Beginning of a Redefined Industry: How the European Court of Justice's Decision in the Open Skies Case Could Change the Global Aviation Industry

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INTRODUCTION:

The air transport industry, for all its imperfections and peculiarities, represents perhaps the greatest achievement of technology and organization in the twentieth century—an achievement which should inspire admiration comparable to that of Dr. Samuel Johnson's observation about the dog walking on its hind legs—"Sir, it is not done well; but you are surprised to find it done at all."[1]

Both globalization and the events of September 11, 2001 have forced the airline industry to undergo some drastic changes. However, the industry's biggest change of the last decade occurred with the recent *Open Skies* decision by the European Court of Justice ("ECJ").[2] The purpose of this article is to give an overview of what led up to the ECJ's decision,

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1. Martin Staniland, *Transatlantic Air Transport: Routes to Liberalization*, *in* EUROPEAN POLICY PAPER SERIES 1999, at 1, 1 (Center for West European Studies-European Union Center, No. 6 1999), http://www.ucis.pitt.edu/cwes/papers/poli_series/transatl_air_trans.pdf.

2. Carl O. Lenz & Nina Niejahr, *The European Court of Justice and European Air Transport Law*, 38 J.L. & ECON, at 157 (2003).

the possible creation of the Transatlantic Common Aviation Area ("TCAA"), and where the industry might be heading in the future.

SECTION I: HOW INTERNATIONAL AVIATION REGULATION GOT STARTED

The Chicago Convention of 1944 established the modern international aviation legal structure.[3] The original purpose for the Chicago Convention was to establish a "[m]ultilateral framework for openness, trade, and mutual co-operation [sic]."[4] However, the Convention instead launched "[a] system largely based on individual national interests, embodied in treaties, executive agreements, and other documents collectively referred to as bilateral air services agreements, bilateral air transport agreements, or, just simply, bilaterals."[5]

One thousand delegates from 54 countries attended the Chicago Convention.[6] The negotiations that took place "[c]reated a framework that permitted developing countries to strictly regulate traffic between their territories and other states and to nurture the development of their own national flag carriers."[7] The result was a "[h]ighly regulated system based on bilateral, government-to-government negotiation."[8] The system has come to comprise over 1,500 bilateral, highly detailed, and often contested individual agreements between countries covering mutual traffic rights.[9]

The Convention proposed five "freedoms" of the sky among the signatory nations, ultimately establishing two of them as part of the final charter:

> (1) the right of a nation's airlines to fly over the territory of another nation in order to reach a third; and, (2) the right of a nation's airlines to make technical stops for fuel and maintenance, but not to load or unload passengers or cargo, in another nation while in transit to a third nation."[10]

The three freedoms that were not annexed were:

> (1) the right of one nation's airlines to freely transport cargo and passengers from its home nation to a second nation; (2) the right of one nation's airlines

3. Stephen D. Rynerson, *Everybody Wants to Go to Heaven, but Nobody Wants to Die: the Story of the Transatlantic Common Aviation Area*, 30 DENV. J. INT'L L. & POL'Y 421, 422 (2002).

4. *Id.*

5. *Id.*

6. Daniel Yergin, Richard H.K. Vietor, & Peter C. Evans, *Fettered Flight: Globalization and the Airline Industry*, 2000 Cambridge Energy Research Associates 38.

7. *Id.* at 40.

8. *Id.* at 41.

9. *Id.*

10. Gabriel S. Meyer, *U.S.-China Aviation Relations:Flight Path Toward Open Skies?*, CORNELL INT'L L.J., 427, 432 (2002).

> to freely transport cargo and passengers from a second nation back to its home nation; and (3) the right of one nation's airlines to freely transport cargo and passengers between a second and third nation, also known as a "fifth freedom" or a "beyond right."[11]

These rights were left to individual nations to negotiate with each other on a case-by-case basis.[12]

In 1946, an agreement known as Bermuda I was negotiated between the United States and Great Britain.[13] This restrictive agreement was a reflection of the two predominant air transport issues present at the time; war-torn, government-owed airlines and fear of intense competition from U.S. carriers.[14] The terms of Bermuda I and similar subsequent agreements allowed the airlines of each nation to operate international service to and from designated gateway cities in each country.[15] Although Bermuda I allowed airlines to operate an unlimited number of flights, the agreement left responsibility for fare determination in the hands of the International Air Transport Association.[16] In addition, while the airlines were free to set their own flight schedules, each nation retained the right of ex post facto review of the other airlines' operations.[17]

However, in 1976 Great Britain renounced Bermuda I and negotiated a more restrictive treaty known as Bermuda II.[18] Bermuda I allowed US carriers to fly from Britain to points in Continental Europe.[19] Bermuda II eliminated the "beyond rights," and, in addition, reduced the number of US carriers permitted to fly to London's Heathrow Airport to two.[20] Bermuda II helped enable British Airways' to capture more than sixty percent of U.S. - Britain air passenger traffic by 1997.[21]

In the 1990s, U.S. air carriers were facing economic hardships.[22] Consequently, the established restrictive bilateral agreements were no

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11. *Id.* at 433.
12. *Id.*
13. *Id.*
14. *See generally id.* "The agreement represented a compromise between two sharply opposing views on the regulation of international transport. The United States supported a largely unregulated aviation market; whereas, Britain sought greater governmental control. More, importantly, Bermuda I helped institute acceptance of governmental involvement in the regulation of international air service. . . .British negotiators sought to create a restrictive agreement, which they hoped would allow their nation's war-raveged airline industry an opportunity to recover and grow, rather than suffer in the face of heavy competition from U.S. carriers." *Id.* at 433-34.
15. *Id.* at 434.
16. *Id.*
17. *Id.*
18. *Id.* at 435.
19. *Id.*
20. *Id.*
21. *Id.*
22. Ved P. Nanda, *Substantial Ownership and Control of International Airlines in the United States*, 50 AM. J. COMP. L. 357, 373 (2002).

longer sufficient for the U.S. airline industry.[23] Therefore, "liberal bilateral" agreements called "Open Skies" agreements were opened with the U.S.'s trading partners.[24] The U.S. Department of Transportation concluded that "[t]he Open-Skies program represents a further progression along the path toward a truly open environment for international aviation services, an environment in which all participants. . . .will reap genuine and lasting benefits."[25] It defined "Open Skies" to include the following basic elements:

(1) Open entry on all routes;
(2) Unrestricted capacity and frequency on all routes
(3) Unrestricted route and traffic rights, that is, the right to operate service between any point in the United States and any point in the European country, including no restrictions as to intermediate and beyond points, change of gauge, routing flexibility, coterminalization, or the right to carry Fifth Freedom traffic;
(4) Double-disapproving pricing in Third and Fourth Freedom markets and (1) in intra-EC markets: price matching rights in third country markets, (2) in non intra-EC markets: price leadership in third-country markets to the extent that the Third and Fourth Freedom carriers in those markets have it;
(5) Liberal charter arrangement (the least restrictive charter regulations of the two governments would apply, regardless of the origin of the flight);
(6) Liberal cargo regime (criteria as comprehensive as those defined for the combination carriers);
(7) Conversion and remittance arrangement (carriers would be able to convert earnings and remit in hard currency promptly and without restriction);
(8) Open code-sharing opportunities;
(9) Self-handling provisions (right of carrier to perform/control its airport functions going to support its operations);
(10) Procompetitive provisions on commercial opportunities, user charges, fair competition and intermodal rights; and
(11) Explicit commitment for nondiscriminatory operation of and access for computer reservation system.[26]

These Open-Skies agreements often require the designated national carriers to be owned and controlled by nationals of the countries involved

23. *See generally id.*
24. *Id.* at 374.
25. *Id.*
26. *Id.* at 374-75.

and include prohibitions on carriage by foreign operators.[27] Usually, Open-Skies Agreements are a "[p]recursor to airline partnerships and, more recently, these have been international airline alliances seeking antitrust immunity from the pertinent regulatory authorities."[28] As a result, member carriers "[a]re allowed not only to code-share, fix prices, capacity, and schedules, and take joint action on routes, but also to share revenues and costs, as well."[29] On November 5, 2002, the ECJ released judgments on these Open Skies.[30]

SECTION II: OPEN SKIES CASE AND ITS IMPACT

A: WHAT IS THE ECJ

The ECJ was created by the six founding Member States of the European Communities in 1952 and was put in place to enforce the uniform Community law against individual defaulting Member States.[31] The Court is currently comprised of 15 judges and 8 advocates general.[32] The Member States, by common accord, appoint the judges and advocates general.[33] The appointees are chosen from jurists who are "[o]f recognized competence" and "[w]hose independence is beyond doubt."[34]

As a guiding principle, "[T]he judges must ensure that Community law is not interpreted and applied differently in each Member State, that as a shared legal system it remains a Community system and that it is always identical for all circumstances."[35] The Court of Justice, in order to fulfill that role, "[h]as jurisdiction to hear disputes to which the Member States, the Community institutions, undertakings and individuals may be parties."[36]

B: BODY OF PRECEDENCE

The European Commission, since 1979, has tried to "[o]btain a mandate from the Council to open Community negotiations with third countries on behalf of the EU and its Member States."[37] The Commission urged EU Member States not to enter into new air transport agreements

27. Moritz Ferdinand Scharpenseel, *Consequences of E.U. Airline Deregulation in the Context of the Global Aviation Market*, 22 NW. J. INT'L L. & BUS. 91, 110 (2001).

28. Nanda, *supra* note 22, at 376.

29. *Id.*

30. Lenz & Niejahr, *supra* note 2 at 157.

31. European Court of Justice, *The European Court of Justice and Case Law* (December 6, 2003), *available at* http://www.eurolegal.org/yurp/ecj.htm.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Frederik Sørensen, Wilko Van Weert & Angela Cheng-Jui Lu, *ECJ Ruling on Open*

with the U.S. in 1992.[38]

In order to guarantee equal opportunities for Community carriers and improve access to the U.S. domestic market, in 1995 the Commission proposed to the Council to open Community negotiations with the U.S.[39] In June of 1996, a limited mandate to this effect was secured by the Commission.[40] Negotiations between the Commission and the U.S. then commenced.[41] However, the U.S. requested that market access had to be included in a negotiable package and that a partial agreement was unacceptable.[42]

The Commission determined that the long run situation was not sustainable.[43] The Commission's view was that without an agreement between the Community and the U.S., the internal market would be fragmented.[44] In addition, the Community considered the Open Skies agreements with the individual Member States an infringement on Community laws and principles.[45] In 1998, the Commission took legal action under Article 226 of the European Community Treaty "[a]gainst several Member States that signed Open Skies Agreements with the U.S. and against the United Kingdom with respect to the ownership and control clause in its bilateral agreement with the U.S."[46]

Skies Agreements v. Future International Air Transport, AIR & SPACE LAW, Vol. XXVIII/1, 6 (Feb. 2003).

38. *Id.*

39. *Id.* at 7.

40. *Id.* (The Commission was granted the right to carry out negotiations on behalf of the Community. "The mandate only allowed the Commission, assisted by a special committee appointed by the Council, to negotiate on soft rights e.g. ground-handling at airports, service, maintenance, computer reservation systems, code-sharing, ownership and control of air carriers, dispute resolution, leasing, environmental issues, competition issues, transitional measures. The Council explicitly excluded from the mandate negotiations regarding market access (i.e. traffic rights), capacity, carrier designation and pricing.") *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* ("In October 1999, the Netherlands, which had also signed the same type of agreement with the US, joined the action in support of the other Member States. In addition, the Commission has since started the procedure against the Netherlands, France, Italy and Portugal, all of which have concluded limited scope Open Skies agreements or regular Open Skies agreements with the US in recent years. However, the Commission has not yet submitted these latter cases to the Court.") *Id.*(article 226 provides: "1. If, during the transitional period, difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, a Member State may apply for authorisation [sic] to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the common market. 2. On application by the State concerned, the Commission shall, by emergency procedure, determine without delay the protective measures which it considers necessary, specifying the circumstances and the manner in which they are to be put into effect. 3. The measures authorised [sic] under paragraph 2 may involve

C. The Open Skies Case

The European Commission referred the Open Skies Agreements between the U.S. and the individual states to the ECJ as a violation of Community law because the agreements affect the internal market and would seriously prejudice possibilities to create an equitable US-European air transport regime.[47] The ECJ was asked by the Commission to decide:

(1) whether the Community had exclusive competence to negotiate and conclude open skies agreements with the U.S. and, if so, to what extent;
(2) whether designation clauses violated the freedom of establishment enshrined in Article 43 EC (previously Article 52 of the Treaty). These so-called "ownership and control clauses" or "nationality clauses" are typically included in air services agreements and provide in principle that a party can only designate airlines that are substantially owned and/or effectively controlled by that party or by nationals of that party.[48]

The Court:

> reaffirmed prior judgments according to which the Community acquires exclusive external competence in the areas covered by its internal legislative acts where those have achieved complete harmonization, if and when these internal rules could be affected by Member States negotiating with third countries or if the internal rules include provisions governing external aspects.[49]

But, the Court reaffirmed its holding of 1995, that the Community did not acquire exclusive competence to negotiate the Open Skies Agree-

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derogations from the rules of this Treaty, to such an extent and for such periods as are strictly necessary in order to attain the objectives referred to in paragraph 1. Priority shall be given to such measures as will least disturb the functioning of the common market.") Treaty Establishing the European Community as Amended by Subsequent Treaties, Article 226 (March 25, 1957), *at* http://www.hri.org/docs/Rome57/Part6.html#Art226.

47. Lenz & Niejahr, *supra* note 2 at 158.

48. *Id.* (article 43 provides: "[w]ithin the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of Establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58 (now 48), under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital." Paul Craig & Gráinne du Búrca, EU Law Text, Cases, And Material 733 (Oxford University Press 1998).

49. *Id.*

ments with the U.S.[50] The Community acquired exclusive competence to enter into commitments with third countries on the following elements:

(1) relating to fares and rates to be charged by third country airlines on routes between Member States, by virtue of the prohibition for third country airlines to practise [sic] price leadership on intra-Community routes;
(2) regarding obligations relating to computer reservation systems ("CRS's"), because the Community's rules relating to CRS's apply, subject to reciprocity, also to nationals of third countries that use or offer for use a CRS in the Community;
(3) regarding slot allocation, since the internal rules for allocation of slots at Community airports apply, subject to reciprocity, to third country airlines. It should be noted that the Court did not find a violation of the Community's external competence by any of the seven Member States that had concluded Open Skies Agreements, as the Commission had failed to substantiate that these agreements included provisions relating to slot allocation.[51]

The Court also held that the ownership and control clauses of the air service agreements, which are typically included in the bilateral agreements, violate the freedom of establishment protected in Article 43 EC.[52]

The Court confirmed that the freedom of establishment obliges Member States to extend to nationals of other Member States the same treatment as that accorded to [its] own nationals, both as regards access to a commercial activity on first establishment and as regards the exercise of that activity. It held that under traditional ownership and control clauses Community airlines established in one Member State, but not substantially owned and/or effectively controlled by that Member State or its nationals may always be excluded from the benefit of the air services agreement with the U.S.[53]

The *Open Skies* judgments adopted new proposals for a Community international air transport policy.[54] The intention of the proposals is to "create a legal framework for handling all bilateral relationships between the Community and third countries in the field of air transport."[55] The proposals call for the granting "[o]f a comprehensive mandate for negotiations of a Community air services agreement with the US" by the Council.[56]

50. *Id.* at 158-59.
51. *Id.* at 159.
52. *Id.*
53. *Id* at 160.
54. *Id.* at 157.
55. *Id.*
56. *Id.* at 160.

As a reaction to the ECJ judgment, the Commission requested EU Member States to denounce the *Open Skies* agreements they had signed.[57] In addition, the Commission asked "Member States to stop making any kind of international commitment in air transport that could be incompatible with Community law."[58]

SECTION III: WHERE THE INDUSTRY GOES FROM THE DECISION

A. OPEN SKIES CASE DECISION IS A LARGE STEP IN CREATING THE TCAA

The decision by the ECJ pushed the airline industry closer to a new realm of existence. For years, members of the European Union have made an argument for the formation of a Transatlantic Common Aviation Area ("TCAA").[59] Additionally, the decision by the Transport Council to pass the responsibility of conducting key air transport negotiations to the European Commission was a step beyond the ECJ judgments.[60]

The European Commission was granted "[a] mandate to begin negotiations on a new transatlantic air agreement" and "[a]greed that the Commission should open negotiations with other foreign states on airline ownership restrictions and that Member States should be permitted to continue bilateral negotiation subject to a degree of Community control."[61] The mandate package agreed upon consists of three different parts:

(1) a Council decision on authorizing the Commission to open negotiations with the United States in the field of air transport.
(2) a Council decision authorizing the Commission to open negotiations with third countries on the replacement of certain provisions in existing bilateral agreements with a Community agreement.
(3) a proposal for a Regulation of the European parliament and of the Council on the negotiation and implementation of air service agreements between member States and third countries.[62]

For the first time, representatives of the U.S. and the EU, the two

57. *See* ECJ Ruling on Open Skies Agreements v. Future International Air Transport, supra note 37 at 11.

58. *Id.*

59. *See generally Towards a Transatlantic Common Aviation Area*, AEA POLICY STATEMENT (Ass'n of European Airlines, Brussels), Sept. 1999 at 1, available at http://www.aviationtoday.com/reports/aeapolicystatement/pdf.

60. Press Release, EU Institutions, New Era for Air Transport: Loyola de Palacio Welcomes the Mandate Given to the European Commission for Negotiating an Open Aviation Area with the US (May 6, 2003), available at http://www.europa.eu/rapid/start/cgi/guesten.ksh.

61. *Id.*

62. *Id.* at 1-2.

largest aviation markets in the world, "[w]ill be able to discuss opening their markets and investment rules directly."[63] The mandate covers issues regarding: "traffic rights, routes, capacity, frequency, slots, fares, application of competition rules, high standards of safety, and aviation security."[64] The ECJ judgments combined with the Commission's mandated authority has moved the TCAA closer to a reality.

B: What is the TCAA

The TCAA, at its core, reflects the EU's goal to "[c]reat[e] a common EU traffic market that can compete against the United States."[65] The TCAA's objective is to replace the fragmented regulatory regime that is currently in place.[66] The current bilateral system is embodied in treaties based on individual national interests.[67] The TCAA would, in theory, replace the individual national interests with a "[s]ystem that on the one hand gives airlines full commercial opportunities on an equal basis and on the other hand ensures that their activities will be governed by a common body of aviation rules avoiding any unnecessary regulation."[68] The primary reason why the EU favors the creation of the TCAA is the greater bargaining power the EU would acquire to negotiate a more favorable air agreement, attaining larger access to the U.S. domestic air transportation market.

The Commission believes "[t]he only way for the EU to achieve a balanced outcome is by pooling the negotiating leverage of all EU Member States and arriving at a joint approach towards [an] external policy in this field."[69] The bilateral agreements, in the view of the Commission, "[g]ave U.S. companies considerable operational opportunities in the European market, without gaining any rights of equal value for European airlines in the United States."[70] The Commission views the EU market of equal size to that of the United States.[71] However, in reality, there are many differences in the air travel markets.

There are many distinctions in the air travel markets of the U.S. and the EU, including things like the structural basis of the market, length of

63. *Id.* at 2.

64. *Id.*

65. Major Stephen M. Shrewsbury, *September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty*, 68 J. Air L. & Com. 115, 144 (2003).

66. *Towards a Transatlantic Common Aviation Area*, *supra* note 60 at 1.

67. Rynerson, *supra* note 3 at 422.

68. *Towards a Transatlantic Common Aviation Area*, *supra* note 60 at 1.

69. Press release, EU Institutions, European Commission Welcomes Court Ruling on "Open Skies"Agreements (Nov. 5, 2002), *available at* http://www.eurunion.org/News/press/2002/200262.htm.

70. Id.

71. Id.

travel, reason for traveling, competition, and demand.[72] The entire European Economic Area is barely forty percent the area of the United States.[73] Europe is thus 2.6 times smaller than the United States, while having 388 million inhabitants versus 267 million inhabitants for the U.S.[74] Therefore, Europe has a much smaller area than that of the United States, its population density is much greater, and the largest share of its population and economic activity is concentrated in a region that represents less than fifteen percent of its total area.[75] As a consequence, most trade and travel occurs between cities that are relatively close to one another, and the distances that must be covered are much shorter than in the United States, especially for business trips.[76] With around fifty percent of the population and economic activity concentrated in a close area, competition by other means of transportation is high.

There is a split among three modes of transportation: road, rail, and air, with the selection between these modes determined by the distance traveled.[77] As one comparison, over fifty percent of trips of distances up to 700 km are made in Europe by private car or coach. In the U.S., road travel accounts for greater than one-half of trips of distances up to 1,200 km in the U.S.[78] Additionally, air transport accounts for over one-half of trips for distances over 1,200 km in both the United States and Europe.[79] The principle difference between Europe and the United States is the large amount of passenger rail traffic in Europe for distances between 100 and 1,000 km, compared with the U.S., where rail passenger traffic is virtually non-existent.[80] In Europe, the market share of rail transport has risen above that of air transport whenever a high speed train goes into service for distances less than 600 km.[81] Thus, the market share for the airline industry is fragmented due to the growth of rail travel in Europe.

72. *See generally* Jacques Pavaux & Michel Loupias, Air Transport Markets in Europe and the United States a Comparison, Institute of Air Transport, (Inst. of Air Transp.), June 2001, available at http://www.iata.org/NR/ContentConnector/CS2000/Siteinterface/sites/mgr/file/ITA_full_28063.pdf. The Institute of Air Transport released the market study comparing and contrasting the air transport markets in Europe and the United States in June of 2001 for the IATA. The study highlights how Europe and the US are two structurally different economic areas, what the competitive differences are in the two economic regions, the differences in the air travel markets, and includes a geographic, demographic, social, and political analysis.

73. *Id.* at 2.

74. *Id.*

75. Id. at 4.

76. Id.

77. *Id.* at 20.

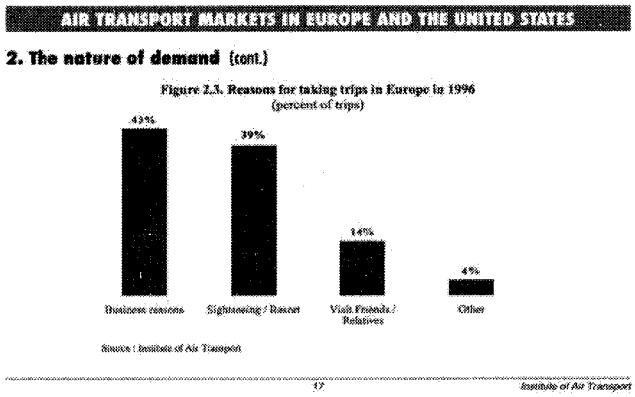
78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 21.

According to the Institute of Air Transport, "[w]ithin Europe, eighty percent of air traffic is performed on stage lengths of less than 1,000 km [compared to]. . .the United States, [where] only fifty-eight percent of air traffic involves stage lengths of less than 1,000 km."[82] The breakdown of why people travel in the EU and US are as follows:



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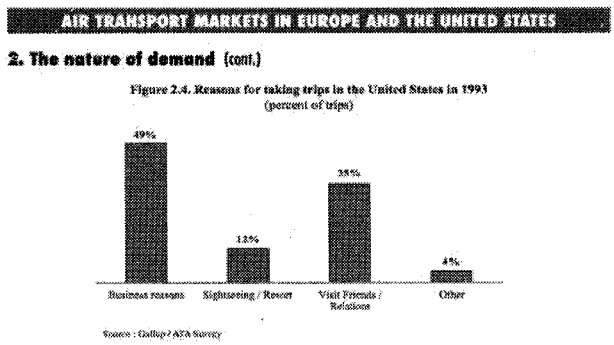

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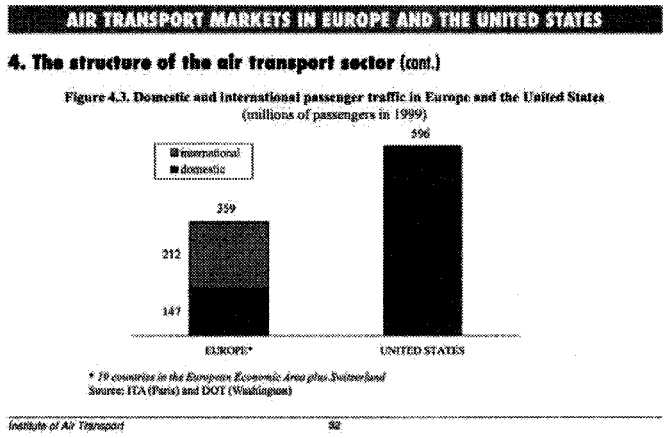
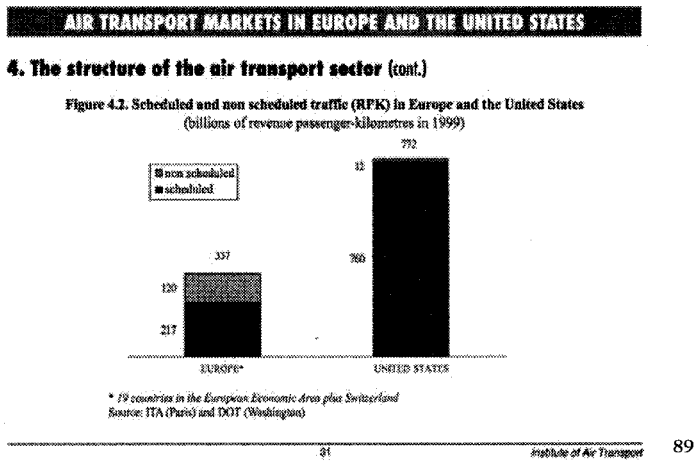
As can be seen, the substantial differences between the two markets are the traveling for sightseeing/resort and visiting friends/relations sectors. The differences in reasons for traveling could have a substantial effect on mode of transportation chosen. In Europe, the air transport industry is more vulnerable to competition from trains than U.S. air transport would be.[85] Creating the TCAA could increase the European airlines profitability due to access to the American market where competition from other modes of transportation is less.

The demand for air travel is greater in the U.S. than in the EU.[86] In 1999, the United States domestic market had a total of 596 million pas-

82. *Id.* at 22.
83. *Id.* at 17.
84. *Id.* at 18.
85. *Id.* at 22.
86. *See generally id.* at 27.

sengers transported. In the same year, the European Union plus Switzerland only transported 359 million passengers.[87]





As the graph shows, the passenger traffic in the domestic market of the U.S. is 1.7 times greater than in the EU.[90] The corresponding graph that indicates revenue is a drastic example of how different the EU and U.S. air transport markets actually are. With the EU gaining greater leverage by creating the TCAA, the EU will incontrovertibly demand access to the U.S. domestic air transport market.

87. *Id.*
88. *Id.* at 32.
89. *Id* at 31.
90. *Id.* at 27.

SECTION IV: CONCLUSION

A. PROSPECTIVE IMPACT ON DOMESTIC EUROPEAN COMPETITION AND U.S. DOMESTIC IMPACT

The impact on the domestic European and domestic U.S. competition is determinative of how the Commission negotiates with the EU Member States. The future of the air transport industry is contingent upon who ends up with the negotiating power for Europe—the individual Member States or the Commission. If the Member States choose to retain the negotiating power left to them after the ECJ decision, the Member States will choose to ratify their current bilateral agreements with the U.S. For the individual Member States, choosing to ratify their bilateral agreements would be wise. These agreements were negotiated by the individual Member States with the U.S. and they are receiving the benefit of what was bargained. If the Member States choose to relinquish negotiating power to the Commission, the risk of the terms of a new agreement not being as favorable would be great. The Commission's interest in negotiating a new bilateral agreement for the entire EU would not specifically take into account the benefits conferred upon the individual Member States as single entities. The Commission's goal in a new bilateral agreement would be for the betterment of the EU, not the Member States as separate entities. Determining the specific impact on competition before a decision on who will have the power to negotiate the bilateral agreements would be nothing short of speculation. However, competitiveness in the domestic EU and domestic U.S. arenas undoubtedly will not remain the same.

B. OVERALL OUTCOME

It seems as if the U.S.'s ability to exclude the American domestic airline industry from direct European competition could come to an end relatively soon. The Associate Deputy Secretary of Transportation, in regards to the recent ECJ decision, declared "[i]t's all about Europe; not about the U.S."[91] However, Europe will not stay confined to the restrictive bilaterals that solely benefit the U.S. if the TCAA materializes and attains as much leverage as it possibly could. Europe unequivocally will want access to the American domestic market when it can use the leverage attained through the TCAA. The U.S. does not want to give the EU access to the American domestic market; hence, the reason the U.S. wants to negotiate with the individual Member States as opposed to the

91. Michael F. Goldman, *Saving Open Skies Agreements in Light of the European Court's Recent Ground-Breaking Decision* at 5-6 (Feb. 2003), *available at* http://www.aci-na.org/docs/ECJ%20Goldman%20article.pdf.

TCAA.[92]

The U.S.'s January 2003 initiative indicated that the U.S. government was prepared to negotiate the Open Skies agreements with the individual Member States to bring them into compliance with the ECJ decision.[93] The terms indicated that the U.S. wants to negotiate with the individual Member States are "[t]he deletion of the intra-EU pricing and CRS provisions and change the nationality clause so that it passes muster under the EU principle of freedom of establishment."[94] Apparently the U.S. decided to negotiate these provisions because:

> -It preserves the existing Open Skies bilateral agreements, the rights that U.S. carriers enjoy under these Agreements, as well as the anti-trust immunity conferred on U.S. carriers for cooperation with their European partners.
>
> -It puts off the need for formal U.S.-EC TCAA-type negotiations.
>
> -The changes are not 'costly' for the U.S. to make since where EU Open Skies bilaterals are involved, U.S. policy already treats fifth freedom like seventh freedom rights, and the U.S. has been liberal in waiving the substantial ownership and effective control requirement (as in the case of Swissair control of Sabena).
>
> -It leaves open the possibility that the U.S. could strike and Open Skies deal with the UK ([if the UK were] to agree to a nationality clause consistent with the EU ['s] right of establishment principle).[95]

If the current Open Skies agreements could be brought into compliance with the ECJ decisions, the U.S. could delay the creation of the TCAA due to the Member States being in conformity.[96] Hence, if the Member States are conforming to the ECJ decisions, the Commission most likely will not get as much deference on the necessity of creating the TCAA with the Member States. However, the animosity towards the Open Skies agreements from certain factions will still exist if the U.S. is capable of bargaining for a reprieve.

Members of the transportation industry have been extremely vocal in voicing their opinions towards the Open Skies agreements. As Richard Branson, the chairman of Virgin Atlantic Airways wrote:

[T]he one-sided U.S. version of open skies is not fair. It retains discrimination against non-U.S. airlines and protects the enormous U.S. domestic market from foreign competition. U.S. open skies are not the way forward. They represent the last gasps of the old, archaic bilateral sys-

92. *See generally id.* at 6.
93. *Id.*
94. *Id.*
95. *Id* at 12.
96. *See generally id.*

tem. We need to move on. . . .This industry is 100 years old, yet still beset by rules and regulations more characteristic of the 19th century than the 21st. It is about time the airline business was treated like the mature industry it clearly is.

We need complete—not partial—deregulation, including the removal of the restrictive ownership and control rules that have stopped me from setting up an airline in the U.S., denying U.S. consumers the benefits of increased competition. And let me be clear: With a change in U.S. law, Virgin America would become a reality. It never ceases to amaze me that in almost any other line of business, I can launch new companies with very few restrictions. But if I say want to establish a U.S. airline, based in the U.S. and employing U.S. staff, everyone throws their arms up in dismay. Yet few would deny that the U.S. airline industry needs more competition and investment.[97]

Pressure to create the TCAA and open the U.S. domestic air transport market will continue to mount. The decisions by the ECJ and the Commission are steps in an ever increasing movement to liberalize the air transport industry. Most likely sooner than later, the air transport industry will manifest into a truly global industry and the realization of the TCAA will occur.

97. Richard Branson, *Fair Competition: A True Revolution In Flight*, Dec. 6, 2003, *available at* www.aviationnow.com/content/ncof/view_28.htm.