

# Common EU Aviation Policy in The 21St Century, With Particular Reference to Its External Relations

Dr. P.P.C. Haanappel\*

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## 1. The "acquis communautaire" at the end of the 20th century: what has been accomplished

"Acquis communautaire" (Fr.) literally means: "what has been acquired". It is probably better rendered in English as: "what has been accomplished". The French expression, however, is current linguistic usage everywhere in the European Union (the EU) to describe the state of affairs in a particular sector. What is that state of affairs in respect of air transport? The brief answer is that, within a very short period, from

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\* Professor of Air and Space Law, Leiden University, Netherlands

1987 to 1999, air transport on routes within the Community has been almost completely liberalised, or if one wishes to use an American expression: almost completely deregulated. However, in the equally important field of air transport from EU countries to countries outside the Union -the so-called area of external relations-, very little has been accomplished, with the consequence that air transport to and from the EU is governed by the traditional system of bilateral air services agreements, meaning individual bilateral agreements between the fifteen individual member States of the Union<sup>1)</sup> and countries outside thereof.

The European Union is the successor to the European Economic Community (EEC), created in 1957. For various reasons which this short paper cannot address, there was very little EEC action in air transport matters from 1957 to 1986.<sup>2)</sup> However, by the year 1986, the European Community (the EC), as the organisation was then called,<sup>3)</sup> was politically and legally ripe for change. In rapid succession, three legislative "packages" were adopted, in the years 1987,<sup>4)</sup> 1990<sup>5)</sup> and 1992, in order to liberalise intra-EU air transport and to create, commencing in 1993, an "internal market without frontiers".

Following are the highlights of that internal, liberalised market:<sup>6)</sup>

- air carrier licensing: provided that the applicant is in possession of a safety certificate ("Air Operator's Certificate" AOC), presents a

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1) *They are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Membership in the EU is dynamic: in or about the year 2005, five other countries are expected to become members. They are: the Check Republic, Estonia, Hungary, Poland, Slovak Republic.*

2) For these reasons see Haanappel, "The external aviation relations of the European Economic Community and of EEC member States into the twenty-first century", (1989) XIV Air Law 69-87, 122-146.

3) *Ibidem* for the succession from EEC to EC to EU.

4) See Council Decisions 87/601 and 602 of 14 December 1987.

5) See Council Regulations 2342/90 and 2343/90 of 24 July 1990.

6) See Council Regulations 2407/92, 2408/92, 2409/92, 2410/92 and 2411/92 of 23 July 1992.

sound financial business plan, and is substantially owned and effectively controlled by EU States or citizens (from any EU member State or combination of member States), such applicant shall be given a license, issued by the authorities of the relevant EU State;

- market access: once licensed *as per* the above, such EU air carrier may fly *any* route *within* the EU, both in the scheduled and non-scheduled (charter) mode (with very few exceptions, mostly related to the environment and congestion);
- fares and rates: on routes within the EU, there shall be pricing freedom for EU carriers, subject to very few possibilities for governmental intervention: basically, such intervention is limited to scheduled air fares (*not* rates) which are either excessively high for the consumer, or excessively low so that the whole airline industry would be financially endangered; and
- competition: on air routes within the EU, Community air carriers are subject to EU competition laws, but receive certain exemptions from those laws, particularly the following:
  - a) participation in IATA<sup>7)</sup> multilateral and other bilateral tariff consultations is allowed, upon certain conditions; and
  - b) participation in IATA's Scheduling Coordination Conferences, allocating scarce runway arrival and departure slots, is permitted.

It is to be recalled that, as stated earlier, air routes to and from the EU remain *outside* the scope of the liberalised, internal market, with one partial exception which will be discussed in section 3 of this paper.

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7) International Air Transport Association.

## 2. Some EU questions asking for immediate attention in the 21st century

There are a number of outstanding and important regulatory questions which should have been decided by the end of this second millennium, but which in all likelihood will not be decided until the beginning of the third millennium. Three of them merit special attention: a new EU Regulation on slot allocation at EU airports; regulatory approval of a number of airline alliances; and renewal or negotiation of a number of competition law exemptions. Although in principle internal EU questions, all of them have at least some external ramifications.

As mentioned above, IATA Scheduling Coordination Conferences for the purpose of slot allocation enjoy an exemption from EU competition laws. In the EU, in addition to the exemption, there is also a Regulation on slot allocation at EU airports which should, pursuant to its own terms, have been reviewed by EU authorities in 1996-97. This review process has still not been completed. The currently valid Regulation<sup>8)</sup> endorses the slot allocation procedures as laid down in the IATA Scheduling Procedures Guide, applicable world-wide, and based on the system of 'grandfather rights', also called 'historical precedence'. In the review process, EU authorities may decide to move away from historical precedence and replace it, in whole or in part, by a system of buying, selling and leasing of slots (slot trading). This would be a very fundamental change which many airlines oppose. It is also to be recalled that, even though the EU Regulation only applies at EU airports, it applies to EU and non-EU carriers seeking scarce slots at congested airports in the Union.

Next is the question of airline alliances. From a technical, competition

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8) See Council Regulation 95/93 of 15 February 1993.

law perspective, the question is highly complex, leading to long delays in the process by which the EU Commission approves alliances, disapproves them, or approves them with conditions. Since important alliances are rarely limited to EU airlines only, the delays cause great legal and hence commercial uncertainty amongst alliance carriers, both in the EU and outside thereof. Recent cases decided by the Commission indicate, however, that alliances involving carriers with complementary route networks stand a much better chance of regulatory approval than those involving carriers with overlapping route networks.

Third, the competition law exemptions, mentioned in the preceding section of this paper, are all of a limited duration and must be renewed at certain times. The so-called block exemptions for passenger tariff consultations and slot allocation procedures are valid until 30 June 2001, and their renewal may not be without complications. There are outstanding requests for renewals of the so-called individual exemptions for the European IATA passenger and cargo agency programmes. Furthermore, there are outstanding requests for approval of an individual exemption for cargo tariff consultations and of individual exemptions for the IATA passenger and cargo services programmes. Only the exemption for slot allocation procedures has external ramifications, since, like the Regulation for slot allocation, it applies to all carriers, EU or not, at all EU airports.

Finally, before moving to the subject of external relations, one important EU air transport problem which will be with the industry for many years to come, merits special attention. It is the perennial problem of air traffic management (ATM). The European skies are congested causing long and frequent flight delays for both European and non-European airlines. Most of the solutions to this problem must be of a technical and operational nature. Nevertheless, there is one regulatory

improvement that can be made. ATM is largely in the hands of EUROCONTROL, an international organisation based in Brussels, to which soon all EU member States<sup>9)</sup> will be Parties, in addition to 14 other European countries.<sup>10)</sup> For the efficient drafting, adoption, implementation and review of EUROCONTROL ATM standards it would be desirable that the EU, in addition to its member States, would become a member of EUROCONTROL in its own right. This would enable EUROCONTROL to use the EU's legislative powers to bring EUROCONTROL standards into force in EU States much more quickly, precisely, uniformly and firmly than is the case now.

### 3. Current external relations

As mentioned at the outset of this paper, EU external air transport relations are not well developed yet. This is not for lack of trying on the part of the EU's executive, the Commission, but because of lack of political agreement at the level of member States in the EU Council. Nevertheless, it is generally recognised that the first decade of the new millennium will probably witness important developments towards a common EU external air transport policy.

Currently, there are three things worth mentioning. First, at a rather early stage, in the year 1979, it was recognised that ideally EU member States should, to the extent possible, speak with a common voice in international aviation organisations of which they are members. Hence a Council Decision was adopted "setting up a consultation procedure on relations between member States and third countries in the field of air transport and on action relating to such matters within international

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9) *Supra* footnote 1.

10) Bulgaria, Croatia, Cyprus, Check Republic, Hungary, Macedonia, Malta, Monaco, Norway, Romania, Slovak Republic, Slovenia, Switzerland, Turkey.

organisations".<sup>11)</sup> Technically, the system works as follows: the EU Commission acts as observer in the international organisation concerned: EU member States attending a meeting of the organisation consult with the Commission representative to see whether a common position on an issue or on issues can be reached. If not: end of procedure. If yes: the EU member State holding the rotating chairmanship of the EU Council<sup>12)</sup> brings the common view out in the meeting, and thereafter, if there is a vote, all EU member States present vote in the same way.

Second, it was already alluded to that there is one exception to the absence of air transport agreements between the EU as a whole and countries outside thereof. That one exception is contained in the European Economic Area (EEA) Agreement, a broad economic co-operation agreement between the EU and three other European nations: Iceland, Liechtenstein and Norway. Pursuant to the agreement, these three countries have adopted the same liberalised air transport policy and legislation<sup>13)</sup> as the 15 EU countries. In practice, this means that the liberalised, internal air transport market extends to 18 countries.

Last, it should be mentioned that with respect to the geographical application of EU competition law a very special situation prevails. In all areas of economic activity, EU competition law applies irrespective of the place in the world where a competition restricting agreement or practice<sup>14)</sup> is entered into, upon the sole condition that the agreement affects trade between EU member States. Not so in air transport: EU competition law, including its above-mentioned exemptions, only applies to air transport and related activities *within* the EU, and by extension, within the EEA. EU competition law cannot be effectively applied and

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11) See Council Decision 80/50 of 20 December 1979.

12) Rotating chairmanships of the EU Council are for six months each.

13) See *supra* footnote 6 and text thereto.

14) Old Article 85, new Article 81 of the Treaty Establishing the European Economic Community (the Treaty of Rome of 1957), as amended.

enforced on air routes between the EU and third countries, except that, where the EU Commission detects an anti-competitive practice in air transport to or from the EU, it has certain investigative powers and may make recommendations for remedial actions to member States.<sup>15)</sup>

#### 4. External relations in the 21st century

In the development of an EU internal air transport market without frontiers, two policies were pursued and co-ordinated to create one result: an air transport policy and a competition policy. The same is likely to happen in the construction of a common EU external air transport policy. To start with the competition side, it should be recalled, as stated in the previous section, that, today, EU competition law does not effectively apply to air transport on routes to and from the EU. Although the EU Commission, on several occasions, has proposed to the EU Council to change this situation, that has not happened yet. However, it is likely to happen in the years to come. How will it happen? Basically, there are two ways: first, as already proposed by the Commission, to adopt a Council Regulation applying the EU competition rules to all routes to and from the Community. Such an approach, it seems to this writer, has the disadvantage that conflicts might arise with the bilateral air services agreements which still exist between individual EU member States and countries outside the EU. Therefore, it is submitted, a more piecemeal approach is required: as, gradually, EU wide air transport agreements are adopted with countries outside the EU, the EU's competition rules, including the appropriate exemptions, might be declared applicable to each separate EU third country market governed by an EU wide agreement. This would also facilitate the adoption of possibly different exemptions in different markets.

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15) *Ibidem*, old Articles 87 and 89, new Articles 83 and 85.



This then brings us to the air transport agreements which may, in the new millennium, be adopted between the EU as a whole and third countries. They may be of three kinds:

**a) Common aviation areas**

The EEA Agreement, described above, is the perfect example of an agreement creating a common aviation area between the EU and three other countries. It is based upon the idea of an association agreement, i.e. an agreement whereby non-EU countries accept EU policy and legislation as their own.

Plans for a European common aviation area are well advanced. The EU and two of the EEA countries, namely Iceland and Norway, are negotiating this agreement with 10 Eastern European countries.<sup>16)</sup> Thus, the European common aviation area would consist of 27 countries, all applying in their own countries and between themselves the "acquis communautaire" of the EU internal air transport market of 1993, and its subsequent modifications.

Plans for a common aviation area between the EU and the United States are also on their way. This is a very ambitious project and would involve, amongst other things, a very far-reaching liberalisation of the North Atlantic air transport market, traditionally accounting for about a quarter of the world's international air transport. Given the commercial and political weight of the United States, such a common aviation area could not be based upon an association type agreement such as the EEA or the intended European common aviation area, in which EU policy and law prevail. Rather, it would be a question of harmonising EU and US

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16) Albania, Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Poland, Romania, Slovak Republic and Slovenia.

policies and moulding them into one coherent set of liberalised air transport rules for the area in question. Some observers predict that this will not prove to be possible, and that eventually US EU air transport relations will be governed by a more traditional bilateral type arrangement between the EU as a whole and the US.

### **b) Multilateral agreements**

The EU will be an active participant in the upcoming GATS<sup>17)</sup> 2000 round of negotiations, to be opened in Seattle in December 1999, which will possibly lead to a revised GATS Air Transport Annex, multilaterally liberalising international air transport beyond the currently applicable Air Transport Annex.<sup>18)</sup> Subjects which have tentatively been designated for possible inclusion in a new Annex include first and second freedom (overflight) rights, all-cargo services and non-scheduled air services. It is to be noted that, in the GATS 2000 negotiations, the EU will be represented by a common delegation, composed of EU Commission civil servants, assisted by an advisory committee of EU member States. The common delegation will exercise the EU's 15 national votes collectively.

The International Civil Aviation Organization (ICAO) should not be overlooked as a forum for multilateral liberalisation of international air transport. Notwithstanding many attempts in that direction, however, ICAO has not accomplished much in this field. Nevertheless, the long-standing Air Transport (Five Freedoms) Agreement of 1944,<sup>19)</sup> to which currently only 11 nations are Parties, remains a model for further

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17) General Agreement on Trade in Services (under the auspices of the World Trade Organisation).

18) Covering aircraft repair and maintenance, computerised reservation systems, and selling and marketing of air transport services.

19) ICAO Doc. 2187.

multilateral liberalisation. The EU participates in the works of ICAO as an observer.

Finally, in this multilateral context, it is to be noted that recently the United Nations Conference on Trade and Development (UNCTAD) has begun to take an interest in international air transport, which is particularly important for developing nations. The EU is an observer in UN bodies.

### c) Bilateral agreements

Recently, the first important bilateral air services agreement of the EU was signed: one between the EU as a whole and Switzerland. It is one of seven agreements between the EU and Switzerland and it is likely to come into force in the year 2001 or 2002. It is very much an association type agreement. The future, however, will also, in all likelihood, witness bilateral air transport agreements between the EU and third countries which are modelled upon the more traditional "fair opportunity to operate" or, in more liberal or "open skies" settings: "fair opportunity to compete", especially where it concerns relations between the EU and countries geographically far away from the EU.

Technically, it is to be kept in mind that the EU does not automatically have the right to enter into bilateral air transport negotiations with third countries: for each EU wide negotiation with a third country, the EU Council must give the EU Commission a specific negotiating mandate. Until such time as an EU wide agreement has been negotiated, approved by Council and come into force, existing bilateral agreements between individual EU countries and individual third countries remain in force.

## 5. Conclusion

As the foregoing has hopefully shown: EU external air transport relations will begin to develop, and that along different axes association agreements, common aviation areas, possible multilateral agreements and bilateral agreements-. The EU will no doubt have a tendency to promote liberal agreements, both in the interest of European air transport users and of the large number of EU airlines wishing to perform air services to points outside the EU. The process will be gradual. Many observers anticipate that the EU will first want to deal with neighbouring countries and with the all important US and Japanese markets collectively, before EU wide negotiations will be initiated with other third countries, or possibly groups thereof.