

The essence of the character of the European Communities is of course the fact that it is uniquely supranational not merely in the aspiration expressed for its future evolution but more particularly in its constitutional framework. During the early days, particularly during the 1960s, the Court of Justice articulated this constitutional condition through the development of certain basic legal concepts which were to provide the foundations stones for the future. In particular the doctrines of the supremacy of Community law, combined with those of direct effect and applicability, assured the functional efficiency of a supranational entity and permitted the ongoing process of integration to maintain momentum. Thus, an irreversible tendency towards the achievement of the elusive and undefined objective of European Union has continued by this means even during periods of economic stagnation. The pace of change has not, however, been consistent. The period between 1973 and 1984 was significantly less dynamic than the earlier and later periods. So, also with the integration of certain economic sectors, far greater progress has been made with some than with others.

Arguably, by the date of commencement in office of the first Delors Commission, the area of economic activity least affected by the very existence of the EC was air transport. Any definition of the supranational nature of the EC introduced a concept of shared sovereignty and in this regard a role for its autonomous institutions, which conflicted very directly with the traditional approach in this sector. This traditional approach was based upon the foundation, expressed in Article 1 of the Chicago Convention, that each State has complete and exclusive sovereignty over its own air space. The actual development of national policies in air transportation since World War II had been conducted in a manner which was essentially anti-competitive, in the sense that competition was effectively excluded by the complex bilateral treaties that regulated inter Member State air transport, and of course also regulated the external bilateral relationships of those States.

Various historic justifications have been advanced as to why this uniquely anti-competitive environment should have been retained for so long. Certainly there had been a view that air transport was to be considered in a different light to other activities in relation to the promotion of competition. From a legal standpoint the general

position of the Member States for many years was that Article 84(2) of the Treaty effectively excluded the intervention of the competition authorities of DG IV, and this rejection was maintained by some, even in the teeth of clear judicial authority, until the matter was determined beyond doubt by the *Nouvelles Frontières* Case in 1986. At a more practical level the majority of Member States were unwilling to contemplate, until recently, the creation of real competition, in part I believe as a result of the unhealthy connection between national airlines and the ministries which regulated their affairs. In some Member States this relationship has resulted in the maintenance of an industry which is unable to compete internationally without a regulatory environment which inhibits competition or State subsidies which distort competition. Either or both of these means have been sought to be justified in different ways, some of which entirely lack credibility. One example is that competition will reduce safety. Others undoubtedly deserve some consideration – such as the necessity to maintain services to remote destinations.

The experience of the United States with the rapid deregulation of 1978-1979, combined with the increasingly widespread use of air travel, created the conditions for a new European debate. Increasingly invidious comparisons between air fares on either side of the Atlantic told their own story about the realities of competitiveness. They also indicated to many who managed or controlled national flag carriers that the degree of reform required to achieve competitive standards would be painful and difficult.

The history of EC policy-making in this sector has been extremely slow moving. Notwithstanding general statements from time to time in European Council communiqués, there was very little real progress towards the completion of a true internal market in air transport until comparatively recently. Neither Memorandum Number 1 in 1979 nor Memorandum Number 2 in 1984 brought practical changes and the package of legislative measures adopted in December 1987 was delivered only because of two factors. The first of these was the startling new impetus of 1992. When the White Paper on the Internal Market was adopted by the Commission in June 1985 it specifically mentioned air transport. It would have been surprising had it failed to do so for there was no more visible failure of the Common Market at that time than in this sector. Thereafter, and at the insistence of a couple of Member States, the urgent demand for progress in this sector was forceably reiterated at European Councils. The second was the means of pressure increasingly available to the Commission through the application of the law. The *Nouvelles Frontières* judgement was to be the first but not the last decision which reinforced the Commission's potential authority. Furthermore, the possible use of Article 90(3) of the Treaty was threatened and no doubt created concern.

The adoption of the first package was important not so much for what it contained (which was certainly less than one might have wished) but because it was patently merely the first real step in an inevitable progression. It constituted furthermore an

implicit commitment that the time framework of 1 January 1993 was as relevant to air transport as to any other sector. However, even the minimal changes that were introduced in fares, capacity and market access were more than symbolic. They represented the beginning of the end of the old order. One significant indication of how radical change would become was to be found in the concession in principle of limited fifth freedom rights – initially to only two Member States. In the longer term, the adoption of the Regulation laying down procedures for the application of the rules of competition was perhaps the most important concession by the Member States which were most reluctant to contemplate change.

The decisions taken by the Council of Ministers on 18 and 19 June 1990 have of course brought the process of liberalization much further. These measures, which will enter into effect on 7 November 1990, whilst falling short of all that the Commission sought constitute a major step forward.

Furthermore, they render attainable the adoption of further changes in a Third Phase to take effect from 1 January 1993.

The papers included in this Special Edition constitute a valuable contribution to the ongoing debate about air transport policy in the EC.

I do not agree with everything that they contain, but it would be surprising if there were not to be continuing substantive disputes particularly in the areas of the right to establishment and that of external competence. Whatever one's view may be about Article 113, it is indisputable that with the creation of a single economic space there will have to be a single approach to the external dimension. Furthermore, the completion of the Internal Market will bring pressures for restructuring in the airline industry already evident from proposed relationships. The law of the EC will remain in a state of flux for some time and one foresees that the contributions in this volume will be part of an ongoing discussion as to what the future may hold.

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