compliance with the competition rules, it has not initiated proposals for the airline industry under the Single European Act, a structural reinvigoration of the EEC Treaty.99

As if the sheer weight of EEC bureaucracy were not enough to slow progress, the composition of each body of representatives of the Member States may also inhibit procedural development. Particularly since “the Council Members act at the direction of their governments,”100 and since those governments are so closely tied to their respective airlines,101 any significant dissent among Member States must be eliminated before final implementing procedures are approved. The tenor of meetings of the EEC transport ministers has been unfavorable in this respect.102

In the absence of implementing legislation, the treaty allows each Member State to determine infringements of the competition provisions.103 Member State administration of the competition laws may lead to inconsistent application. “Member States would be free to interpret the competition laws to their individual benefit . . . . [T]he competition laws would only be invoked when convenient, and would have little significant impact in promoting a more competitive EEC airline industry.”104 In addition, only the appropriate national authorities may act under law.105 It is not always clear, however, who these authorities are or who determines their right to act.106 All these factors suggest that

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99 The Single Act: A New Frontier for Europe, BULL. EUR. COMMUNITY (Supp. No. 1)(1987)(Communication from the Commission to the Council). See also Commission to Pursue Airline Reforms, supra note 98. The Single European Act became effective on July 1, 1987. Id. Among other modifications of the EEC Treaty, this Act requires Commission proposals to pass Parliament before vote by transport ministers takes place; at that point only a majority and not a unanimity of ministers’ votes is necessary. A Rock on the Runway, supra note 98.

100 Comment, supra note 6, at 370 n.53.

101 See supra notes 83-90 and accompanying text.

102 An October 1986 meeting illustrates these problems. At that meeting Germany and France were generally in accord with suggested policy measures, but Denmark, Spain, and Greece found them too liberal and the Netherlands found them too conservative. The Twelve Have Made Progress, supra note 96, at 7-8. See also supra note 98 and accompanying text.

103 EEC Treaty, supra note 1, arts. 88, 89.

104 Comment, supra note 6, at 373 (citing Letter from K. Hammarskjold, Office of the Director General, IATA, to G. Constogoeorgis, Commissioner, European Economic Community [hereinafter Hammerskjold Letter]).

105 See supra notes 68-74 and accompanying text.

106 Reuben, Air Transport in Europe: New Perspectives for Competition Law?, 136 NEW L.J. 160, 161 (1986)(examining a wide range of possible “appropriate authorities” within Great Britain, including the Director General of Fair Trading, the Monopolies and Mergers Commission, the Secretary of State, and the Civil Aviation Authority).
effective steps may not be taken to invalidate price-fixing agreements.

Difficulties arise for the Commission in this situation because it has no authoritative, Council-approved procedures on which to rely. The investigatory powers of the Commission under Article 89 are dependent upon cooperation from the Member States.\(^{107}\) In the unlikely event that a Member State reports its own violations of the competition provisions, the Commission would still rely upon that State to enforce any of its proposed remedial measures.\(^{108}\)

The conflict between Member State interests in nationalized airlines and a deregulated Community air transport policy exacerbate the weaknesses in the Community's governing structure and in the New Frontiers decision itself. The result is an absence of uniformity\(^ {109} \) and certainty as to what the law actually means.\(^ {110} \) The New Frontiers decision does not assign any positive substantive duties to the Member States, it only delineates what is "contrary" to their treaty obligations.\(^ {111} \)

Some steps to enforce a competitive policy have been taken, albeit slowly. On July 9, 1986, the Commission first gave Member States a waiting period during which to improve their airlines' price-fixing behavior. After this period expired, the Commission sent letters to ten airlines warning them to desist in their cartel practices.\(^ {112} \) Seven airlines responded positively to this measure, while Lufthansa, Alitalia, and Olympic Airways persisted in fixing fares, pooling revenues, and dividing routes.\(^ {113} \) After the Council's failure to reach an official policy position,

\(^ {107} \) Comment, supra note 6, at 374.

\(^ {108} \) Id. Furthermore, "[a]n independent decision by either the Commission or the Court of Justice with regard to the application of the competition laws would not achieve the community goal of adopting a common air transport policy." Id. at 374-75.

\(^ {109} \) Id. at 373 (citing Hammarskjold Letter, supra note 104).

\(^ {110} \) Id. at 375 n.91.

\(^ {111} \) New Frontiers, 4 Common Mkt. Rep. (CCH) at 16,781. The Opinion of the Advocate General interprets "a line of decisions" of the Court as requiring "the Member States not to adopt or maintain in force any measures that might enable the airlines to escape from the constraints imposed by the competition rules in the treaty, or, more specifically, to coordinate their flight tariffs." Id. at 16,795-96. The Advocate General does not, however, discuss whether the Member States are immediately to break off all such agreements possibly in violation of the rules, or whether the Member States are to report themselves or other Member States. Neither is it clear what will become of the IATA and its tariff coordinating services. As KLM and Air France argue, any obligations of the Member States must "be given a sufficiently specific content" in order to be operable. Id. at 16,786.

\(^ {112} \) Commissioner Warns Airlines to End Cartel Practices, Fin. Times, July 10, 1986 (int'l ed.). Those airlines included British Airways, British Caledonian, Sabena, SAS, Lufthansa, Air France, and KLM. Id. The Commission is now reviewing the replies. EC Falls to Free Civil Aviation: Airlines Will Face Antitrust Changes, 52 Antitrust & Trade Reg. Rep. (BNA) 94 (Jan. 15, 1987) [hereinafter EC Falls to Free Civil Aviation].

\(^ {113} \) EC Commission Declares Illegal Cartel Arrangement of Airlines, 52 Antitrust & Trade Reg. Rep. (BNA) 655 (Apr. 2, 1987)[hereinafter Illegal Cartel Arrangement]. The Commission has declared these practices "null and void" for illegality. Id. The three airlines involved initially refused
the Commission indicated it would be willing to pursue enforcement action against the airlines in court.\textsuperscript{114}


1. Article 85(3)

Article 85(3) exempts any concerted activity or agreement between commercial undertakings that contributes “to the improvement of the production or distribution of goods or to the promotion of technical or economic progress. . . .”\textsuperscript{115} This article’s only proviso is that consumers be allowed a fair share of the resulting benefit.\textsuperscript{116} This exemption does not, however, tolerate undue restrictions on or substantial reductions in competition.\textsuperscript{117}

At least three EEC governments contend that this provision supports “their powers to approve air tariffs even where those tariffs are coordinated between the airlines concerned,” as long as such powers are not used “for exclusively protectionist purposes.”\textsuperscript{118} The Commission has recognized that airline participation in setting air fares, done pursuant to bilateral agreements negotiated between Member States, does not directly violate Articles 85 and 86.\textsuperscript{119} To the extent such agreements promote economic and technical progress, it is arguable that they do not contravene Article 85(1).\textsuperscript{120}

2. Article 90

Article 90 provision subjects public enterprises in the EEC to treaty

to discuss the matter with the Commission. \textit{EC Commission is One Step Closer to Deregulation of Airline Sector}, 52 Antitrust & Trade Reg. Rep. (BNA) 913 (May 14, 1987).

\textsuperscript{114} EC Fails to Free Civil Aviation, supra note 112.

\textsuperscript{115} EEC Treaty, supra note 1, art. 85(3).

\textsuperscript{116} Id.

\textsuperscript{117} Id.

\textsuperscript{118} France, Italy and the Netherlands contend that their powers to coordinate air tariffs should not be eliminated unless the criteria set out in Article 85(3) are no longer met. \textit{New Frontiers}, 4 Common Mkt. Rep. (CCH) at 16,786 (Opinion of the Advocate Gen.).

\textsuperscript{119} Comment, supra note 6, at 379 n.133 (citing COMMISSION OF THE EUROPEAN COMMUNITIES, TENTH REPORT ON COMPETITION POLICY 22, 23 (1981)).

\textsuperscript{120} For discussion of how such regulation has encouraged the development of the air transport industry, see supra notes 20-33 and accompanying text. It is arguable, of course, whether the consumer is indeed being allowed a fair share of the resulting benefit. \textit{See} EEC Treaty, supra note 1, art. 85(3). A recent study by Dr. Sean Barrett indicates “that average fare levels within Europe are now two-and-a-half times dearer than internal American fares.” \textit{Sky High Too Long}, The Times (London), May 3, 1986. While it may be unfair to judge European air fares against deregulated American fares, the point is that a thick layer of benefit exists that is \textit{not} being realized by the EEC consumer. On the basis of these figures, it would be difficult to justify an Article 85(3) exemption.
rules, particularly treaty competition rules.\textsuperscript{121} To the extent that the enforcement of such rules impairs the ability of the undertaking to perform its public duties, Article 90(2) prevents application of the rules.\textsuperscript{122} Since they are public in nature,\textsuperscript{123} the European national airlines may contend that despite the New Frontiers decision, treaty competition rules do not govern their activities.\textsuperscript{124}

Advocate General Carl Lenz noted in his opinion to New Frontiers that before Article 90(2) can operate to exempt the airlines from the competition rules, all other avenues of redress within the treaty must be exhausted, including Article 85(3).\textsuperscript{125} "Since even coordinated tariffs may be exempted from the prohibition on cartels under Article 85(3) of the treaty, I [the Advocate General] am unable to see how the application of Article 85 to the fixing of air tariffs can be shown to be incompatible with the tasks assigned to the airlines."\textsuperscript{126} It is therefore not at all certain that an exemption under Article 90(2) would be granted.

In addition to expressing his doubts as to the viability of an Article 90(2) exemption, the Advocate General further noted that the Court of Justice had left the issue open for discussion.\textsuperscript{127} The Court's previous decisions have indicated that while enterprises that enjoy "dominant position" and "certain privileges," such as ports, may be granted an exemption under Article 90(2),\textsuperscript{128} that provision cannot "create individual

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\textsuperscript{121} Article 90 provides in relevant part:

1. Member States shall, in respect of public enterprises and enterprises to which they grant special or exclusive rights, 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 in Articles 85 to 94 inclusive.

2. Any enterprise charged with the management of services of general economic interest or having the character of a fiscal monopoly shall be subject to the rules contained in this Treaty, in particular to those governing competition, to the extent that the application of such rules does not obstruct the de jure or de facto fulfillment of the specific tasks entrusted to such enterprise. The development of trade may not be affected to such a degree as would be contrary to the interests of the Community.

EEC Treaty, supra note 1, art. 90.

\textsuperscript{122} Id.

\textsuperscript{123} See supra notes 83-90 and accompanying text.

\textsuperscript{124} This view is shared by many: "There has been widespread consensus that air transport enterprises are enterprises in the sense of Article 90, para. 2 which are entrusted with tasks of 'general economic interest.'" Weber, Air Transport in the Common Market and the Public Air Transport Enterprises, 5 ANNALS AIR & SPACE L. 283, 289 (1980)(discussing the applicability of Article 90(2) to both scheduled and charter airlines).

\textsuperscript{125} New Frontiers, 4 Common Mkt. Rep. (CCH) at 16,794-95.

\textsuperscript{126} Id. at 16,795 (emphasis in original); see also supra notes 112-18 and accompanying text.

\textsuperscript{127} New Frontiers at 16,794.

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rights which the national courts must protect."

The fact that a high degree of proof of harm must be shown, coupled with the reluctance of the Court of Justice to make such rulings, renders the success of such an exemption claim doubtful.

C. The Impact on Independent Airlines

The *New Frontiers* decision does not appreciably improve the position of private airlines seeking to compete in the Common Market. The decision is ambiguous because it simultaneously requires application of the competition rules while avoiding any direct finding of violations. This lack of clarity, stemming from the absence of implementing regulation, leads to the conclusion that the airlines involved are "protected against individual action for as long as there is a legislative vacuum under the relevant articles of the EEC Treaty." The proof that this absence of procedural rules for enforcement of the decision will preclude successful suits for price-fixing is found in the September 11, 1986, decision of the Queen's Bench Division of the British High Court. Lord Bethell, bringing a suit aimed at striking down cartel practices among the airlines, alleged price-fixing, revenue pooling, and fixing of service on the London-Amsterdam route by British Airways and KLM, in violation of Article 85. The two airlines had entered into a bilateral pricing agreement for the route and advertised a roundtrip fare of £49. Since no seats remained available at this price when Lord Bethell flew, he had to pay £144 for a seat identical to the

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130 *Id.* at 16,794-95; *see also supra* notes 122-24 and accompanying text.

131 This conclusion does not suggest that no such claims will be attempted. Indeed, arguments in *Weber*, *supra* note 124, at 289-94, indicate that a strong case could be made for such claims, although the provisions of Article 90(2) would not automatically apply to airlines.

132 As one commentator points out, the French statutes were not found to violate treaty competition law. This observation reinforces the potential weight of policy decisions by the Commission and gives greater power to the Member States in determining violations of Article 85. *Ministers' Meeting Today on Airline Deregulation*, Int'l Herald Trib., June 30, 1986.


134 *See UK Court Won't Entertain Case Attacking Collusion By Airlines*, 51 Antitrust & Trade Reg. Rep. (BNA) 475 (Oct. 2, 1986)(the case brought by Lord Bethell before the Queen's Bench Division was dismissed)[hereinafter *UK Court*]; *Bethell Loses Point in Air Fare Fight*, The Times (London), Sept. 12, 1986.

135 For discussion of Lord Bethell's previous attempt to break up airline cartel practices, see *supra* note 7 and accompanying text.

136 *See UK Court*, *supra* note 134.
lower fare seats.\textsuperscript{137} In dismissing the case, the British High Court relied on the Court of Justice’s \textit{New Frontiers} decision and the interpretation that “its effect [was] suspended until applied in accordance with procedures set out by Articles 88 and 89.”\textsuperscript{138} Until the Commission and the Member States agree upon implementing rules, the decision will have no practical effect.

Private undertakings, such as the former Laker Airways and the newer Virgin Atlantic, may perhaps find a more encouraging market in their native Great Britain than elsewhere in the Community.\textsuperscript{139} The fact remains, however, that such airlines will not be able to gain entry and remain on equal footing with national airlines until deregulation, however modified, occurs. Some degree of competition must pervade the market before carriers without government backing can operate effectively.\textsuperscript{140} The \textit{New Frontiers} decision has done little to ensure this result.

Additional uncertainties in the decision may further delay its effective application. For example, the decision does not specify what is to be done in the event that two Member States reach different conclusions as to the validity of mutual pricing agreements under Article 85. Also, no specific approach is set out for application of Article 86 to competition violations.\textsuperscript{141} Finally, there remains the unresolved problem of international pricing agreements involving non-EEC countries.\textsuperscript{142} These questions raise even more barriers to the use of the \textit{New Frontiers} decision to promote truly competitive behavior.

V. CONCLUSION

A complete and definitive statement of EEC air transport competition policy is long overdue. While \textit{New Frontiers} is neither complete nor definitive, it is nonetheless a starting point. The complexities of both the

\textsuperscript{137} Id.
\textsuperscript{138} Id. (quoting a source at British Airways).
\textsuperscript{139} Britain has been the most progressive of the Member States with respect to a liberalized air policy. In addition to planning for at least partial privatization of British Airways, Britain has “led the fight to abandon the secret agreements between airlines.” Osborn, \textit{EEC Tries to Force Airlines to Cut Fares}, Daily Telegraph, July 10, 1986.
\textsuperscript{140} The owner of Virgin Atlantic, Richard Branson, commented just after the \textit{New Frontiers} decision was issued that he planned to apply for a license on a particular route and that he anticipated disapproval. \textit{Air Industry Governed by Treaty of Rome}, supra note 8. Although the Commission has urged any airlines encountering such problems to contact its officials for assistance, \textit{id.}, it does not seem probable in light of the prevailing interpretations of the \textit{New Frontiers} decision that the Commission would actually take the national airlines or Member States to court on behalf of smaller private airlines.
\textsuperscript{141} Currently, an Article 86 charge against Lufthansa is being investigated. \textit{Illegal Cartel Arrangement}, supra note 113.
\textsuperscript{142} See Burnside, supra note 72, at 2169.
industry and its regulation, however, prevent the decision from resolving the difficulties of applying the EEC Treaty competition rules to air transport. In fact, the decision's procedural shortcomings only add to the problem.

It will probably be years before all the ramifications of the decision are fully understood and related procedures and responsibilities clearly described. It will probably be years beyond that point before smaller private airlines in the Community realize a competitive gain. Meanwhile, however, the irrefutable fact remains that the Court of Justice has stated unequivocally that treaty competition rules apply to air transport. A framework now exists, incomplete as it may be, and the efforts of the Court to clarify initial responsibilities within that framework encourage its success. More importantly, the decision's link to the EEC Treaty ensures valuable continuity and stability to the air transport system in the EEC.

Virginia J. Clarke

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143 This is especially true as the large European airlines begin discussing mergers as a means of competing effectively with the large United States airlines that are moving rapidly and relatively inexpensively into the European market. *European Airlines Discuss Joining Forces*, Wall St. J., June 10, 1987, at 18, col. 1.