WORKING PAPER Nº 30

I. REGULATING AIR TRANSPORT COMPETITION
II. IN THE UK AND THE EUROPEAN COMMUNITY.
AIRPORT REFORMS IN EUROPE: PROCURING COMPETITION AND CHOICE

Madrid-Sheffield, March 1998

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I. REGULATING AIR TRANSPORT COMPETITION IN THE UK AND THE EUROPEAN COMMUNITY

I. REGULATING AIR TRANSPORT COMPETITION IN THE UK AND THE EUROPEAN COMMUNITY*

INTRODUCTION.

This paper on The Changing Nature of Air Transport Regulation is an attempt to chart the British experiences of privatisation and regulation in air transport. It assesses the key implications of the European air transport liberalisation programme, because I believe there is much that the system of air transport regulation and the resulting organisation of the industry structure in the UK and the European Community (EC) have to offer to the wider aviation community, whether that be the Australian-New Zealand Single Aviation Market, or the Southern Cone Common Market (Mercosur) between Argentina, Brazil, Paraguay and Uruguay, or the Andean Pact (Cartegena Agreement) between Bolivia, Columbia, Ecuador Peru and Venezuela. Programmes of economic re-structuring are being adopted the world over; whether they are labelled as *re-inventing government* in the United States, *perestroika* in Russia or *doi moi* in Vietnam matters very little. What does matter is the ability to exchange information and lessons to the benefit of our much globalised communities.

This paper is comprised of three sections, the first providing a brief background to the privatisation of British Airways (BA), while the second will examine the regulatory responses adopted by the Civil Aviation Authority (CAA), the statutory corporation responsible for economic and safety regulation of British air transport. However, it is also common knowledge that since 1992 the landscape of airline regulation has changed as a result of the European liberalisation programme for air transport to create a single market with no internal frontiers. For some member countries, the change has been dramatic; for others, a matter of formality. To the extent that the UK is a member of the EC, it is imperative to locate the discussion in this paper within the context of the new legal and economic order.

The Privatisation of British Airways

* This is a revised paper delivered at the World Bank Conference on Emerging Issues in Utility Regulation and Agency Design, Seville, 4-8 November 1996.

The experience of ownership in air transport has been largely cyclical. When air transport first emerged as an industry, just prior to the First World War, it was conceived within the private sector. The first commercial flights were operated under the auspices of private entrepreneurs such as Holt Thomas and Handley Page. Indeed, when they turned to the Government for subsidies to assist in their competition with the French operators, they were promptly told to go away by Winston Churchill, then the Secretary of State for Air. Hence, the birth of the 'fly by themselves' policy. To cut a long story short, a series of amalgamations, and the combination of lessons from the World Wars and pressures for coherence, led to the nationalisation of the industry in 1946.[1]

The privatisation of BA was first conceived in 1979. It was no secret then that the plan to transfer BA to the private sector was part of the wider programme of privatisation. Whether this was a matter of political dogma or the result of systematic policy consideration is an issue on which opinions will differ; time and space does not allow for an exhaustive treatment here. Suffice it to say that privatising BA would remove the restrictions commonly associated with State ownership. In any event, it was increasingly clear that the structure of the industry was rapidly becoming out-dated. For a considerable number of years, BA had been operating alongside private independent airlines which were first licensed as “associates” of the statutory monopolies under s.14(4) of the Civil Aviation Act 1946. Accordingly, the imbalance between the competing interests became more acute. Much like the problems besetting State aids within the EC, BA as a publicly-owned institution had access to unlimited funds and guarantees which the independent operators had not. Thus in retrospect, given the competition that already existed and a gradual change in the thinking of the Government, there remained little point in protecting BA within the public sector. However, the actual sale of BA did not take place until early 1987, despite having been conceived some eight years earlier. The causes for the delay were three-fold, and in one respect, peculiarly unique to air transport.

- Decline in BA's profits and colossal losses in 1979-1982. This led to extensive restructuring and the attendant uncertainties. Staff were retrenched, unprofitable routes were abandoned and the aircraft fleet had to be re-evaluated.
- The failure to conclude the UK-US air services agreement - Bermuda Agreement II.
- The antitrust litigation against BA and others in the US as a result of the collapse of Laker Airways in early 1980s.[2]

1 Civil Aviation Act 1946.

2 *British Airways Board v Laker Airways* (1984) 3 All ER 39.

In the run-up to the privatisation, the Government instructed the regulatory agency responsible, the Civil Aviation Authority (CAA), to investigate the implications for competition stemming from BA's sale to the private sector. The final report of its review was published in 1984.[3] One of the main concerns of the CAA was the outright transfer of BA to the private sector with its relative strength and size intact. As a publicly-owned corporation, BA enjoyed all the advantages of size, strength and economies of operation. Its privatisation without modification would do no more than to preserve the monolithic structure of the once nationalised industry and present the danger of reinforcing the imbalance already existing in the industry, and if nothing else, create the risk of destroying the work of the CAA in promoting airline competition and indeed the policies of the Government on competition.

Accordingly, the CAA recommended that there had to be some reduction in its relative size so that other airlines were offered adequate opportunities to develop and prosper. It said specifically,

> It is particularly unfair where that advantage has been gained through past preference rather than through the exercise of pure commercial skills in an open marketplace. Where competition takes place among parties of relatively comparable size and strength, the need to intervene in order to control predatory behaviour is less likely to arise. Predation or the threat of it are characteristic features of structural imbalance within an industry. The need to avert such behaviour or the threat of it reinforces the arguments of policy for diminishing the present imbalances within the industry.[4]

In its view, the structural imbalance could be diminished by transferring certain routes operated by BA to other British airlines including and in particular, the "second force" airline, British Caledonian.

Nevertheless, the CAA was aware that whatever changes had to be made to the size of BA, it was important at the same time to ensure that BA remained sufficiently strong to compete with foreign airlines. It remarked:

> If one were to ignore the external dimension - the question of the United Kingdom's competitive strength vis a vis foreign airlines - it might well be argued that these recommendations do not go far enough to create a fair competitive balance between British Airways and other British airlines. It is essentially the external dimension, the consideration of the United Kingdom's competitive strength in the world at large, which determines that British Airways should not be broken up and that no greater reduction in the scale of British Airways should take place.[5]

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3 *Airline Competition Policy* (CAP 500).
4 *Ibid*, para.25.
5 *Ibid*, para.81.

In the end, however, BA was privatised with relatively few changes to its structure. Quite apart from the enforced changes by the CAA through its licensing process, BA remains largely the incumbent on a majority of national and international routes and enjoys about 40% of the slots at the principal airport, Heathrow. A response to competitive forces then becomes a matter of opportunity cost for the airline, by switching the use of one slot for a particular service to another.

The Philosophy of Economic Regulation

Much has been said of the CAA and its role in the process of BA's privatisation. But this hides its more significant contribution to the regulation of British air transport through a consistent policy of promoting airline competition. It is an irony that the CAA has not attracted the level of attention which has been given to such other regulatory agencies as the Office of Telecommunications (OFTEL), Office of Gas Supply (OFGAS) and Office of Electricity Regulation (OFFER), given not least that the statutory framework and objectives of OFTEL, OFGAS and others have been modelled, *mutatis mutandis*, on those conceived for the CAA. Perhaps this has much to do with the fact that the CAA has been pursuing a consistent policy with the consequent predictability of outcomes and the conspicuous absence of a confrontational approach in performing regulatory functions. Moreover, the airline industry in the private sector has had time to mature, and is more pluralistic than, say, electricity supply.

The CAA is the one regulatory agency that assumes all the characteristics of a US regulatory commission, and in that respect, is therefore peculiar within the British system of public administration. For example, it believes in consultation and actively pursues an open process of decision-making. It adopts the "notice-and-comment" procedure embedded in the US Administrative Procedure Act 1946, a practice which has only recently emerged in British administrative practice. The significance of the CAA's practices need to be seen against the general rule that administrative authorities have no legal duty to consult with interested parties unless otherwise specified in legislation or required by the principle of "legitimate expectations".[6] Even so, the belief of the CAA in harnessing wider participation by affected interests pre-dates the arrival of such judicially created concepts of legitimate expectations. Likewise, just as there is no general duty to provide reasons for administrative decisions, the CAA stands out with its practice of issuing reasons for its licensing decisions. Both consultation and reasons are the quintessence of policy legitimacy and regulatory rationality.

Regulating for Competition

The CAA is a statutory body established under the Civil Aviation Act 1971 following one of the most comprehensive reviews in the history of air transport

6 *Council of Civil Service Unions v Minister for Civil Service* [1984] 3 All ER 935.

regulation[7]. Its duties are two-fold: economic and safety regulation. S.4 of the consolidated legislation, Civil Aviation Act 1982, charges the CAA with the following objectives:

- to secure the provision of air transport services by British airlines which satisfy all substantial categories of public demand which provides the lowest charges consistent with:
  - a high standard of safety
  - an economic return to efficient operators
  - securing a sound development of the British civil air transport industry;
- to further the reasonable interests of users of air transport services.

These objectives are pursued by the CAA within a licensing framework established by ss.64-69 of the 1982 Act. Apart from the general criteria relating to managerial competence and financial fitness in s.65, the criteria for licensing in s.68 require the CAA to have regard to:

- the effect that any newly licensed air transport services may have on existing services;
- the benefits which may accrue from enabling two or more airlines to compete among themselves;
- the need to minimise any adverse effects on the environment and disturbance to the public resulting from noise, vibration or atmospheric pollution cause by air transport pollution;
- the need to impose minimum regulatory burden on the air transport industry.

It is particularly noteworthy that no explicit mention of competition is made within the terms of the CAA's duties. However, in the CAA's view, the statutory objectives imposed upon it can best be achieved through a licensing policy built on the philosophy of competition. It believes in competitive solutions. This is evident both in its statement of licensing and its body of licensing case-law. However, the CAA does not regard competition as an end in itself. On the contrary, competition is pursued as a means for the realisation of the statutory objectives, from which the CAA has come to accept that "the reasonable interests of users" must be its prime concern in the performance of its economic regulatory functions. The CAA believes that these interests would be best served:

[7] Edwards Committee, *British Air Transport in the Seventies* (Cmnd.4018, 1969).

> by the existence of a number of efficient and profitable British airlines strong enough to compete with each other and with foreign airlines, directly or indirectly, where the opportunity arises or can usefully be created. Thus, it will seek to encourage the development and maintenance of an environment in which efficient British airlines can operate profitably and in which competition between British carriers and with foreign airlines can flourish and user choice is enhanced.[8]

This policy statement presents a general presumption that the CAA would license air transport services liberally to procure a multi-airline industry and to sustain a competitive environment for air transport.

[8] *Statement of Policies on Route and Air Transport Licensing* CAP 620 (1993), para.4.

This liberal philosophy is borne out by the CAA's licensing decisions. For example, in approving the application of Jersey European Airways to operate the London (Gatwick)-Jersey route, the CAA stated that it should proceed on the "explicit assumption that it should grant a license" because of its established policies on competition.[9] The CAA has also reasoned that a policy presumption in favour the reasonable interests of users means that it would require powerful objections before an application with demonstrated benefits such as alternative products in fares or schedule would be refused.[10] Where the proposed benefits has been decided as a matter of commercial judgment, the CAA would be inclined to leave the forces of the market place to determine the feasibility of the proposal unless "the need is evident" for regulatory intervention. This was held in the case involving BA's application to operate the Birmingham-Berlin route in which the CAA also remarked that where "there was scope for UK airlines to compete effectively on international routes, and potential for bringing new benefits, operators should be allowed to put their services to the test of the market."[11]

What is significant, in the CAA's application of the liberal licensing policies, is the consistent way in which the objectives have been pursued, and consequently the predictability of outcomes; so much so that the number of licensing hearings has declined substantially over the years. In 1994 and 1995, for example, the CAA sat to hear only two cases, while in 1996 no hearings were held to determine licensing cases. This contrasts sharply with the 40 hearings it used to have, and even more sharply with its predecessor, the Air Transport Licensing Board, which sat for over 140 days per year on hearings. This consistency of policy application also means that any undue application would simply be thrown back, with an invitation that the applicant first consults the statement on licensing.

Equally significant in a policy that promotes competition and regards user interests as paramount is the paradigm shift from a protectionist approach where producer interests, that is airline interests, were given first priority to a much more liberal approach where competition is regarded as a means for furthering purchaser interests, that is user interests. When the CAA was first created by the Civil Aviation Act in 1971, the language of the legislation was clear in its intention to give a measure of preference to these airline interests. User interests were *subject to* these other airline interests, and competition was the exception. Over time, this framework has changed, due in part to the evolution of the CAA’s work and in part to the change in the beliefs of the government that a liberal democracy requires a commitment towards individual autonomy and choice in consumption. Competition came to be seen as the organising concept for the industry. Accordingly, the need for more competition is now read into the Civil Aviation Act 1982, but more

9 CAA Decision 1/93.
10 Eg. CAA Decision 8/91.
11 CAA Decision 3/91.

importantly user interests have been placed on an equal footing with airline interests. Competitive solutions were regarded as the most suitable means for neutralising the dominance of BA and to create a more pluralistic industry base. The liberal approach in route licensing which encouraged new entrants enabled the CAA to create the conditions for sustainable competition and as a result to get out of regulating fares and frequency of services, though it should be borne in mind that this liberal approach is by no means an immutable part of the CAA's regulatory philosophy.

Substitution Policy

However well intended, competition is not a natural accomplice of air transport in the real world. Bilateral restrictions in international air transport are dauntingly common. While these could perhaps be circumscribed by the force of reason and persuasion, restrictions on competition arising from infrastructural limits such as slots and airport capacity are more complex. The CAA recognises these limitations on competition and to that end operates a policy of *substitution* where it would consider "substituting another carrier for an incumbent so as to safeguard or further the interests of users."[12] This has proven to be an important instrument for harnessing competition, but it is equally a minefield for administrative lawyers. Under this policy, airlines are expected to provide services of the level envisaged by the statute and demanded by users. Where, however, they fall short of these requirements, for example, by not competing effectively or by providing services of inferior quality, they will lose the right to provide those services. In deciding whether to invoke the sanction of substitution, the CAA will take into account the length of time the incumbent has taken to establish itself on that route and the degree of commitment displayed in providing the services. However, the CAA has stressed that substitution will be applied only sparingly, and only in circumstances "when to do so would manifestly enhance the achievement of the objectives of the Act."[13] Indeed, the CAA has only applied this policy once when it was called to decide how the limited frequency between London and Tokyo would be distributed between BA and Virgin Atlantic Airways. In its reasoning, the CAA remarked that the application of its licensing policy to secure a multi-airline industry did not imply giving an automatic preference to smaller airlines at the expense of BA. Nevertheless,

12 *Statement of Policies on Route and Air Transport Licensing* CAP 620 (1993), para.9.

13 *Ibid*.

> If the Authority's and the Government's multi-airline policy is to have its desired effect of creating and maintaining an environment in which efficient British airlines other than BA can operate profitably and in which competition between British carriers and with foreign airlines can flourish, it must mean that where a carrier such as Virgin is operating successfully and to the obvious benefit of users the Authority will do all that it reasonably can to allow the airline the opportunity to grow and compete.[14]

The case was extremely unique because it was the first occasion when the CAA had been required to condition the air transport licence of an airline by reducing the number of runway slots at a foreign airport. The intervention was therefore necessitated by the highly unusual circumstances of the case and did not constitute "some sort of 'open season' on the route rights and slots" of an airline.

Whatever may be the flaws of formal regulatory intervention, the theory of substitutability offers itself as a strategic policy instrument for harnessing competition within a framework where market forces will continue to operate. By the same token, it is crucial to ensure that the procedures accompanying this intervention are sufficiently robust, open and fair so that the legitimate expectations of the relevant parties are properly safeguarded. In the realm of administrative law, the substitution policy presents all the classic problems of controlling the discretion exercised by public agencies. Even so, this must not detract from its importance as a tool to procure greater contestability within the industry. Indeed, the rationale for this policy seems also to have found its way into the policy proposals of the European Commission dealing with external relations in aviation and particularly the way in which traffic rights granted to a less able and willing carrier should be handled.[15]

A New Era - Single European Aviation Market

On that note then, it is appropriate to turn to the Single European Aviation Market since no discussion on air transport will be complete without reference to this unified market. Indeed, much of the CAA's work has now been superseded by the creation of this new legal and economic order for European air transport. A cursory examination of the liberalisation programme as the foundation of the Single Aviation Market is in order.

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14 CAA Decision 1/91.

15 See J.Goh, "External Relations in Community Air Transport: A Policy Analysis" (1996) 2 *European Public Law* 451.

The liberalisation programme began life in 1987 with the adoption of the "first package" of legislative measures. This consisted of two measures giving effect to the antitrust provisions of Articles 85 and 86 of the Treaty of Rome in respect of air transport, and two further measures dealing with fares as well as capacity and access to regional routes.[16] It should be said, however, that the period of gestation was less than smooth, for there was a distinct reluctance to proceed with a Common Air Transport Policy. In part, this was attributed to the dispute between the UK and Spain over Gibraltar, but more significantly, the *immobilisme* had much to do with the political character of air transport.[17] Along the way, a series of cases were brought before the European Court of Justice which revealed the unsatisfactory absence of a Common Air Transport Policy.[18]

The prime objectives of the Common Air Transport Policy are subsumed within the general objective of establishing a common market comprising "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured". In addition, in its first memorandum on air transport, the European Commission identified four objectives of a common policy for air transport:

- a total network unhampered by national barriers with efficient services beneficial to the different user groups at prices as low as possible without discrimination;
- financial soundness for the airlines, reduced operating costs and greater productivity;
- safeguards for the interests of airline staff in the general context of social progress, including the removal of barriers to free access to employment;
- improvements in conditions of life for the general public and respect for the wider interests of our economies and societies.[19]

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16 Council Regulation 3975/87: OJ (1987) L374/1; Council Regulation 3976/87: OJ (1987) L374/9; Council Directive 87/601: OJ (1987) L374/12; Council Decision 87/602: OJ (1987) L374/19.

17 See N.Aygyris, "The EEC Rules of Competition and the Air Transport Sector" (1989) 26 *CMLRev* 5 and J.Goh, "Regulating the Skies of Europe: Air Transport Competition" (1992) 27 *European Transport Law* 272

18 Case 13/83, *European Parliament v Council* [1986] 1 CMLR 138; Cases 209-213/84, *Ministére Public v Asjes* [1986] 3 CMLR 173; Case 246/81, *Lord Bethell v Commission* [1982] ECR 2277; *Lord Bethell v Sabena* [1983] 3 CMLR 1.

19 *Contribution of the European Communities to the Development of Air Transport Services*, Bull. EC Supp.5/79.

The second phase of the liberalisation programme witnessed another set of measures which established greater flexibility in decisions relating to fares, market access and capacity.[20] The final and third package of measures was perhaps the most important and far-reaching. Apart from the legislation harmonising the licensing laws of member countries, Community carriers were given an open access to markets, while fares and capacity were deregulated.[21] Typically, however, exemptions apply in a number of important respects, the most important of which relate to market access such as the right of Member States to regulate access to certain airports, to regulate routes which are subject to a public service obligation, and until April 1, 1997 the right to regulate access to domestic services. Equally, there are safeguards against excessively high fares or capacity as well as against unreasonably low fares. The merits and de-merits of these safeguards can be taken up elsewhere, but it may be said that the rationale for these provisions is to protect particularly the Spanish, Portuguese and Greek carriers against the charter operators which tend to have very low operating costs and thus much lower fares, since the Iberian and Aegean traffic are primarily charter. It should be added that one of the most significant consequences of the third package is the effective abolition of the distinction between scheduled and charter services, and this is now becoming apparent.[22]

However, the effects of these measures on the CAA and its work can be simply stated. For all those air transport routes which fall within the scope of the Market Access Regulation, that is Community routes, national laws would no longer apply. By implication, national laws and authorities would no longer have the jurisdiction over air fares or capacity relating to these Community routes. Consequently, the CAA would only have jurisdiction and regulatory discretion in the residual areas of domestic air transport until April 1, 1997, and international air transport.[23] In addition, it will continue to have regulatory responsibility for services to the Channel Islands and the Isle of Man, although the CAA in its own right has not been slow to extend the measures of the liberalisation programme to these services. For example, it said in relation to its proposal to extend the freedom arising from the liberalisation programme to these services,

> In framing its proposals however it took the view that these were unlikely to be of great practical significance given both the way in which it has treated applications for charter services and the transparently liberal policies towards Channel Islands services...Implicit in its proposals therefore was the assumption that it would grant liberally further applications.[24]

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20 Council Regulation 2342/90: OJ (1992) L217/1; Council Regulation 2343/90: OJ (1992) L217/8.

21 Council Regulation 2407/92: OJ (1992) L240//1; Council Regulation 2408/92: OJ (1992) L240/8; Council Regulation 2409/92: OJ (1992) L240/15.

22 I do not propose to enter into the details of these liberalisation measures for the lack of time, but for the interested reader, see J.Goh, *European Air Transport Law and Competition* (John Wiley, 1997).

23 There has been considerable difficulties for the EC to achieve a common policy on external relations in air transport: see, n.15 *supra*.

24 CAA Decision 3/93.

That said, the aims of the liberalisation programme to provide an automatic right of access to air transport markets, the deregulation of fares and capacity, and the overall liberal approach to European air transport competition, was little more than a formality for the CAA and British air transport. In the first place, the CAA had been pursuing a consistent policy of liberal licensing which presumed in favour of granting a license to provide competing services unless overwhelming evidence to the contrary was produced. Fares were deregulated in 1985, and the approach to capacity regulation has been everything but restrictive. In these respects, there is a substantial degree of overlap between the policies of the CAA and the Common Air Transport Policy.

For all the similarities, one difference is especially noteworthy; that is, the substantive difference between the more obvious and transparent emphasis of the CAA on competition as a means for securing the reasonable interests of users, and the less obvious stance of the European institutions. Although competition has been accepted as a general means for achieving the four objectives outlined for the air transport industry, and has recently been proclaimed as the foundation for growth, competitiveness and sustainable development,[25] decisions of the Commission in a number of areas have yet to demonstrate that it is not merely paying lip service to this rationale. Until more recently it was not entirely clear whether competition was regarded as a means or an end, nor was it clear whether harmonisation or the completion of the Single Aviation Market was only a means to higher objectives. However, it is comforting to note that Mr Neil Kinnock, the Transport Commissioner, has had the occasion to state explicitly that "liberalisation is not an end in itself."[26] On the issue of State aids to airlines, for instance, the CAA had occasion to make the following observation.

> The Commission has set out a list of issues to which it would have regard in considering whether injections of equity constitute aid. It is however by no means apparent from its written decisions that it has applied its own guidelines with equal rigour.[27]

By the same token, the CAA counselled in respect of airline mergers against the belief that "it is only by further growth through merger or acquisition between themselves that the Community's largest national airlines can hope to compete with the biggest carriers from the US and the Far East, and that only by softening substantially normal requirements of competition policy will such airlines emerge."[28] Although it is only proper that regard must be had of the strength of Community airlines in the international markets, this is a matter of detail and not simply a broad argument about size if we are not to run the risk of sacrificing the

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25 *Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century* COM(93) 700.

26 Press Release of DG-VII, October 24, 1996.

27 *Airline Competition in the Single European Market* CAP 623 (1993), para.255.

28 *Ibid*, para.234.

benefits of choice and competition intended by the liberalisation programme. Since user interests have been the emphasis of British air transport policy for over a decade, any shift towards producer interests is a policy reversal of considerable magnitude.

Conclusions

Taking Regulation Seriously

This is an appropriate point to draw together several of the central issues for a conclusion, and to offer an agenda for the next steps. Let me begin by stating the obvious, that regulation as a concept in air transport must be taken seriously. While this assertion may seem strange at first sight when deregulation appears to be much more fashionable in contemporary public policy, or indeed an affront to the language of the New Right, this is not the case on further analysis. History and experience, which need not be rehearsed here, bear a strong testimony to the proposition that competition and user choice, at least in air transport, will not thrive within a system built entirely on market forces. The air transport industry is not naturally competitive, nor is it naturally contestable, contrary to some analyses.[29] Professor Alfred Kahn and his allies were wrong when they thought "An airplane was nothing but a marginal cost with wings". They are as wrong today as they were then. Unfettered competition will destroy competition itself.

That residual or minimum regulation is necessary to ensure a competitive multi-airline industry is almost taken as read. It is inevitable that complete deregulation must presume a certain degree of parity in terms of market access and indeed market strength of the competitors. This is not, and has not been, the case with British air transport. The most popular airports tend to be the most congested, thus making access extremely difficult. This is accentuated by an industrial structure characterised by a dominant airline which enjoys all the benefits of economies of scope, scale and network - the very fear of the CAA if BA was privatised without modification to its size and consequently its relative strength. By no means, however, does the right of regulating access or entry tantamount to a "Robin Hood" philosophy whereby routes are taken from the dominant to give to the weak. It is not about creating *equality*; rather, as Milton Friedman has long argued in his thesis on freedom of choice, it is about the *equality of opportunities*.[30] These arguments apply to fares and capacity regulation to the extent that they remain essential for the CAA to deal with anti-competitive behaviour through its regulatory authority to vary conditions of an air transport license. Equally, these arguments are no less applicable to European air transport as State-owned airlines continue to be able to flex their

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29 The most prominent is W.Baumol, J.Panzar & R.Willig, *Contestable Markets and The Theory of Industry Structure* (1982).

30 For example, *Free To Choose* (Penguin: 1980).

economic muscles against smaller carriers, primarily because of past preferential treatment.

Regulation in the sense conceived here is not simply the regulation of route entry, the control over fares or formal approval of capacity levels. It has a broader meaning, a broader remit that includes the regulation of anti-competitive practices, abuses of a dominant market position and the threat of these. Some may label this as antitrust policing, others may prefer to call it competition surveillance; it does not really matter. However we choose to characterise such formal intervention, ultimately it is a regulatory act; an instrument of public policy which impinges on competition. Control over route entry, for example, is as much a leverage for competition as a guard against unfair competition. Without the possibility to intervene to procure equality of opportunities and without proper safeguards against anti-competitive behaviour, competition may be absent and choice will be diminished. In such cases, individual autonomy to choose between competing products will be less than genuine, and freedom for entrepreneurial action to provide competing products will be impeded by barriers of sorts. This flies in the face of the New Right theory. If these arguments are accepted, however, then the concept of regulation becomes non-controversial and the question becomes one of more or less regulation.

These propositions are premised on the rationale that regulation and its equivalent classifications are a means to an end. This must imply that regulating for competition is not an immutable part of public policy. Policies do not have a life of their own; a policy emphasizing competition is an expression of a preferred solution at a given point in time. The CAA explicitly recognises this so that if it was "persuaded that the multi-airline industry policy was no longer in the interests of air transport users, it would abandon it."[31]

The Next Steps

Be that as it may, there is no question that competition is generally regarded today as the rationale for industrial organisation, indeed for governmental organisation. Most will accept that it is here to stay for some while. On that account, there is much to be done to ensure that competition in European air transport is both potent and real. Three fields of action seem especially urgent. The first relates to the availability of slots at congested but invariably popular airports. The present legislation governing slot allocation adopts the internationally accepted system of "grandfather rights" where slots are allocated according to incumbency.[32] That is to say, a current holder of a slot has a first claim to the same slot in the following corresponding season. The restrictive effect of this system on competition is considerable, yet there is an obvious absence of a better alternative. Under this legislation, "new entrants" are assured of 50% of the slots from the slot pool which acts as repository for

31 CAA Decision 7/90.

32 Council Regulation 95/93, OJ (1993) L14/1.

surrendered slots, unused slots and slots otherwise becoming available. The difficulty with a system of such generality is that the distribution of slots is non-discriminatory. For example, it does not harness competition by ensuring that preference is given to those new entrants seeking to introduce a competing service against an incumbent. Indeed, slots may be allocated to non-Community carriers who qualify as new entrants. This speaks nothing of the suitability of slots in terms of timing, whether they are sufficiently attractive to provide competing services. These issues have to be examined, together with the possibility of loosening the narrow definition of new entrants which presently has the effect of excluding proven competitors such as British Midland Airways and Virgin Atlantic Airways.

The Commission is currently proposing to legalise slot trading, which in any event is commonly practised by airlines. How it proposes to deal with the question of smaller airlines being unable to match the might of larger airlines in bargaining for slots is less clear at this stage. What is important, however, is the recognition that a measure of preference must be conferred on new entrants, lest it becomes impossibly burdensome to meet the start-up costs.

The second area in which action needs to be taken is state aids to airlines. As long as Article 222 of the Treaty of Rome guarantees the neutrality of ownership in undertakings, the issue of state aids will remain unavoidable, although it has to be said that pressures of different sorts are driving governments to consider the privatisation of state-owned airlines including Iberia, Lufthansa and Air France. While state aids are not objectionable if they were extended as a rational commercial action, it is not always readily ascertainable whether aid has been given, nor whether the authorised aid has been used for purposes which may prejudice competition. Allegations are already rife on the misuse or possible misuse of aids, against Air France for under-cutting fares[33] and Air Outre-Mer when it proposed to purchase Air Liberté.[34] It is therefore clear that achieving greater transparency in the relationship between a State-owned airline, the State is a necessary pre-condition towards fair and effective competition.

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33 Case T-236/95, *TAT-European Airlines v Commission* OJ (1996) C64/20.

34 Air Outre-Mer had previously received aid to the value of FFr300m from the French Government: *Twenty-Fifth Report on Competition Policy* (1995).

The third area in which action is called for has only recently emerged as a cause for concern. "Strategic alliances" in air transport have never before received so much attention. They were largely taken for granted. The most prominent form of strategic alliance is code-sharing between airlines primarily to gain greater access to markets which otherwise they would not have done so individually. It is also a much easier way of circumventing the limitations of foreign ownership in airlines. However, strategic alliances such as code-sharing fall short of constituting a merger and are therefore outside the scope of the Merger Regulation.[35] Yet, the implications of such agreements are so pronounced for competition as is clear from the investigations into the British Airways and American Airlines code-sharing agreement. Although the Commission is empowered to "take appropriate measures" under Article 89 to deal with such alliances, it is clear that the jurisprudence for regulating airline competition will remain incomplete as long as these alliances are not subject to a more coherent framework of analysis. So, for example, instead of "previously independent undertakings merging" under the Merger Regulation, it may now be necessary to have "operations becoming indistinct" which one must concede as having a wider scope of application. In addition to code-sharing agreements, airlines have also responded to the changing structure of the industry in other ways which raise similar concerns for competition. Franchising of an airline brand or name is gradually gaining acceptance although hitherto only BA has positioned itself at the forefront of this development. As a concept, franchising has existed for a long while, but it remains relatively new in air transport. However, let there be no mistake that in as much as this practice can give rise to competition concerns, it will also be notoriously difficult to intervene since it bears all the characteristics of a fair commercial decision.

This paper began life by looking at the privatisation of BA and the subsequent regulatory policies to respond to the competition issues of British air transport. But it should be clear that much has now changed as a result of EC laws. Accordingly, for this paper to make sense, it has been necessary to consider the regulatory issues in the light of developments within the EC to which the UK still belongs. Policies and practices have had to be changed; some were no more than a formality, others represented a substantive re-orientation of policy objectives. Although at one time the UK seemed an aberration in Europe, my task here was not to plead the special case of any party; the learning curve should transcend any political intransigence. At any rate, geography has effectively made the decision for us. It has also been necessary to delve into various historical aspects of air transport competition, but for which I make no apology. I think it is taken as read that to understand where we are and to know where we can go, we need to know where we have come from, and how.

[35] Council Regulation 4064/89, OJ (1989) L395/1 as corrected by OJ (1990) L257/14.

II. AIRPORT REFORMS IN EUROPE: PROCURING COMPETITION AND CHOICE

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INTRODUCTION

It is now over ten years since the European Community took the significant step of legislating for a Single European Aviation Market. Having overcome some serious obstacles, primarily political obstacles, the first of a series of liberalisation measures was adopted in 1987 under the Common Air Transport Policy. That was 30 years since the Treaty of Rome was adopted. Ironically, the Treaty contained very little in the way of policy detail on this sector. Much was left to the Council. Nevertheless and in retrospect, it remains a remarkable feat to have achieved so much within this time, particularly in breaking down long-established practices in international air transport and much else besides. The main thrust of the first package was to extend the application of the competition rules in Articles 85 and 86 to air transport. The second package was introduced in 1990, although the third package remains by far the most significant set of measures in the programme creating an internal market for air transport services; indeed, those measures heralded a new era going far beyond the imagination of the founders of international civil aviation.

The third package, which was adopted in 1992, contains three Council Regulations which collectively abolished the regulation of market access, capacity and fares for air transport services within the Community subject, as always, to a number of limited exceptions. In particular, Member States were given the discretion to regulate access to domestic markets although this exemption expired on 1 April 1997, and thus represented the complete liberalisation of air transport services within the Community. If the achievements in 30 years have been remarkable, it is even more remarkable that within the comparatively short space of ten years, the Community has managed to abolish a practice as old as the industry itself: the regulation of domestic services.

The aims of this essay are two-fold: first, to provide an assessment of the reforms for liberalising and increasing competition in airport services, namely groundhandling services and airport slot charges. Secondly, this essay will be assessing the extent to which these reforms, and proposed reforms, will be affected by the antitrust rules of the Treaty. This must include an examination of the rules against state aids and the extent to which their application in the airport sector would harness the realisation of the policy objectives. Finally, it will aim to conclude with a number of remarks on the future of airport regulation and competition, and to identify the policy areas still requiring further consideration and action to complete the programme of air transport harmonisation and liberalisation.

COMPETITION AND CHOICE

Competition and choice are two sides of the same coin. Choice implies the existence of at least two alternatives which are generally substitutes for each other. It follows that these alternatives are competing products, services or courses of action. In economic theory, competition has two traditional aims. First, the notion of allocative efficiency. The argument runs that under conditions of perfect competition, consumer welfare is maximised through an optimal allocation of economic resources. These resources would be allocated between goods and services in a way which matches precisely the quantities desired by consumers, being the price they are prepared to pay on the market. Secondly, economic theories have also argued that competition is the foundation of productive efficiency. This means that under conditions of perfect competition, goods and services will be produced at the lowest cost possible so that it also results in less wastage. As little as possible of society's wealth will then be expended in the production process. In this way, the combination of allocative and productive efficiency will lead to the maximisation of consumer welfare and society's wealth, so as to facilitate overall progress. In practice, however, the haphazard behaviour of consumers and irrational economic actions are a real and serious source of distortions for these theoretical assumptions.

Be that as it may, to the extent that competition is attainable, choice finds expression in two forms. In the first place, it implies choice on the part of providers or producers, whether to produce and if so how much to produce and charge. Secondly, competition implies choice for the purchasers to choose between different providers or producers. Accordingly, competition and choice are the essence of individual empowerment to create and to exploit opportunities, and to find expression in a given political, social or economic setting. It is already evident that "choice has become the ruling political sentiment" in most mature political and social systems. It is a multi-faceted concept; it is the language committed to individual autonomy but without prejudice to the need for sharing and collectivism necessary to sustain a society.

AND SO TO THE COMMON MARKET AGAIN

If these are the arguments underlying the wider political wider, including the economic, then it follows that the three packages outlined above would not on their own be sufficient to bring about a truly single market for European air transport where competition is sustainable and choice for users is genuine. The width of the industry necessarily means that other affiliated areas must also be addressed, and where appropriate, measures adopted to fulfill the aims of the common air transport policy. To that end, the Council has adopted a host of measures covering slot allocation at airports, computer reservation systems, compensation for denied-boarding and others. In addition, the Council has also adopted a measure for the liberalisation of groundhandling services at European airports, and is presently considering a proposal dealing with airport slot charges. Although these two policy areas, which are the subject of this commentary, deal with air transport

infrastructure, there is little doubt of their importance to the realisation of the policy objectives. If a key aim of the single aviation market is to provide safe and reliable air transport at a reasonable cost to users, then it must follow that carriers should not be burdened with excessive, un-related costs for access to these infrastructures (which in practice are usually passed on to users). Indeed, slot charges at European airports are already one of the highest in the world. In 1994, the Comité des Sages appointed by the Commission concluded that airport charges represented 13.5% of the airlines' total operating costs, making it one of the highest items of expenditure for an airline. As such, this was a major disadvantage to European carriers in competition with other global carriers and compared unfavourably with the charges at American airports. In part, this is because there are no expensive border control procedures for US domestic flights. The Comité des Sages had also reasoned that the charges were low because many of the US carriers owned and managed the terminal buildings, giving them incentives to keep costs down.

This speaks nothing of the charges for groundhandling services, and the absence of choice in suppliers. At present, groundhandling services at most airports within the Community can only be provided by the airport operator itself or the national flag carrier. The Commission is of the view that this lack of competition has resulted in poor quality services and high charges being imposed by the operators. Indeed, a study has found some charges to be 200% more than those at liberalised airports such as London (Heathrow). Evidently, this fails to find rythm with the language of political and economic change in recent years: competition and choice. Accordingly, the Council has adopted a Directive for the liberalisation of groundhandling services at Community airports, to secure *inter alia* greater user choice, product and service innovation, as well as productive efficiency.

LIBERALISING GROUNDHANDLING SERVICES

Hitherto, groundhandling services have been exempted from Article 85 of the Treaty on the basis that certain agreements could produce economic benefits particularly in ensuring that services of a high standard are provided with continuity and at a reasonable cost, but more generally to allow time for the air transport sector to adapt to a more competitive environment. Accordingly, Commission Regulation 2673/88 was adopted to exempt groundhandling services from Article 85, pursuant to its enabling powers under Council Regulation 3976/87. Although the exemption was to expire on 31 January 1991, the Commission extended the expiry date to 31 December 1992 by adopting Commission Regulation 82/91. At the end of this period, however, this exemption was allowed to lapse primarily on two grounds. First, the exemption had proved to be of little use in practice because competition concerns typically arose under Article 86, given the nature of the market and Article 90(1) on special and exclusive rights to undertakings. Secondly, the exemption was never intended to be permanent so that at some point in time liberalisation of the services had to come.

Much of the driving force for Community action to introduce more competition into the handling services at airports has come from complaints submitted by airlines and prospective groundhandling entrants that certain practices arising from the monopoly and duopoly structure were in violation of the competition rules of the Treaty. One complaint in 1994 related to the poor quality of services and non-transparent tariff at Athens airport, which was operated by the Greek national flag carrier, Olympic Airways. When the Commission began the infringement procedure, the Greek authorities carried out improvement works, including the provision for a new operator to compete alongside Olympic Airways. Olympic Airways has also established a tariff structure that relates to the actual cost of service, which will be published in advance.

THE LEGAL FRAMEWORK

Although the general aim of the Directive is to liberalise the provision of groundhandling services, some degree of regulatory control has been retained. The latter has been deemed as necessary to the extent that airports must be able at the same time "to fulfil their infrastructure management functions and to guarantee safety and security on the airport premises as well as to protect the environment and the social regulations in force". In addition, restrictions to competition have been necessary so that airports can function properly and be able "to reserve for themselves the management of certain infrastructures which for technical reasons as well as for reasons of profitability or environmental impact are difficult to divide or duplicate". However, regulatory policies must be objective, transparent and non-discriminatory. In the United Kingdom, for example, the function of regulation has been assigned to the Civil Aviation Authority.

The Directive provides specifically that Member States may make the activities of groundhandling subject to the approval of a public authority independent of the managing body of the airport. The Directive sets out explicitly that the criteria for approval must relate only to a sound financial situation, sufficient insurance cover, security and safety of installations, aircraft, equipment and persons, as well as environmental protection and compliance with relevant social legislation.

SCOPE OF DIRECTIVE

The Directive applies to any Community airport open to commercial traffic. The groundhandling services to which the Directive applies are listed the Annex. These are as follows:

ground administration and supervision;
passenger handling;
baggage handling;
freight and mail handling;

ramp handling;
aircraft services;
fuel and oil handling;
aircraft maintenance;
flight operations and crew administration;
surface transport;
catering services.

Further, the Directive has classified groundhandling services according to third-party handling and self-handling. In the case of third-party handling, defined as groundhandling services provided to an airport user, the Directive has provided that all such services at those airports whose annual traffic is not less than 3 million passenger movements or 75,000 tonnes of freight must be liberalised by 1 January 1999. Alternatively, the similar requirement applies at those airports whose traffic has not been less than 2 million passenger movements or 50,000 tonnes of freight during the six months prior to 1 April or 1 October of the preceding year.

However, Member States may exempt four categories of third-party groundhandling services from the requirement of free access to the market by restricting the number of suppliers. These are baggage handling, ramp handling, fuel and oil handling, and freight and mail handling in respect of the physical handling between the air terminal and the aircraft. In any event, Member States may not limit this number to fewer than two suppliers for each category of service. (Article 6(2)) Where this restriction applies, Member States cannot however prevent an airport user from having "an effective choice between at least two suppliers". (Article 6(4))

In addition, Member States will be required by 1 January 2001 to ensure that at least one of the authorised suppliers is not directly or indirectly controlled by the managing body of the airport, any airport user who has carried more than 25% of the passengers or freight recorded at the airport, or a body controlling or controlled directly or indirectly by the that managing body or airport user. This is a clear statement that vertical integration between the infrastructure operator and a downstream service supplier will not be favoured, and it seems likely that any proposal for merger will be assessed accordingly. Member States may, however, request a deferment of this obligation until 31 December 2002, although in considering the application, the Commission must have regard to "the evolution of the sector and, in particular, the situation at airports comparable in terms of traffic volume and pattern". (Article 6(3))

Self-handling is defined in the Directive as "a situation in which an airport user directly provides for himself one or more categories of groundhandling services and concludes no contract of any description with a third party for the provision of such services". (Article 2(f)) The Directive requires free access for all types of self-handling services listed in the Annex as from 1 January 1998. However, in the case of four categories of services, liberalisation will only apply from 1 January 1998

where the annual traffic at the airport is not less than 1 million passenger movements or 25,000 tonnes of freight. These are the air-side services of baggage handling, ramp handling, fuel and oil handling, and freight and mail handling between the aircraft and airport terminal. By implication, therefore, these services at airports whose annual traffic is below that threshold, will fall outside the scope of the Directive. In addition, the Directive provides a right for Member States to regulate entry into these four markets, although they cannot limit the number of suppliers to less than two.

REGULATING ACCESS

Although the Directive provides a general framework for the liberalisation of groundhandling services at Community airports, it provides at the same time a regulatory framework for Member States to oversee the programme of liberalisation and to ensure that the objectives of the programme are secured. In particular, the Directive establishes a number of exemptions to the general right of market access and the procedures to be adhered to when invoking one of the exemptions.

In addition to the discretion of Member States to limit the number of suppliers to no less than two in respect of the specified categories of third-party groundhandling and self-handling services, Article 9 of the Directive provides a general discretion for Member States to limit the number of suppliers for one or more categories of services other than those already referred to. Indeed, Member States may limit the number to a single supplier, or to prohibit self-handling altogether. However, the right to exercise this discretion would arise only in circumstances where specific constraints of available space or capacity at the airport, resulting in particular from congestion and area utilisation rate, make it impossible to open up the market.

Exemptions which are granted cannot in general exceed a period of three years, and must be accompanied by a plan to overcome the constraints. Furthermore, these exemptions must not unduly prejudice the aims of the Directive, nor give rise to distortions of competition between suppliers, nor extend further than is necessary. Any decision to exempt is subject to examination by the Commission, who may approve the decision if it considers that "the alleged constraints exist and that it is impossible to open up the market", or oppose the decision if it considers that the alleged constraints "have not been proved to exist or that they are not so severe as to justify the exemption." It is submitted that these are high thresholds, and are necessary to ensure that Member States do not abuse their discretion in granting exemptions and in doing so defeat the objectives of the Directive. It seems arguable that constraints making it impossible to open up the market would only be acceptable in instances when additional space or capacity cannot be found by more efficient use of existing space. This raises the question of whether long-term leases between an airport operator and a supplier would constitute a sufficient ground for exemption. (See below, however) By the same token, airport operators might be expected to create the necessary space by re-arranging or scaling down existing

activities if this was in proportion to the resulting increase in competition. Where this was possible, it would be unlikely that the alleged constraints would be regarded as so severe as to justify the exemption. Thus, on balance, if the public interest could be better served by greater competition, even if this demands the scaling down or termination of existing activities, it would seem that airport operators cannot rely on the exemption provided by the Directive. This approach seems consistent with the jurisprudence of the Commission, and of the Court of Justice, in interpreting exemptions which by their nature must be construed narrowly against the general rule.

Beyond this, the Directive envisages that there will be circumstances when Member States may have to reserve the management of certain centralised infrastructures to the managing body of that airport or another body. In particular, Member States may do this where the complexity, cost or environmental impact of the functions in question does not allow for division or duplication. These may include baggage sorting, de-icing, water purification and fuel-distribution systems. Indeed, Member States may require suppliers of groundhandling services and self-handlers to use these infrastructures. However, to ensure fairness, the management of these infrastructures must be made transparent, objective and non-discriminatory.

SELECTION PROCEDURES

The Directive sets out the general selection principles to be adopted by Member States in cases where they propose to limit the number of suppliers. The standard conditions or technical specifications which groundhandling suppliers are required to satisfy must be relevant, objective, transparent and non-discriminatory. Member States may also include in the selection criteria a public service obligation in cases of airports serving peripheral or developing regions "which have no commercial interest but which are of vital importance for that Member State". (Article 11(1)(a)) Where suppliers are selected under these procedures, the Directive restricts the period of supply by these suppliers to a maximum of seven years.

In the first instance, the managing body of that airport shall have the duty of selecting the suppliers on an open-tender basis, but following consultation with the Airport Users' Committee set up in accordance with Article 5 of the Directive. However, this is provided that that managing body does not itself offer similar groundhandling services and has no direct or indirect interest over or involvement in any undertaking providing such services. Where this is not the case, the competent authorities of Member States (for example, the CAA in the case of the UK) which are independent of that managing body shall make the selection.

An appellate process for any party with a legitimate interest is provided under the Directive. Again in the UK, for example, an appeal may be made to the CAA or the Secretary of State depending on the nature of the decision against the appeal is being made, as specified in the Directive and the implementing statutory instrument.

AIRPORT SLOT CHARGES

The liberalsation of airport charges for landing and taking-off is by no means easy, for if nothing else, airports are generally monopolies of the infrastructure on which airlines depend to land or take-off their aircraft. Indeed, where competition cannot be procured, liberalisation will run the danger of monopoly pricing, although a robust enforcement of the antitrust rules may prevent such inflated prices. The arguments are already well rehearsed. Given that airport infrastructures are typically monopolies, and the procurement of competition difficult, the incentives of contestability in the market will also be absent. According to Baumol et. al., a contestable must be one

> into which entry is completely free, from which exit is costless, in which entrants and incumbents compete on completely symetric terms, and entry is not impeded by fear of retaliatory price alterations.

An important assumption in their theory is therefore that entry into the market is free so that it "exacts no explicit costs and that entrants suffer from no disadvantages in the techniques available to them". Explicitly costs are either those entry costs which are greater than the costs incurred by the incumbents or social costs in the form of undesirable consequences to be borne by society. This follows that in a contestable market the 'sunk costs' are either negligible or non-existent. On this analysis, it is clear that liberalisation is unlikely to be appropriate, even less so to result in a competitively structured market for airport networks. Accordingly, competition in airport slot charges is unlikely at best, except in a number of limited circumstances explored below.

REGULATION

It is more likely than not that airport slot charges at major European airports will continue to be regulated for the forseeable future. Even so, this is not to say that charges cannot be brought lower without the incentives of competition. Much depends on the philosophy and strategy of regulating airport charges. Be that as it may, there are common denominators for any system of regulating airport charges. In particular, there has to be transparency in the charges, and the manner in which the charges are imposed on carriers must be based on objective criteria and must not be non-discriminatory. To that end, the Commission has proposed a Directive on airport charges which aims "to ensure compliance with the principles of non-discrimination, cost-relatedness and transparency".

The proposed Directive will establish a Community framework where "fair and equitable" market conditions apply to airport users and airport operators. Such a regulatory framework would not have been necessary but for the limited competition which to which airports are exposed.

Scope of Directive

The proposed Directive will apply to airports or airports systems of Member States and which are open to commercial traffic. However, airports whose annual traffic is less than 250 000 passengers movements or 25 000 tonnes of freight will be exempt from the provisions requiring airports charges to be reasonably related to the cost of services, transparency of the charges and the consultation procedures stipulated in the Directive. They are nevertheless required to adhere to the principle of non-discrimination in setting airport charges.

Non-discrimination

The familiar principle of non-discrimination seeks to ensure in the present context that there are no discriminatory practices by airport operators for flights within the Community which are offering equivalent services. In setting airport charges, airport operators will be required to apply the same level of charges to equivalent intra-Community air services in terms of the aircraft type and size, the distance flown, and the requsite administrative and customs formalities. Where discounts on charges have been proposed, they must be in conformity with the provisions of the Treaty. (Article 5(2)(b)) This is critical since it will prohibit airport operators from giving preferential treatment to the national flag-carriers at a time when the majority of airports and carriers is still under State ownership. Consequently, it matters not that the service in question is operated by a non-Community carrier, for example, under a fifth-freedom right granted by two Member States. This is equally critical since the prime concern in this regard must be the interests of passengers or freight users, and not the carriers who are more than likely to pass on such charges to the end-user.

Cost of Services

In the absence of competition in this specific market, the key is therefore to ensure that the charges for the services or facilities offered are reasonably related to the cost of providing them. Article 4 of the proposed Directive provides for this. In determining the level of charges, airport operators may have special regard to a number of factors viz, the cost of financing the facilities, financial charges, expenditure on operation and maintenance, general administrative charges and taxes, and a reasonable return on capital. In addition, they are also entitled to take into account, in line with their commercial policy, all or part of their income which is not derived from airport charges. The responsibility for ensuring compliance with this requirement will lie with Member States in accordance with, *inter alia*, Article 3b of the Treaty on subsidiarity.

In derogating from the above stipulations, Article 5 of the proposed Directive specifically enables management bodies of airports or airport systems to include in the levels of airport charges "the external environmental costs dues to air traffic" and

to set charges which reflect "the requirements in terms of management of the airport facilities or any changes in demand and use of the airport during a given period" although these considerations cannot be used to increase additional revenue for the airport.

Regional Airports and Cross-Subsidisation

The proposed Directive recognises that regional airports may require financial support in relation to airport charges in order "to promote economic and social cohesion". (Article 4(2)) To that end, it permits the airport charges in "the major national airport of a Member State" to be established at a level which will financially the levels of airport charges in regional airports in the same Member State. This is subject to a number of conditions. First, the financial support must come from revenue other than the airport at the major national airport. Secondly, the support may come from airport charges provided that they are established in conformity with the general requirements of the cost-relatedness of charges. Thirdly, when the two conditions cannot be met *and* when the public subsidies received are not sufficient, then financial support can only be provided where the regional airport concerned has an annual traffic of less than 300 000 passeger movements or 30 000 tonnes of freight *and* where the annual transit or transfer traffic for passengers at the major airport represents at least 5% of the total traffic at that airport.

Two observations are in order. In the first place, the proposed Directive has not defined the terms of "the major national airport", although it seems clear that there can only be one major national airport in the Member State concerned. An objective and accurate measure for defining the major national airport should be the highest throughput of passenger and freight in the Member State, rather than annual turnover. Turnovers may be derived from inflated charges, rather than genuine commercial strength, and are therefore not an accurate measure of performance and importance. The task of designating the major national airport should, quite rightly, be devolved to Member States since the Directive has already proposed to devolve the task of evaluating the need for any such cross-subsidisation and whether the stipulated conditions have been met to "the management body" designated under national laws or regulations for administering and managing the airport facilities and coordinating and controlling the activities of the various operators at the airport or airport system.

The second observation relates to the third condition for financial support. It is not entirely clear from the proposed provisions of the Directive whether the 5% of transfer passenger traffic at the major national airport should emanate from the regional airport concerned, or all regional airports within the Member State, or any airport for that matter. Given the context of the provisions, it is not likely to be the intention of the Directive that the 5% transfer traffic should emanate from any airport within the Community or elsewhere. Equally, the three conditions laid down in the proposed Directive seem to be progressively narrower and should imply that

the 5% transfer traffic should emanate from the regional airport designated to receive financial support rather than all the regional airports in the Member State.

Transparency

To ensure the cost-relatedness or airport charges, it is essential to ensure also that there is a sufficicent degree of transparency in the manner in which such charges are established so that their cost-relatedness can be properly evaluated. The Directive proposes to achieve this by requiring the management body of the airport or airport systems to provide to each airport user information on the components serving as a basis for determining the level of the airport charges. (Article 6) This must include:

- a clear list of the various services offered by the airport in return for the airport charge levied;
- the method of calculation used;
- the amount of each category of airport charges collected at the airport;
- the total number of staff deployed to services which give rise to the collection of airport charges; and
- the forecasts in relation to airport charges, traffic growth and any proposed investments.

In return, airport users will be required to supply the management body with information concerning their traffic and fleet composition forecasts, their development projects at the airport and consequently their requirements at the airport concerned.

Member States will be required by the proposed Directive to lay down a system of penalties which it is anticipated will cover the disclosure of information. (Article 8) In particular, there should be penalties for the refusal to supply information or for supplying false information either by the management body or airport users. Likewise, there should be penalties extending to the misuse or abuse of information, in particular for disclosing information without the consent of the informer.

Consultation

Comparable to the Directive on groundhandling, the proposed Directive on airport charges will require Member States to establish a procedure for consultation between the management body and airport users. Quite apart from adding to the efforts of ensuring more transparency in decision-making processes, the consultation procedure will enable airport users to contribute to any decision of the management body to modify the system or level of airport charges. Curiously, however, the proposal provides further that the views of the users "do not bind the authority responsible for taking a decision" since if nothing else it must be a potential source for futility. What the Direcitive does propose is, perhaps timidly, that airport users are able to request for a second consultation "in the event of disagreement over the

decision". (Article 7) Be that as it may, the decisions of the authority will not be immuned from judicial review, and to that extent may be declared void if they cannot be substantiated by the evidence or are devoid of logic.

AIRPORT SYSTEMS

Airport systems briefly defined means two or more airports grouped together to serve the same city or conurbation, for example, London (Heathrow-Gatwick-Stansted) and Paris (Charles de Gaulle-Orly). Airport systems in the Community are identified in Council Regulation 2408/92 on market access, and are appended to this paper. Although it is well accepted that competition in airport charges is limited, it is possible in theory at least to secure competition in this market between the airports in an airport system. An essential requirement, however, is that ownership of the airports within the system must be different to ensure genuine competition. On the basis of the airport systems recognised by Council Regulation 2408/92 in which none of the airports within a system are separately owned, competition in charges seems unlikely at best.

SURROUNDING AIRPORTS AND RELEVANT AIRPORT

Beyond an airport system, the possibility of competiton in the airport charges market is much greater. This would be competition between surrounding airports of sufficiently close proximity, but yet provide a serious alternative to the each other. It matters not whether the airports concerned are within an airport system; indeed, they may be two individual airports which do not belong to any airport system, for example between Manchester Airport and Liverpool Airport. The airport systems recognised by Council Regulation 2408/92 do not necessarily include such surrounding airports of sufficiently close proximity, but are yet competitors for a greater slice of the market by tempting airlines to use their respective airports with the incentive of lower airport charges. For example, the London airport system does not include Luton airport which is of sufficient proximity to the airports within the system, but is not regarded as part of that system. To that extent, and to the extent that these airports are likely to be under different ownership, for example the London and Paris airports, competition between them can provide the incentive of lower airport charges.

Although it is clear that in a point-to-point service, these individual airports would represent distinct markets, the likelihood that these airports may become substitutes for each other heightens as the distance of travel increases. Thus, for example, a journey between London and Brussels may not be sufficiently distant to include the Paris airports as alternatives to the London airports. It would seem unlikely at best to expect a traveller from London to travel to Paris for a flight to Brussels. The overall cost would likely outweigh the benefit. On the other hand, for a journey, say, between London and Rio de Janeiro, the Paris airports and indeed Amsterdam (Schipol), may be regarded as possible substitutes. In essence, whether competition

in airport charges is possible between surrounding depends largely on the definition of the relevant market. The Commission has already had at least two occasions to examine this issue in depth.

In 1991, the Commission had to examine the acquisition by Delta Airlines of Pan Am's trans-Atlantic operations in so far as they affected Community routes. Under the Merger Regulation, which this case qualified to be examined, the Commission is required to determine, *inter alia*, whether the acquisition would create or strengthen a dominant position. This requires the Commission to ascertain the relevant geographic or product market. In its assessment, the Commission took the view that there were two possible definitions for determining the relevant geographic market. In the first definition, the Commission considered that each route between the US and the Community, for instance London(Heathrow)-Detroit, could be regarded as a distinct market, having regard of course to the regulatory restrictions stemming from any bilateral agreement between the US and Member States. Secondly, it accepted that the relevant market could also be defined according to "a bundle of routes" on the basis that was sufficient demand-side substitutability between certain routes. Thus, for instance, a London-New York service could be substituted by a Paris-New York or Amsterdam-New York service. In that case, the Commission concluded that the services into or from London, Frankfurt, Paris, Amsterdam, Brussels, Zurich and Copenhagen had a certain degree of substitutability between them. Consequently, to the extent that there is such demand-side substitutabability, there maybe competition between these airports for a greater share of the trans-Atlantic market.

The Delta-Pan Am case was the first air transport merger that the Commission had to examine under the new Merger Regulation, but ironically it left open the choice between the narrower definition of individual routes and the wider definition of bundle of routes because it reasoned in that case that on either definition no dominant position would be created or strengthened.

The Commission was presented with another opportunity in 1992 to examine the notion of the relevant market in the air transport sector when it examined the merger between Air France and Sabena. Apart from the the markets between France and Belgium which the Commission had to determine whether a dominant position would be created or strengthened, it also had to consider the markets relating to Turkey and Hungary where there was an overlap of operations between the two carriers. In that context, the Commission adopted the wider definition and concluded that the Paris-Ankara and Brussels-Ankara routes could be considered as a bundle. By implication then, the Paris-Budapest and Brussels-Budapest routes could also be similarly regarded as the relevant market. It offered the following explanation:

> For the several million people living north of the area of attraction of the Paris airports and south of the area of attraction of Brussels airport, these airports may be regarded as capable of being substituted

> for one another, because of their proximity, for fairly long flights such as those to Anakara and Budapest.

It is clear from the foregoing analysis that competition between airports in terms of charges is possible. The likelihood depends in particular on the relavant market in question so that the longer the journey, the greater the likelihood of competition between the surrounding airports. This is by no means the norm, but rather an exception. Airports are essentially monopolies of the infrastructure, and to the extent that competition between them may or may not be possible, the antitrust rules of the Treaty have an instrumental role to play whether in the liberalisation of groundhandling services, safeguarding of the conditions of competition, or prevention of anti-competitive practices and abuses of a dominant market position. Their effect in fostering the aims of the common air transport market are already evident not simply the specific market of air transport services, but also in such ancillary markets as computer reservation systems. To these we now turn.

LIBERALISATION AND ANTITRUST REGULATION

The antitrust rules are set out in Articles 85 and 86 of the Treaty. Article 85(1) prohibits:

> all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

It prohibits in particular those agreements or practices which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development, or investment; share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other parties thereby placing them at a competitive disadvantage; and
- make the conclusion of contracts subject to acceptance by other parties of supplementary obligations, which by their nature or according to commercial usage, have no connection with the subject of such contracts.

A number of the above provisions seem to have specific relevance to the provision of groundhandling services at airports in particular, although the manner in which airport charges are levied may also come within the purview of some of these provisions.

Unlike Article 86, Article 85(3) makes provision for exemptions to be granted in respect of certain cases. In the main, an exemption may be granted if the agreement in question contributes:

> to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.

But in all cases, the agreement must not:

> impose indispensable restrictions for the attainment of such objectives, nor afford the possibility of substantially eliminating competition in the relevant market.

Article 86, on the other hand, stipulates that:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

In particular, it prohibits those agreements identified also in Article 85(1), although in its case they would not be regarded as an exhaustive list of the circumstances constituting an abuse.

There is already extensive literature on the application of Articles 85 and 86, and accordingly a comprehensive analysis of these rules will not be attempted here. Suffice it to say, however, that the Commission has already had numerous opportunities to examine their application in relation to the air transport sector and most recently in respect of the co-operation agreement between Lufthansa and SAS. Hence, the present analysis will be confined to their application in the groundhandling services and airport charges markets.

GROUNDHANDLING

Although the groundhandling Directive has put in place a programme for the progressive liberalisation of groundhandling services at Community airports, and aims to liberalise almost all such services by 31 December 2002, it is without prejudice to the competition rules of the Treaty and their effect on airport liberalisation. Indeed, the Directive explicitly recognises in Recital 28 that "this Directive does not affect the application of the rules of the Treaty". It is already clear that the application of Articles 85 and 86 of Treaty has had an important impact on the liberalisation process of air transport and ancillary services, and it seems plausible to suggest that these Articles, at least potentially, are capable of achieving a speedier and broader liberalisation of airport services.

In terms of Article 85, an airport operator would be prohibited from concluding agreements, typically vertical agreements with suppliers of groundhandling services, which prevents or distorts competition unless an exemption can be obtained. In particular, it would not be able to conclude agreements which require suppliers of services to fix prices, or indeed to share a section of the market where the airport operator is itself providing similar groundhandling services. More importantly, it would be prohibited from concluding agreements which impose dissimilar conditions for equivalent transactions to the benefit or detriment of other parties, in particular where the airport operator itself or its subsidiary is providing comparable services. It seems clear also that, long leases between an airport operator and a supplier, air-side or land-side, would be prohibited in the first instance as either limiting the market or sharing sources of supply unless an exemption can be obtained in accordance with the conditions of Article 85(3). Article 85 would similarly prohibit horizontal agreements between a supplier of groundhandling service and suppliers of other services which prevent or distort competition. While there is little doubt that Article 85 is highly relevant to harnessing competition in the groundhandling market, and excepting horizontal agreements, the majority of agreements or practices of concern is likely to focus on the market power of the airport operator.

In that regard, Article 86 seems to have much greater relevance, not least because the Commission has acknowledged on the one hand that the majority of airports within the Community is operated either by monopolies or oligopolies as a consequence of the special or exclusive rights granted by Member States, and the Court of Justice has held on the other hand that legal monopolies have a dominant position within the terms of Article 86. Given this, airports, and other comparable sectors, provide a unique illustration of the relevance of Article 86. Specifically, airport operators would be subject to the doctrine of essential facilities as developed by the Court of Justice. The essence of the doctrine is best explained by the Commission in *Sealink* in which it stated that:

> A dominant undertaking which both owns or controls and itself uses an essential facility, and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article 86, if the other conditions of that Article are met.

In practice, this means a dominant undertaking of infrastructural facilities cannot use its power to regulate access to the market so as to restrict competition in a neighbouring, but distinct, market dependent on that infrastructure, unless there are relevant, objective and necessary grounds for doing so. It would seem therefore that in the case of airports and groundhandling services, space constraints may be acceptable as a justifiable ground for restricting competition, provided this is "an objective concern which the conduct [abuse] is necessary to protect." The line of

cases on access to essential facilities suggests that this principle will be applied strictly, and that the Commission will tend to look unsympathetically on any claim by the infrastructure operator to refuse access. Indeed, in the complaint by British Midland (BM) against Aer Lingus on the latter's refusal to interline with BM, the Commission went as far as rejecting the claim by Aer Lingus that it made little commercial sense to offer interline facilities to BM since the result from BM's competing services would be a loss of revenue to itself. The Commission reasoned further that the refusal to offer the flexibility of interlining would significantly reduce the revenue of the new entrant and seriously affect the economics of its operations.

Thus, while the Directive has liberalised the majority of groundhandling services at airports there remain two instances when Article 86 can propel the process of liberalisation. First, in the case of *airports* falling outside the scope of the Directive, typically the smaller airports who do not meet the annual traffic threshold, but are nevertheless sufficiently important within the common market, they are subject to Article 86, and consequently would be prohibited from practices which could be construed as an abuse of their dominant position. Secondly, in the case of those *services* which Member States have been given a discretion to limit the number of suppliers, Article 86 would similarly extend to these services. For instance, where a Member State has opted to exercise its discretion to limit the number of suppliers, but there is nevertheless space or capacity to have more than two suppliers, then a complaint under Article 86 by potential entrants or carriers may lead to an opening up of the market, if the airport operator has been adjudged to have abused its dominant position.

AIRPORT CHARGES

The doctrine of essential facilities is equally applicable, if not more specifically relevant, in the case of airport charges. In particular, since airports are generally monopolies and therefore have a dominant market position, airport charges which are discriminatory or excessive to the detriment of certain carriers or to deter certain carriers from using the airport in preference to others would clearly be an abuse of that market power. These issues have already been considered by the Commission in its decision holding that any fee charged for access to the infrastructure must not distort competition to the extent that it benefits a particular party or class at the expense of another. In 1993 British Midland had complained to the Commission that the discounts for landing fees at Brussels (Zaventem) airport, which increased in line with the volume of traffic carried by an airline, favoured an airline with a high traffic volume at the airport and thereby placed smaller airlines such as itself at a competitive disadvantage. It claimed that the fee structure discriminated against smaller or regional carriers since they were unlikely to reach the thresholds to qualify for a discount. On the other hand, Sabena, the Belgian national carrier which was based at Zaventem easily exceeded the threshold to qualify for a substantial

discount. This was contrary to Article 86 since in particular there were no objective justifications for applying such a system given that the services required by an aircraft for landing or departing were the same.

The Commission had little difficulty in coming to the view that the airport had a dominant position in the relevant market since in the first place it was a legal monopoly established by the Belgian State and secondly, there were no realistic alternatives to infrastructures at Zaventem for airlines operating short- and medium-haul services to and from that airport. The remaining question was whether the system of discount amounted to an abuse. The Commission noted that to qualify for any discount, the monthly charges due from an airline had to be a minimum of Bfrs 5 million. This attracted a 7.5% discount, rising to 30% for monthly charges of Bfrs 20 million and above. According to the Commission's assessment, on the basis of four different aircraft types (DC9, A320, B757, B747), an airline using the DC9 had to operate at least an average of 7 daily frequencies to qualify for the minimum discount. An airline using the A320 would have to operate 6 daily frequencies, 4 daily frequencies with the B757 and a daily frequency with the B747 to qualify for the minimum discount of 7.5%. At the top end of the scale, an airline using the DC9 had to operate at least an average of 28 daily frequencies, and 4 daily frequencies with the B747, to qualify for the 30% discount. In the view of the Commission, these thresholds were "so high that only a carrier based at the airport can benefit, to the detriment of other Community carriers". Accordingly, the structure of the charges and discounts did not properly relate to the nature of the service required, that is for landing and taking-off; rather the discounting system was related to the number of movements which favoured larger carriers. Indeed, an abuse under Article 86 would arise where a dominant undertaking discriminates for reasons other than its own interest such as giving preferential treatment to another undertaking from the same State, or to another undertaking pursuing the same policy. In that case, Sabena, the national carrier of Belgium, which was based at Zaventem was in receipt of preferential treatment as a result of the discounting system. Consequently, the Commission concluded that to "apply dissimilar conditions to commercial partners for equivalent transactions, thereby placing some of them at a competitive disadvantage, constitutes an abuse of a dominant position", and therefore an infringement of Article 86.

Beyond such an abuse, if we accept that some competition between airports is possible, particularly between neighbouring airports, then predatory airport charges which are aimed at eliminating competition would indubitably constitute also an abuse within the terms of Article 86. Proving such a predatory practice is by no means easy although charges which are below cost would seem to present a *prima facie* case of abuse. This would be consistent with the reasoning of the Court of Justice in AKZO in which it stated that:

> A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by

> taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs and, at least, part of the variable costs relating to the unit produced.

Although the proposed Directive on airport charges seeks to inject a greater degree of transparency into the manner in which such charges are imposed and to harmonise the criteria for setting such charges, it is by no means procuring a seismic change to the system of charging for access to airport infrastructures. Even so, it is an audacious attempt to reform some long-standing practices. Article 86, however, offers much in the way of ensuring that airports charges are not only properly related to cost, but in doing so, is likely to foster efficiencies in the interest of air transport users and airlines.

STATE AIDS TO AIRPORTS

At first sight, all State aids must be the antithesis of any competitive order. This is so because it has the potential of distorting competition and creating inequity between the competing undertakings by virtue of the unequal access to finance, endowment of special rights or exclusive privileges and other conditions which cannot be described as normal commercial transactions. State intervention in the form of aids has been a characteristic of air transport for many years; a manifestation of not only extensive public ownership in airlines but also the political attributes of the sector. Airports are little different. However, as private companies have the right to raise money from the capital markets, so it must be possible for publicly-owned corporations to have such equivalent access to capital funds, and this would be in the form funds from the owner or loans extended subject to guarantees or security from the owner, that is the State. This right is implicit within the Treaty in so far as Article 222 provides for the neutrality of ownership in undertakings.

> This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

This means there cannot be any enforced privatisation of undertakings to achieve a level playing field, though it must be taken as read that this provision cannot be construed as reserving to Member States the power to adopt or enact measures which would adversely affect the objectives of the Treaty. In addition too, Article 90 of the Treaty recognises the right of Member States to maintain public undertakings and to grant special or exclusive rights to any undertaking although they are prohibited from adopting measures which are contrary to the rules of the Treaty. Even so, where undertakings have been entrusted with the operation of services of general economic interest, such as airports, the obligation extends only to ensuring that the application of such measures "does not obstruct the performance, in law or in fact, of the particular tasks assigned to [the undertakings]." It must follow that these undertakings which have been assigned functions of general economic interest will often require funds to make the performance of those functions possible. To this

extent then, State funding cannot be regarded as inimical to the aims of competition since this is little different from a private investor who deems it appropriate to invest in the actitivites of a private undertaking. This approach is consistent with the Market Economy Investor Principle (MEIP) developed by the Commission to assist its assessment of State aids cases. The aim is to mimic the behaviour of the private investor under comparable circumstances. It entails a comparison between "the terms on which the funds were made available by the State to the [undertaking], and the terms which a private investor operating under normal market conditions would find acceptable in providing funds to a comparable undertaking."

Where State funding become controversial or objectonable is when they distort or have the effect of distorting competition within the defined sector. The prohibition is set out in Article 92(1):

> Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall insofar as it affects trade betwen Member States, be incompatible with the common market.

It may therefore be argued that where competition is obtainable between airports, especially in respect of airport charges, aid granted by a Member State which favours a particular airport would be incompatible with the common market. There is no question that it would affect trade between Member States. Even so, the Treaty provides further that State aids may be approved in a number of circumstances, notwithstanding the above prohibition, and these have come to be classified as "mandatory" and "discretionary" exemptions.

The mandatory exemptions are contained in Article 92(2) and provides the following derogations:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination relating to the origin of the products concerned;
(b) aid to make good the damage caused by natural disasters or exceptional occurences; and
(c) aid granted to the economy of certain areas of the Federal Republic Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

It is arguable that these mandatory exemptions have very little, if any, application to the case of airports, though of course it may be possible to invoke derogation (b) where for instance the airport terminal building has been damaged by unforeseen accidents, or the subsidence of the runway. Nevertheless, compensation for such

damages would normally be derived from the obligation of airports to take out the necessary insurance.

Slightly more complex are the discretionary exemptions. These are contained in Article 92(3).

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of Member States;
(c) aid to facilitate the development of certain economic activities or of certain economic area, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common market;
(e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

Both (d) and (e) have not been applied in the aviation sector. In practice, aid for economic activities or areas under (c) has been the most common ground for justifying aid in the sector, although both (a) and (b) have had some relevance in a number of cases.
State aids to airports have been virtually non-existent hitherto since in general airports are monopolies under State onwership in one form or another. In that respect, the circumstances in which airports might have to resort to State assistance will be limited; deficits an always be corrected by higher charges in the absence of genuine competition. This is not to give a *carte blanche* to airports in such a monopolistic position to impose excessive charges since they would be subject to the antitrust rules in Article 86. The Brussels (Zaventem) airport case has already shown that an abuse of a dominant position was still possible regardless of the fact that the State might have authorised the charges or increase in charges. The Commission seized the occasion to observe that:

> a Member State infringes Articles 90 and 86 of the Treaty when it requires the undertaking to exploit its dominant position in an abusive fashion by applying to its commercial partners dissimilar conditions for equivalent transactions...Article 90(1) of the Treaty must be interpreted as precluding public authorities from imposing on undertakings to which they have been granted exclusive rights any conditions as to price that are contrary to Articles 85 and 86.

Given these considerations, State aids to airports have attracted little controversy. But be that as it may, this is unlikely to remain so with the expansion of activities in the aviation sector. Competition, particularly between neighbouring airports, to

tempt airlines to use their airport would increase as more airlines are established and more destinations are offered under the liberalisation programme. Several examples of such competition have already been cited above. It is in such cases when the control of State aids becomes crucial to ensure that their use does not lead to a distortion of competition between airports and threaten the realisation of the common market objectives. The presumption must be to consider any assistance from the State as an aid and prohibited accordingly, unless the conditions of the MEIP can be fulfilled. Exemptions should therefore be construed narrowly and permitted only in highly exceptional cases. There is no mistaking that in time State aids to airports will become a sensitive issue, perhaps not to extent that encountered in relation to airlines. Experience over the years in respect of State aids to airlines have been probelmatic and controversial. This was especially so in recent years as State-owned airlines scrambled for major capital injections to prepare for the deregulated era. For privately-owned airlines, this was a cause for concern, and the consequence was a juridification of the relations between airlines, Member States and the Commission as law and courts became the weaponry with which to attack these handouts as well as the shelter to defend against these confrontations.

CONCLUSION

Although the measures on liberalising air transport services, groundhandling services, airport charges, slot allocation and on harmonisation of air traffic control are microcosms of the Community's efforts to build a Single European Market, it seems clear that the programme of air transport and airport liberalisation are charting territories previously never imagined. It is breaking down long-established structures and practices, and challenging airlines, airports and others to think and to be competitive. To that extent, it will be making historic achievements.

Nevertheless, to ensure that the realisation of the liberalisation objectives and benefits are not threatened, it is crucial that airport operators, who also provide groundhandling services, are prevented from engaging in practices anathema to competition. Much like other liberalised sectors of the air transport industry, the competition rules will need to be strictly applied and the exemptions construed narrowly. While there is already notable competition in groundhandling services at some major European airports, by far the majority is still operated by a monopoly with exclusive rights granted by the Member State concerned. Since choice, or in its absence, productive efficiency, is a clear sentiment of these reforms, the means for procuring and sustaining competitive conditions must be rigorously employed to safeguard this aim. Whether the choice in this context is exercised by airlines as direct users of the infrastructure, or passengers as indirect beneficiaries, is simpy a manifestation of the prismatic characteristic of the concept.

The measures examined in this essay, and those examined elsewhere, do not in any way signify the completion of the Single European Aviation Market. Far from it. The application and effects of these measures necessarily require review in the light

of experience. In particular, there is already strong evidence to suggest that the slot allocation Regulation needs to be revised to reflect the current inadequacies within it. Equally, there remains a pressing need to address the issue of air traffic control and management to eliminate the inefficiencies stemming from the airspace congestion and duplication of resources and jurisdiction. This speaks nothing of the need to create a common policy for air transport relations with non-Community countries, which hitherto has been plagued by difficulties of varying nature and proportions.

Be that as it may, creating the Single European Aviation Market has been and will continue to be an evolutionary process. In this way, the basic objectives of any air transport policy to meet all substantial categories reasonable demands for safe air transportation at reasonable cost can be safeguarded.

APPENDIX I

COUNCIL DIRECTIVE 96/67/EC
of 15 October 1996
on access to the groundhandling market at Community airports

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 84 (2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure laid down in Article 189c of the Treaty,

(1) Whereas the Community has gradually introduced a common air transport policy with the aim of completing the internal market in accordance with Article 7a of the Treaty as a lasting contribution to promoting economic and social progress;

(2) Whereas the objective of Article 59 of the Treaty is to eliminate the restrictions on freedom to provide services in the Community; whereas, in accordance with Article 61 of the Treaty, that objective must be achieved within the framework of the common transport policy;

(3) Whereas through Council Regulations (EEC) No 2407/92, (EEC) No 2408/92 and (EEC) No 2409/92 that objective has been attained with regard to air transport services as such;

(4) Whereas groundhandling services are essential to the proper functioning of air transport; whereas they make an essential contribution to the efficient use of air transport infrastructure;

(5) Whereas the opening-up of access to the groundhandling market should help reduce the operating costs of airline companies and improve the quality of service provided to airport users;

(6) Whereas in the light of the principle of subsidiarity it is essential that access to the groundhandling market should take place within a Community framework, while allowing Member States the possibility of taking into consideration the specific nature of the sector;

(7) Whereas in its communication of June 1994 entitled 'The way forward for civil aviation in Europe` the Commission indicated its intention of taking an initiative

before the end of 1994 in order to achieve access to the groundhandling market at Community airports; whereas the Council, in its resolution of 24 October 1994 on the situation in European civil aviation, confirmed the need to take account of the imperatives linked to the situation of airports when opening up the market;

(8) Whereas, in its resolution of 14 February 1995 on European civil aviation, the European Parliament repeated its concern that account should be taken of the impact of access to the groundhandling market on employment and safety conditions at Community airports;

(9) Whereas free access to the groundhandling market is consistent with the efficient operation of Community airports;

(10) Whereas free access to the groundhandling market must be introduced gradually and be adapted to the requirements of the sector;

(11) Whereas for certain categories of groundhandling services access to the market and self-handling may come up against safety, security, capacity and available-space constraints; whereas it is therefore necessary to be able to limit the number of authorized suppliers of such categories of groundhandling services; whereas it should also be possible to limit self-handling; whereas, in that case, the criteria for limitation must be relevant, objective, transparent and non-discriminatory;

(12) Whereas if the number of suppliers of groundhandling services is limited effective competition will require that at least one of the suppliers should ultimately be independent of both the managing body of the airport and the dominant carrier;

(13) Whereas if airports are to function properly they must be able to reserve for themselves the management of certain infrastructures which for technical reasons as well as for reasons of profitability or environmental impact are difficult to divide or duplicate; whereas the centralized management of such infrastructures may not, however, constitute an obstacle to their use by suppliers of groundhandling services or by self-handling airport users;

(14) Whereas in certain cases these constraints can be such that they may justify restrictions on market access or on self-handling to the extent that these restrictions are relevant, objective, transparent and non-discriminatory;

(15) Whereas the purpose of such exemptions must be to enable airport authorities to overcome or at least reduce these constraints; whereas these exemptions must be approved by the Commission, assisted by an advisory committee, and must be granted for a specific period;
(16) Whereas, if effective and fair competition is to be maintained where the number of suppliers of ground-handling services is limited, the latter need to be chosen according to a transparent and impartial procedure; whereas airport users should be

consulted when it comes to selecting suppliers of ground-handling services, since they have a major interest in the quality and price of the ground-handling services which they require;

(17) Whereas it is therefore necessary to arrange for the representation of airport users and their consultation when authorized suppliers of ground-handling services are selected, by setting up a committee composed of their representatives;

(18) Whereas it is possible in certain circumstances and under specific conditions, in the context of selecting suppliers of ground-handling services at an airport, to extend the public service obligation to other airports in the same geographical region of the Member State concerned;

(19) Whereas the managing body of the airport may also supply ground-handling services and, through its decisions, may exercise considerable influence on competition between suppliers of ground-handling services; whereas it is therefore essential, in order to maintain fair competition, that airports be required to keep separate accounts for their infrastructure management and regulatory activities on the one hand and for the supply of ground-handling services on the other;

(20) Whereas an airport may not subsidize its ground-handling activities from the revenue it derives from its role as an airport authority;

(21) Whereas the same transparency requirements must apply to all suppliers wishing to offer ground-handling services to third parties;

(22) Whereas, in order to enable airports to fulfill their infrastructure management functions and to guarantee safety and security on the airport premises as well as to protect the environment and the social regulations in force, Member States must be able to make the supply of ground-handling services subject to approval; whereas the criteria for granting such approval must be objective, transparent and non-discriminatory;

(23) Whereas, for the same reasons, Member States must retain the power to lay down and enforce the necessary rules for the proper functioning of the airport infrastructure; whereas those rules must relate to the intended objective and must not in practice reduce market access or the freedom to self-handle to a level below that provided for in this Directive; whereas the rules must comply with the principles of objectivity, transparency and non-discrimination;

(24) Whereas Member States must retain the power to ensure an adequate level of social protection for the staff of undertakings providing ground-handling services;

(25) Whereas access to airport installations must be guaranteed to suppliers authorized to provide ground-handling services and to airport users authorized to

self-handle, to the extent necessary for them to exercise their rights and to permit fair and genuine competition; whereas it must be possible however, for such access to give rise to the collection of a fee;

(26) Whereas it is justified that the rights recognized by this Directive should only apply to third-country suppliers of ground-handling services and third-country airport users subject to strict reciprocity; whereas where there is no such reciprocity the Member State should be able to suspend these rights with regard to those suppliers and users;

(27) Whereas arrangements for greater cooperation over the use of Gibraltar airport were agreed in London on 2 December 1987 by the Kingdom of Spain and the United Kingdom in a joint declaration by the Ministers of Foreign Affairs of the two countries, and such arrangements have yet to come into operation;

(28) Whereas this Directive does not affect the application of the rules of the Treaty; whereas in particular the Commission will continue to ensure compliance with these rules by exercising, when necessary, all the powers granted to it by Article 90 of the Treaty,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Scope

1. This Directive applies to any airport located in the territory of a Member State, subject to the provisions of the Treaty, and open to commercial traffic in the following circumstances:

(a) The provisions of Article 7 (1) relating to categories of ground-handling services other than those referred to in Article 7 (2) shall apply to any airport regardless of its volume of traffic as from 1 January 1998.

(b) The provisions relating to the categories of groundhandling services referred to in Article 7 (2) shall apply as from 1 January 1998 to airports whose annual traffic is not less than 1 million passenger movements or 25 000 tonnes of freight.

(c) The provisions relating to the categories of groundhandling services referred to in Article 6 shall apply as from 1 January 1999 to airports:

> - whose annual traffic is not less than 3 million passenger movements or 75 000 tonnes of freight; or - whose traffic has been not less than 2 million passenger movements or 50 000 tonnes of freight during the six-month period prior to 1 April or 1 October of the preceding year.

2. Without prejudice to paragraph 1, the provisions of this Directive shall apply as from 1 January 2001 to any airport located in the territory of a Member State, subject to the provisions of the Treaty, and open to commercial traffic, whose annual traffic is not less than 2 million passenger movements or 50 000 tonnes of freight.

3. Where an airport reaches one of the freight traffic thresholds referred to in this Article without reaching the corresponding passenger movement threshold, the provisions of this Directive shall not apply to categories of groundhandling services reserved exclusively for passengers.

4. The Commission shall publish, for information, in the Official Journal of the European Communities a list of the airports referred to in this Article. The list shall first be published within three months following the entry into force of this Directive, and thereafter annually.

Member States shall, before 1 July of each year, forward to the Commission the data required to compile the list.

5. Application of this Directive to the airport of Gibraltar is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated.

6. Application of this Directive to Gibraltar airport shall be suspended until the arrangements in the joint declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 have come into operation. The Governments of Spain and the United Kingdom will so inform the Council on that date.

Article 2

Definitions

For the purposes of this Directive:

(a) 'airport` means any area of land especially adapted for the landing, taking-off and manoeuvres of aircraft, including the ancillary installations which these operations may involve for the requirements of aircraft traffic and services including the installations needed to assist commercial air services;

(b) 'airport system` means two or more airports grouped together to serve the same city or conurbation, as referred to in Annex II to Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes;

(c) 'managing body of the airport` means a body which, in conjunction with other activities or not as the case may be, has as its objective under national law or regulation the administration and management of the airport infrastructures, and the co-ordination and control of the activities of the different operators present in the airport or airport system concerned;

(d) 'airport user` means any natural or legal person responsible for the carriage of passengers, mail and/or freight by air from, or to the airport in question;

(e) 'groundhandling` means the services provided to airport users at airports as described in the Annex;

(f) 'self-handling` means a situation in which an airport user directly provides for himself one or more categories of groundhandling services and concludes no contract of any description with a third party for the provision of such services; for the purposes of this definition, among themselves airport users shall not be deemed to be third parties where:

- one holds a majority holding in the other; or - a single body has a majority holding in each;

(g) 'supplier of groundhandling services` means any natural or legal person supplying third parties with one or more categories of groundhandling services.

Article 3

Managing body of the airport

1. Where an airport or airport system is managed and operated not by a single body but by several separate bodies, each of these bodies shall be considered part of the managing body of the airport for the purposes of this Directive.

2. Similarly, where only a single managing body is set up for several airports or airport systems, each of those airports or airport systems shall be considered separately for the purposes of this Directive.

3. If the managing bodies of airports are subject to the supervision or control of a national public authority, that authority shall be obliged, in the context of the legal obligations devolving upon it, to ensure that this Directive is applied.

Article 4

Separation of accounts

1. Where the managing body of an airport, the airport user or the supplier of groundhandling services provide groundhandling services, they must rigorously separate the accounts of their groundhandling activities from the accounts of their other activities, in accordance with current commercial practice.

2. An independent examiner appointed by the Member State must check that this separation of accounts is carried out.

The examiner shall also check the absence of financial flows between the activity of the managing body as airport authority and its groundhandling activity.

Article 5

Airport Users' Committee

1. Twelve months at the latest following the entry into force of this Directive, Member States shall ensure that, for each of the airports concerned, a committee of representatives of airport users or organizations representing airport users is set up.

2. All airport users shall have the right to be on this committee, or, if they so wish, to be represented on it by an organization appointed to that effect.

Article 6

Groundhandling for third parties

1. Member States shall take the necessary measures in accordance with the arrangements laid down in Article 1 to ensure free access by suppliers of groundhandling services to the market for the provision of groundhandling services to third parties.

Member States shall have the right to require that suppliers of groundhandling services be established within the Community.

2. Member States may limit the number of suppliers authorized to provide the following categories of groundhandling services:

- baggage handling,
- ramp handling,
- fuel and oil handling,
- freight and mail handling as regards the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft.

They may not, however, limit this number to fewer than two for each category of groundhandling service.

3. Moreover, as from 1 January 2001 at least one of the authorized suppliers may not be directly or indirectly controlled by:

- the managing body of the airport,

- any airport user who has carried more than 25 % of the passengers or freight recorded at the airport during the year preceding that in which those suppliers were selected,

- a body controlling or controlled directly or indirectly by that managing body or any such user.

However at 1 July 2000, a Member State may request that the obligation in this paragraph be deferred until 31 December 2002.

The Commission, assisted by the Committee referred to in Article 10, shall examine such request and may, having regard to the evolution of the sector and, in particular, the situation at airports comparable in terms of traffic volume and pattern, decide to grant the said request.

4. Where pursuant to paragraph 2 they restrict the number of authorized suppliers, Member States may not prevent an airport user, whatever part of the airport is allocated to him, from having, in respect of each category of groundhandling service subject to restriction, an effective choice between at least two suppliers of groundhandling services, under the conditions laid down in paragraphs 2 and 3.

Article 7

Self-handling

1. Member States shall take the necessary measures in accordance with the arrangements laid down in Article 1 to ensure the freedom to self-handle.

2. However, for the following categories of groundhandling services:

- baggage handling,

- ramp handling,

- fuel and oil handling,

- freight and mail handling as regards the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft,

Member States may reserve the right to self-handle to no fewer than two airport users, provided they are chosen on the basis of relevant, objective, transparent and non-discriminatory criteria.

Article 8

Centralized infrastructures

1. Notwithstanding the application of Articles 6 and 7, Member States may reserve for the managing body of the airport or for another body the management of the centralized infrastructures used for the supply of groundhandling services whose complexity, cost or environmental impact does not allow of division or duplication, such as baggage sorting, de-icing, water purification and fuel-distribution systems. They may make it compulsory for suppliers of groundhandling services and self-handling airport users to use these infrastructures.

2. Member States shall ensure that the management of these infrastructures is transparent, objective and non-discriminatory and, in particular, that it does not hinder the access of suppliers of groundhandling services or self-handling airport users within the limits provided for in this Directive.

Article 9

Exemptions

1. Where at an airport, specific constraints of available space or capacity, arising in particular from congestion and area utilization rate, make it impossible to open up the market and/or implement self-handling to the degree provided for in this Directive, the Member State in question may decide:

(a) to limit the number of suppliers for one or more categories of groundhandling services other than those referred to in Article 6 (2) in all or part of the airport; in this case the provisions of Article 6 (2) and (3) shall apply;

(b) to reserve to a single supplier one or more of the categories of groundhandling services referred to in Article 6 (2);

(c) to reserve self-handling to a limited number of airport users for categories of groundhandling services other than those referred to in Article 7 (2), provided that those users are chosen on the basis of relevant, objective, transparent and non-discriminatory criteria;

(d) to ban self-handling or to restrict it to a single airport user for the categories of groundhandling services referred to in Article 7 (2).

2. All exemptions decided pursuant to paragraph 1 must:

(a) specify the category or categories of groundhandling services for which the exemption is granted and the specific constraints of available space or capacity which justify it;

(b) be accompanied by a plan of appropriate measures to overcome the constraints.

Moreover, exemptions must not:

(i) unduly prejudice the aims of this Directive;

(ii) give rise to distortions of competition between suppliers of groundhandling services and/or self-handling airport users;

(iii) extend further than necessary.

3. Member States shall notify the Commission, at least three months before they enter into force, of any exemptions they grant on the basis of paragraph 1 and of the grounds which justify them.
The Commission shall publish a summary of the decisions of which it is notified in the Official Journal of the European Communities and shall invite interested parties to submit comments.

4. The Commission shall examine closely exemption decisions submitted by Member States. To that end the Commission shall make a detailed analysis of the situation and a study of the appropriate measures submitted by the Member State to check that the alleged constraints exist and that it is impossible to open up the market and/or implement self-handling to the degree provided for in this Directive.

5. Further to that examination and after consulting the Member State concerned, the Commission may approve the Member State's decision or oppose it if it deems that the alleged constraints have not been proved to exist or that they are not so severe as to justify the exemption. After consulting the Member State concerned the Commission may also require the Member State to amend the extent of the

exemption or restrict it to those parts of an airport or airport system where the alleged constraints have been proved to exist.

The Commission's decision shall be taken no later than three months after notification by the Member State and shall be published in the Official Journal of the European Communities.

6. Exemptions granted by Member States pursuant to paragraph 1 may not exceed a duration of three years except for exemptions granted under paragraph 1 (b). Not later than three months before the end of that period the Member State must take a new decision on any request for exemption, which will also be subject to the procedure laid down in this Article.

Exemptions under paragraph 1 (b) may not exceed a duration of two years. However, a Member State may on the basis of the provisions of paragraph 1 request that this period be extended by a single period of two years. The Commission, assisted by the Committee referred to in Article 10, shall decide on such request.

Article 10

Advisory Committee

1. The Commission shall be assisted by an advisory committee made up of representatives of the Member States and chaired by the representative of the Commission.

2. The Committee shall advise the Commission on the application of Article 9.

3. The Committee may furthermore be consulted by the Commission on any other matter concerning the application of this Directive.

4. The Committee shall establish its own rules of procedure.

Article 11

Selection of suppliers

1. Member States shall take the necessary measures for the organization of a selection procedure for suppliers authorized to provide groundhandling services at an airport where their number is limited in the cases provided for in Article 6(2) or Article 9. This procedure must comply with the following principles:

(a) In cases where Member States require the establishment of standard conditions or technical specifications to be met by the suppliers of groundhandling services, those conditions or specifications shall be established following consultation with the

Airport Users' Committee. The selection criteria laid down in the standard conditions or technical specifications must be relevant, objective, transparent and non-discriminatory.

After having notified the Commission, the Member State concerned may include among the standard conditions or technical specifications with which suppliers of groundhandling services must comply a public service obligation in respect of airports serving peripheral or developing regions which are part of its territory, which have no commercial interest but which are of vital importance for the Member State concerned.

(b) An invitation to tender must be launched and published in the Official Journal of the European Communities, to which any interested supplier of groundhandling services may reply.

(c) Suppliers of groundhandling services shall be chosen:

(i) following consultation with the Airport Users' Committee by the managing body of the airport, provided the latter:

- does not provide similar groundhandling services; and - has no direct or indirect control over any undertaking which provides such services; and has no involvement in any such undertaking;

(ii) in all other cases, by competent authorities of the Member States which are independent of the managing body of the airport concerned, and which shall first consult the Airport Users' Committee and that managing body.

(d) Suppliers of groundhandling services shall be selected for a maximum period of seven years.

(e) Where a supplier of groundhandling services ceases his activity before the end of the period for which he was selected, he shall be replaced on the basis of the same procedure.

2. Where the number of suppliers of groundhandling services is limited in accordance with Article 6 (2) or Article 9, the managing body of the airport may itself provide groundhandling services without being subject to the selection procedure laid down in paragraph 1. Similarly, it may, without submitting it to the said procedure, authorize an undertaking to provide groundhandling services at the airport in question:

- if it controls that undertaking directly or indirectly; or if the undertaking controls it directly or indirectly.

3. The managing body of the airport shall inform the Airport Users' Committee of decisions taken under this Article.

Article 12

Island airports

In the context of the selection of suppliers of groundhandling services at an airport as provided for in Article 11, a Member State may extend the obligation of public service to other airports in that Member State provided:

- those airports are located on islands in the same geographical region; and such airports each have a traffic volume of no less than 100 000 passenger movements per year; and such an extension is approved by the Commission with the assistance of the Committee referred to in Article 10.

Article 13

Consultations

Member States shall see to it that a compulsory consultation procedure relating to the application of this Directive is organized between the managing body of the airport, the Airport Users' Committee and the undertakings providing groundhandling services. This consultation shall cover, inter alia, the price of those groundhandling services for which an exemption has been granted pursuant to Article 9 (1) (b) and the organization of the provision of those services. Such consultation shall be organized at least once a year.

Article 14

Approval

1. Member States may make the groundhandling activity of a supplier of groundhandling services or a self-handling user at an airport conditional upon obtaining the approval of a public authority independent of the managing body of the airport.

The criteria for such approval must relate to a sound financial situation and sufficient insurance cover, to the security and safety of installations, of aircraft, of equipment and of persons, as well as to environmental protection and compliance with the relevant social legislation.

The criteria must comply with the following principles:

(a) they must be applied in a non-discriminatory manner to the various suppliers of groundhandling services and airport users;

(b) they must relate to the intended objective;

(c) they may not, in practice, reduce market access or the freedom to self-handle to a level below that provided for in this Directive.

These criteria shall be made public and the supplier of groundhandling services or self-handling airport user shall be informed in advance of the procedure for obtaining approval.

2. The approval may be withheld or withdrawn only if the supplier of groundhandling services or self-handling airport user does not meet, for reasons of his own doing, the criteria referred to in paragraph 1.

The grounds for withholding or withdrawal must be communicated to the supplier or user concerned and to the managing body of the airport.

Article 15

Rules of conduct

A Member State may, where appropriate on a proposal from the managing body of the airport:

- prohibit a supplier of groundhandling services or an airport user from supplying groundhandling services or self-handling if that supplier or user fails to comply with the rules imposed upon him to ensure the proper functioning of the airport;

Those rules must comply with the following principles:

(a) they must be applied in a non-discriminatory manner to the various suppliers of groundhandling services and airport users;

(b) they must relate to the intended objective;

(c) they may not, in practice, reduce market access or the freedom to self-handle to a level below that provided for in this Directive;

- in particular require suppliers of groundhandling services at an airport to participate in a fair and non-discriminatory manner in carrying out the public service obligations laid down in national laws or rules, including the obligation to ensure continuous service.

Article 16

Access to installations

1. Member States shall take the necessary measures to ensure that suppliers of groundhandling services and airport users wishing to self-handle have access to airport installations to the extent necessary for them to carry out their activities.

If the managing body of the airport or, where appropriate, the public authority or any other body which controls it places conditions upon such access, those conditions must be relevant, objective, transparent and non-discriminatory.

2. The space available for groundhandling at an airport must be divided among the various suppliers of groundhandling services and self-handling airport users, including new entrants in the field, to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of the relevant, objective, transparent and non-discriminatory rules and criteria.

3. Where access to airport installations gives rise to the collection of a fee, the latter shall be determined according to relevant, objective, transparent and non-discriminatory criteria.

Article 17

Safety and security

The provisions of this Directive in no way affect the rights and obligations of Member States in respect of law and order, safety and security at airports.

Article 18

Social and environmental protection

Without prejudice to the application of this Directive, and subject to the other provisions of Community law, Member States may take the necessary measures to ensure protection of the rights of workers and respect for the environment.

Article 19

Compliance with national provisions

A supplier of groundhandling services at an airport in a Member State shall be required to comply with the provisions of national law which are compatible with Community law.

Article 20

Reciprocity

1. Without prejudice to the international commitments of the Community, whenever it appears that a third country, with respect to access to the groundhandling or self-handling market:

(a) does not, de jure or de facto, grant suppliers of groundhandling services and self-handling airport users from a Member State treatment comparable to that granted by Member States to suppliers of groundhandling services and self-handling airport users from that country; or (b) does not, de jure or de facto, grant suppliers of groundhandling services and self-handling airport users from a Member State national treatment; or (c) grants suppliers of groundhandling services and self-handling airport users from other third countries more favourable treatment than suppliers of groundhandling services and self-handling airport users from a Member State;

(b) Member State may wholly or partially suspend the obligations arising from this Directive in respect of suppliers of groundhandling services and airport users from that third country, in accordance with Community law.
2. The Member State concerned shall inform the Commission of any withdrawal or suspension of rights or obligations.

Article 21

Right of appeal

Member States or, where appropriate, managing bodies of airports shall ensure that any party with a legitimate interest has the right to appeal against the decisions or individual measures taken pursuant to Articles 7 (2) and 11 to 16.

It must be possible to bring the appeal before a national court or a public authority other than the managing body of the airport concerned and, where appropriate, independent of the public authority controlling it.

Article 22

Information report and revision

Member States shall communicate to the Commission the information required by it to draw up a report on the application of this Directive.

The report, accompanied by any proposals for revision of the Directive, shall be drawn up not later than 31 December 2001.

Article 23

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than one year from the date of its publication in the Official Journal of the European Communities. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 24

Entry into force

This Directive shall enter into force on the 20th day following that of its publication in the Official Journal of the European Communities.

Article 25

Addressees

This Directive is addressed to the Member States.

ANNEX

LIST OF GROUNDHANDLING SERVICES

1. Ground administration and supervision comprise:

1.1. representation and liaison services with local authorities or any other entity, disbursements on behalf of the airport user and provision of office space for its representatives;

1.2. load control, messaging and telecommunications;

1.3. handling, storage and administration of unit load devices;

1.4. any other supervision services before, during or after the flight and any other administrative service requested by the airport user.

2. Passenger handling comprises any kind of assistance to arriving, departing, transfer or transit passengers, including checking tickets and travel documents, registering baggage and carrying it to the sorting area.

3. Baggage handling comprises handling baggage in the sorting area, sorting it, preparing it for departure, loading it on to and unloading it from the devices designed to move it from the aircraft to the sorting area and vice versa, as well as transporting baggage from the sorting area to the reclaim area.

4. Freight and mail handling comprises:

4.1. for freight: physical handling of export, transfer and import freight, handling of related documents, customs procedures and implementation of any security procedure agreed between the parties or required by the circumstances;
4.2. for mail: physical handling of incoming and outgoing mail, handling of related documents and implementation of any security procedure agreed between the parties or required by the circumstances.

5. Ramp handling comprises:

5.1. marshalling the aircraft on the ground at arrival and departure (*);

5.2. assistance to aircraft packing and provision of suitable devices (*);

5.3. communication between the aircraft and the air-side supplier of services (*);

5.4. the loading and unloading of the aircraft, including the provision and operation of suitable means, as well as the transport of crew and passengers between the aircraft and the terminal, and baggage transport between the aircraft and the terminal;

5.5. the provision and operation of appropriate units for engine starting;

5.6. the moving of the aircraft at arrival and departure, as well as the provision and operation of suitable devices;

5.7. the transport, loading on to and unloading from the aircraft of food and beverages.

6. Aircraft services comprise:

6.1. the external and internal cleaning of the aircraft, and the toilet and water services;

6.2. the cooling and heating of the cabin, the removal of snow and ice, the de-icing of the aircraft;

6.3. the rearrangement of the cabin with suitable cabin equipment, the storage of this equipment.

7. Fuel and oil handling comprises:

7.1. the organization and execution of fuelling and defuelling operations, including the storage of fuel and the control of the quality and quantity of fuel deliveries;

7.2. the replenishing of oil and other fluids.

8. Aircraft maintenance comprises:
8.1. routine services performed before flight;

8.2. non-routine services requested by the airport user;

8.3. the provision and administration of spare parts and suitable equipment;

8.4. the request for or reservation of a suitable parking and/or hangar space.

9. Flight operations and crew administration comprise:

9.1. preparation of the flight at the departure airport or at any other point;

9.2. in-flight assistance, including re-dispatching if needed;

9.3. post-flight activities;

9.4. crew administration.

10. Surface transport comprises:

10.1. the organization and execution of crew, passenger, baggage, freight and mail transport between different terminals of the same airport, but excluding the same transport between the aircraft and any other point within the perimeter of the same airport;

10.2. any special transport requested by the airport user.

11. Catering services comprise:

11.1. liaison with suppliers and administrative management;

11.2. storage of food and beverages and of the equipment needed for their preparation;

11.3. cleaning of this equipment;

11.4. preparation and delivery of equipment as well as of bar and food supplies.

APPENDIX II

Proposal for a Council Directiove on airport charges
COM/97/0154 (23/04/1997)
OJ NO. C 257/2 (22/08/1997)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 84 (2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Acting in accordance with the procedure provided for in Article 189c of the Treaty in cooperation with the European Parliament,

1. Whereas the Community has progressively introduced a common air transport policy, in particular for the purpose of completing the single market, under Article 7a of the Treaty;

2. Whereas the internal market comprises an area without internal borders in which the free movement of people, goods, services and capital is guaranteed;

3. Whereas a Community framework is needed to ensure that fair an equitable market conditions apply both to users and passengers and to the owners and management bodies of airports;

4. Whereas, however, these rules must comply with the principle of proportionality in accordance with the third paragraph of Article 3b of the Treaty and should therefore be limited to the laying down of fundamental principles;

5. Whereas, in addition, the administrative management and the financial situation of the smallest airports do not justify the application of the Community framework;

6. Whereas, within this market, there should be no discrimination between intra-Community flights for the provision of equivalent services;

7. Whereas airports may be managed as commercial undertakings which must strive to be efficient in order to make their activities profitable and to better satisfy market requirements and passengers' needs;

8. Whereas, however, within that market, airports are exposed to limited competition;

9. Whereas, among their various activities, the main task of airports is to ensure the handling of aircraft from landing to take-off so as to enable users to carry out their air transport business;

10. Whereas, for this purpose, airports offer a certain number of facilities and services directly related to the operation of aircraft, the costs of which they must be able to cover;

11. Whereas, unlike other types of airport revenue or charges which may be levied on users, airport charges provide compensation for the facilities and services provided by the airport;

12. Whereas such services and facilities can, by their nature, only be provided by the airport itself; whereas, in view of this monopoly situation, the level of airport charges must be in relation to the costs borne for the provision of such facilities and services, taking into consideration the objective of economic and social cohesion;

13. Whereas an airport must also be able to cover all of the costs required for its sound operation in terms of efficiency, safety and the environment by modulating the level of the charges;

14. Whereas it is therefore important to ensure the transparency of the costs to which such services or facilities give rise; whereas, therefore, any changes made to the system or level of airport charges must be explained to airport users;

15. Whereas, at the same time, to enable airports to fulfil their task of managing the facilities and better satisfying users' requirements, the airport's management body must receive sufficient information regarding users' forecasts and objectives concerning the airport;

16. Whereas such changes or investment proposed by the airport must be explained in the framework of consultation procedures between the management bodies and airport users;

17. Whereas the airport's management body must be able to retain control of the management and funding of its facilities;

18. Whereas it is necessary to take appropriate steps to ensure that infringements of Community law carry penalties which are effective, proportionate and dissuasive;

19. Whereas this Directive should not affect the application of the provisions of the Treaty, and in particular Articles 85 to 94 thereof,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Aim and scope

The aim of this Directive is to ensure compliance with the principles of non-discrimination, cost-relatedness and transparency as regards airport charges.

It applies to any airport or airport system located in a territory subject to the provisions of the Treaty and open to commercial traffic. However, Articles 4 to 7 apply only to airports with annual traffic of at least 250 000 passenger movements or 25 000 tonnes of freight.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

1. 'airport` means any land specially developed for the landing, take-off and manoeuvring of aircraft, including any related facilities it may contain for aircraft traffic and service requirements and the facilities needed to accommodate commercial air services;

2. 'management body` means the body which, whether or not in conjunction with other activities, has the task under national laws or regulations of administering and managing the airport facilities and co-ordinating and controlling the activities of the various operators present at the airport or within the airport system concerned;

3. 'intra-Community air service` means any commercial, scheduled or non-scheduled flight between two Community airports;

4. 'airport charges` means the sums collected at an airport for the benefit of the management body and paid by the airport's users ensuring the remuneration of facilities and services which, by their nature, can only be provided by the airport and which are related to handling passengers and freight, landing, lighting, parking of aircraft and, where appropriate, the security of passengers as well as the environmental effects of handling aircraft and passengers, excluding any amounts paid for air navigation or meteorological services;

5. 'airport system` means two or more airports grouped together to serve the same city or conurbation, as defined in Article 2 (m) of Council Regulation (EEC) No 2408/92;

6. 'airport user` means any natural or legal person carrying passengers, mail and/or freight by air from or to the airport concerned.

Article 3

Non-discrimination

Member States shall take the measures necessary to ensure that the same level of airport charges is applied at airports to equivalent intra-Community air services in terms of the aircraft type and/or characteristics, the distance flown and/or the administrative and customs formalities.

Article 4

Cost-relatedness

1. Member States shall ensure that the level of airport charges collected at airports or in the airport systems is set in a reasonable relation to the overall cost of the services and facilities which these charges intended to cover. When determining the level of such costs, particular account shall be taken of:

(a) the cost of financing the facilities, including depreciation in the value of the assets during the period concerned and the financing of any facilities for which the project and the date of commencement of the works have been duly agreed and any administrative permits, where appropriate, have been issued;

(b) the financial charges;

(c) the expenditure on operation and maintenance;

(d) the general administrative charges and various taxes;

(e) a reasonable return on the capital invested.

2. Without prejudice to the application of the competition rules of the Treaty, the airport charges applicable in the major national airport of a Member State can be established at a level which permits the management body, in order to promote economic and social cohesion, to support financially the levels of airport charges in regional airports in the same Member State, on:

(a) this financial support comes from revenue other than the airport charges in the major airport; and/or

(b) this support comes from airport charges, provided that they are established in conformity with paragraph 1; or

(c) otherwise, when the conditions referred to in points (a) and (b) are not fulfilled and when the subsidies granted by public authorities are not sufficient, the regional airports concerned have an annual traffic of less than 300 000 passenger movements or 30 000 tonnes of freight and on condition that the annual traffic of transfer or transit passengers at the major airport represent at least 5 % of the total traffic at that airport.

3. The costs shall be determined using the principles of accounting and evaluation generally accepted in each of the Member States.

Article 5

Modulations

1. By derogation from Article 4, the management bodies may include the external environmental costs due to air traffic and modulate the charges to reflect the requirements in terms of management of the airport facilities or any changes in demand and use of the airport during a given period.

Member States shall ensure that the modulations are not designed to generate additional revenue for the airport.

2. The management body may also, as part of its commercial policy,

(a) take account of all or part of its income that is not derived from airport charges when establishing the total level of its airport charges;

(b) grant discounts in conformity with the provisions of the Treaty.

3. Any modulation in the level of the airport charges shall be applied in a transparent and non-discriminatory manner.

Article 6

Transparency

1. In order to improve the quality of the service provided to airport users, Member States shall ensure that the management bodies provide each airport user with information on the components serving as a basis for determining the level of the airport charges. This information shall include:

(a) a clear list of the various services provided by the airport in return for the airport charge levied; and

(b) the method of calculation used by the management body.

2. The management body shall in particular provide airport users or the associations representing them with information concerning:

(a) the amount of each category of airport charges collected at the airport;

(b) the total number of staff deployed to services which give rise to the collection of airport charges;

(c) forecasts of the situation at the airport as regards airport charges, traffic growth and any proposed investments.

3. Member States shall ensure that airport users submit information to the management body concerning in particular:

(a) forecasts as regards traffic;

(b) forecasts as to the composition of their fleet;

(c) their development projects at the airport;

(d) their requirements at the airport concerned.

Article 7

Consultation

1. Member States shall take the necessary measures to arrange, at each airport, a procedure for consultation between the management body and airport users. The aim is to seek the views of airport users before the decision to modify the system or the level of airport charges is taken. These views do not bind the authority responsible for taking a decision with regard to the airport changes.

Such consultation shall be held at least once a year.

2. Member States shall take the necessary steps to ensure that an airport informs airport users or the organizations representing them of any decision to change the system or level of airport charges at least two months before the change takes effect.

3. Member States shall also ensure that, in the event of disagreement over the decision, airport users are able to request to be consulted a second time.

Article 8

Penalties

Member States shall lay down a system of penalties applicable in the event of infringement of the national provisions transposing this Directive and shall take all necessary steps to ensure their implementation. The penalties shall be effective, proportionate and dissuasive.

Member States shall notify the Commission of those provisions before 1 January 2002 and of any subsequent amendment relating thereto as soon as possible.

Article 9

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to conform with this Directive before 1 January 2002. They shall forthwith inform the Commision thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the text of the essential provisions of domestic law which they adopt in the field covered by this Directive. The Commission shall inform the other Member States thereof.

Article 10

Report and revision

1. The Commission shall submit a report to the European Parliament and the Council on the operation of this Directive before 1 January 2004 as well as, when appropriate, any suitable proposal.

2. Member States and the Commission shall cooperage in the application of this Directive, particularly as regards the collection of information for the report mentioned in paragraph 1.

Article 11

Entry into force

This Directive shall enter into force on the 20th day following that of its publication in the Official Journal of the European Communities.

Article 12

Addressees

This Directive is addressed to the Member States.

APPENDIX III

Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes

List of Airport Systems

DENMARK: Copenhagen - Kastrup/Roskilde

GERMANY: Berlin - Tegel/Schonefeld/Tempelhof

FRANCE:	Paris - Charles de Gaulle/Orly/Le Bourget Lyon - Bron - Satolas
ITALY:	Rome - Fumicino/Ciampino Milan - Linate/Malpensa/Bergamo (Orio al Serio) Venice - Tessera/Treviso
UNITED KINGDOM:	London - Heathrow/Gatwick/Stansted