The Integration of Aviation Law in the EC: Teleological Jurisprudence and the European Court of Justice

DAVID MAZZARELLA*

TABLE OF CONTENTS

PART I INTRODUCTION 354
Background 354
PART II CASES AND EVENTS 356
The French Merchant Seamen Case 356
The Belgian Railways Case 358
The Commission's Response 360
Re: Olympic Airways AE 360
The Transport Policy Decision 361
Nouvelles Frontières 363
Le Coup De Grâce 366
The Council Acts 366
PART III THEORETICAL ANALYSIS 367
Ultra Vires Jurisprudence 367
Teleology and Covert Activism 368
The Supranational Engine (of Integration) 370
PART IV SUMMARY AND CONCLUSIONS 371

* Juris Doctor Candidate, University of Denver, College of Law.

I. INTRODUCTION

There are currently twelve members in the European Community.[1] More are knocking on the door.[2] As the Member States become more integrated, the EC sets a striking example as the most effective trade bloc and the first operative supranational government.[3] One of the most important and least understood institutions in the EC is the Court of Justice of the European Community.[4]

This paper focuses on the role that the Court plays within the institutional framework of the European Community. This study demonstrates the Court's effect on integration by analyzing a line of decisions that led to EC governance of air transportation.

BACKGROUND

International aviation law is characterized by countless bilateral agreements that allow exceptions to the Chicago Convention's mandate of complete national sovereignty over airspace. Almost every major EC carrier is government owned or subsidized.[5] In negotiating bilateral agreements, governments make arrangements to protect their carriers from normal market conditions. There are a number of reasons why EC Member States prefer protection instead of liberalization which the application of EC law entails.

National airlines, know as "flag carriers", are used to serve a variety

1. European Community hereinafter referred to as EC and Community. The 12 nations are Belgium, Netherlands, Luxembourg, France, Germany, Italy, (original members); Denmark, Great Britain, Ireland, Spain, Portugal, and Greece. *See generally*, P. KAPTEYN, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES (1989), P. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (1985).

2. The most recent expansion resulted from the reunification of Germany. East European countries such as Hungary also want in. It is doubtful that they would be given full membership at this time due to their economic woes. Membership would almost certainly beget a transfer of populations from Eastern to Western Europe, and a transfer of EC development funding away from the Mediterranean Member States. Turkey has been kept out for the same reasons, although it does have an associative membership. This probably is the most likely solution for Eastern European countries at this time. Most likely candidates presently are the EFTA countries. With the thawing of the cold war, neutrality has become moot. This helped lead to the recent free trade agreement between the EC and EFTA which expanded the common market significantly. Austria appears to be on deck for full membership. Norway was slated to join in 1973, but opted out by referendum. They are likely candidates. Instead of joining one by one, it is possible that all of the EFTA nations will join under the same act of accession.

3. For a view that an EC-type community is the solution to problems in the Middle East *see* Cobban, *The Surest Way to Middle East Peace*, CHRISTIAN SCIENCE MONITOR Dec. 5, 1991, p. 19.

4. Hereinafter referred to as the European Court of Justice, ECJ, Court of Justice, and the Court.

5. The most notable exception is British Airways.

of state interests such as foreign policy,[6] economic policy, social policy,[7] national prestige, and national defense. The political exchanges that make up the myriad of bilateral agreements among the EC states, and between EC states and non-EC states, are unlikely to be readily denominated into a common EC policy. More importantly, the EC nations and their flag carriers feared changes that would lead to a move towards a more competitive commercial climate and a system whereby competition laws would apply to airline activities. Governments whose airlines are so important to them are understandably hesitant to yield control to a supranational organization aimed at reducing barriers to competition. The result of this desire to keep air transportation out of the Community legal system is reflected in the treaty establishing the European Economic Community.[8]

Commonly referred to as the Treaty of Rome, the EEC Treaty is one of the broadest multilateral agreements ever signed. The most important institutions called for by the Treaty are the Court of Justice, the Commission, and the Council. The Commission is a pro-federalist institution that consists of seventeen members whose independence is beyond doubt.[9] The Council, on the other hand, consists of partisan representatives from each of the Member States. The Council prefers intergovernmental decision-making over the Commission's vision of federalism. Generally, legislation is entered pursuant to the Treaty by the Council's acceptance of a Commission proposal.[10]

The Treaty has several provisions which are concerned with transportation. Article 3 of the Treaty of Rome sets out the "activities of the Community."[11] One of the eleven stated activities of the European Economic Community is to adopt "a common policy in the sphere of transport."[12] Articles 74-84 specifically relate to the development of the Common Transport Policy. Article 84 is probably a reflection of the hesitancy of the contracting states to alter their complete control of their nation's international aviation industry.[13] Article 84 explicitly states that the transport provisions do not apply to air (and sea) transportation. It goes

6. i.e. Air France flying to former colonies, for political as well as economic reasons.

7. i.e. Olympic Airways forms a unifying social link for the Greeks who are scattered on the islands.

8. Hereinafter referred to as the Treaty of Rome, Treaty, EEC Treaty.

9. Treaty of Rome art. 157.

10. *See generally*, P. KAPTEYN, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES (1989); P. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (1985).

11. Treaty of Rome art. 3.

12. Treaty of Rome art. 3(e).

13. P. Haanappel, *The Future Relations between EEC Institutions and International Organizations Working in the Field of Civil Aviation*, 15 AIR LAW 317 (1990). Haanappel points out that "EEC Governments opposed change, and preferred the maintenance of the status quo. . .."

on to say that the council may decide on measures for air (and sea) transportation if it acts unanimously. Therefore, each contracting state agreed to keep air transport out of EC control, unless they all agreed at a later date to include it in the EC framework. Given the interests of the Member States and the requirement of unanimous action by the Council, it is not surprising that it took thirty years for the Council to adopt regulations for air transportation. What is surprising is that the Council did eventually act. Part II of this paper is a chronological analysis of the line of cases which led to that action.

II. CASES AND EVENTS

THE FRENCH MERCHANT SEAMEN CASE

In 1973, the Court of Justice of the European Communities made its first move in the aviation field. *Re French Merchant Seamen: E.C. Commission v. France*[14] revolved around Article 84 and its provision allowing the Council to determine the extent to which sea and air transport would be regulated by the EC.

The facts are simple. France had a law which favored the hiring of French nationals in the French maritime industry. The Commission brought the claim under Article 169 claiming that France failed to comply with Article 48 which prohibits discrimination on the basis of nationality. Because the Court has implemented very strict standing requirements under certain treaty provisions,[15] France's first argument was that the Commission did not have standing under Article 169 because it had no legal interest in the matter.

The Court was quick to hold that the Commission did not need a legal interest to bring a case under Article 169.[16] The importance of this holding is that the Court has granted the Commission complete standing under Article 169. Since the Commission is a pro-EC institution, the Court, in effect, is encouraging the Commission to bring cases so that the Court can have the opportunity to further EC integration.

The second, and most important, argument that France brought in this case concerned sea transportation. France acknowledged that transportation is one of the areas governed by the Treaty of Rome. Article 3(e) and Articles 74-84 refer to a common transport policy and give the guide-

14. Re French Merchant Seamen: E.C. Commission v. France (Case 167/73), [1974] 2 C.M.L.R. 216.

15. Most notable is the Court's standing requirements for Article 173. Here the Court has disallowed standing for persons, forcing them to take their case to national courts, which can then refer the case to the ECJ for a "preliminary ruling" under Article 177. In this way, the ECJ has positioned itself as a supreme appellate court. *See* Rasmussen, *Why is Article 173 Interpreted against Private Plaintiffs?*, 5 E.L.R. 112 (1980).

16. *Supra* n. 14 at 227.

lines with which it is to be developed. But Article 84(2) leaves it up to the Council to decide the extent and procedure for regulating sea and air transport. France argued that since the Council did not develop any provisions on sea (and air) transport, sea (and air) transport were not subject to the Treaty. The Court held that Article 84(2) only pertained to the provisions relating to the development of a common transport policy (Articles 74-84). The Court went on to hold that sea and air transport are "subject to the general rules of the Treaty."[17]

In order to apply the Treaty to the facts in the case, the Court decided the case as if the Treaty governed transportation generally. The flaw in the Court's analysis is that the Treaty of Rome does not purport to govern transportation in the general sense. Instead, all of the Treaty provisions relating to transportation speak of a common transport policy that falls under the aegis of the Treaty.[18] The Court's sneaky decision violated the Treaty of Rome's provisions on common transport policy and egregiously sidestepped the plain meaning and intent of Article 84(2).[19]

The Court could have limited its holding by stating that the free movement of workers (Articles 48-51) provisions apply to sea and air transport. Instead, it left its holding wide open by making sea and air transport subject to the "general rules" of the treaty.[20] "General rules" could easily be construed to include the Treaty's provisions on Competition, Right of Establishment, and Taxation. The Court used a low-profile maritime case[21] to take a giant step toward bringing sea and air transportation under the Treaty of Rome.

This is not to say that the ECJ was poised to judicially enforce the Treaty in this area right away. It may be an activist Court, but it is also a shrewd one. It knows when to step and how far to walk. If the Court lashed out and applied the competition provisions of the Treaty to aviation, it would probably have been crippled by political criticism from the governments which created it. What the Court did in *French Merchant Seamen* was to send a clear message to the Council that legislation in this area is necessary. The Court let it be known that it was moving toward

17. *Id.* at 229.

18. Treaty of Rome art. 3(3), 61, 74-84.

19. "The Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport." Treaty of Rome art. 84(2).

20. *Supra* n. 14.

21. The decision mentions that France was in the process of changing its discrimination law, but not because it was contrary to EC law. Since the French government was working to change the law, and since the injury claimed was not significant in magnitude, it is likely that the case did not attract a lot of attention. It is interesting to note that the Court used a seemingly insignificant case about maritime affairs to slip in a few words which subjects aviation to the Treaty. This is not Cardozo, but it is equally masterful in its own way.

applying the competition rules of the Treaty to aviation. This would mean that aviation in Europe would be radically liberalized, and in the absence of secondary legislation, governed by the whims of a Court's interpretations of a few ambiguous treaty provisions. This would truly be a nightmare for the protected European carriers. In essence, the Court began to create an environment whereby the Member States (in the Council) would demand a detailed aviation policy.

THE BELGIAN RAILWAYS CASE

The next decision that played a role in the development of EC aviation law was the *Commission of the European Communities v. Kingdom of Belgium*.[22] Unlike *French Merchant Seamen*, this case concerned rail transport which was part of the existing legislation on transportation.[23] The issue was whether Belgium's subsidies to its railroad were in violation of Article 92 which is a general prohibition on state aid to industry.

Article 92 begins with "[s]ave as otherwise provided in this Treaty, any aid granted by a Member State . . . [is] incompatible with the common market." Since Article 92 begins in this fashion, and since Article 77 deals exclusively with aid to transport, Belgium made the highly plausible argument that Article 92 did not apply to the facts at hand. Belgium argued that Article 77 governed the case.[24] Article 77, which is under the Transport Title of the Treaty of Rome, allows for aid if it meets "the needs of coordination of transport" or if it represents reimbursement for obligations taken for "public service". Since Belgium's aid to its railway industry arguably satisfied at least one (probably both) of Article 77's conditions, Belgium's position seemed rock solid. But again, the Court refused to apply the Treaty provision that was on point.

The Court held[25] that "Article 77 of the Treaty . . . cannot be to exempt aid to transport from the general system of the Treaty concerning aid granted by the states and from the controls and procedures laid down therein."[26] In other words, Article 77 does not mean what it says it

22. Case 156/177, E.C. Commission v. Belgium, .C.R. 1881 (1978). E.C. Commission v. Belgium (Case 156/177), [1978] E.C.R. 1881.

23. The Council had already begun to regulate surface transport. Whether the Council's activities in this area were sufficient to constitute a "Common Transport Policy" is addressed in the Transport Policy Decision.

24. *Supra* n. 22 at 1894.

25. This is not the primary holding of the case, according to the way in which the ECJ structured its decision. (Did they put it in a less conspicuous place because it is a controversial and insupportable conclusion?) Regardless of the structure of the Court's analysis, for the purposes of this paper, it is the holding.

26. *Supra* n. 22 at 1894-1895. The Court's rationale is not provided in the decision. ECJ decisions are a unique hybrid of common law and civil law; the Court creates precedent like a

does.[27]

This decision, taken in conjunction with *French Merchant Seamen*, was the writing on the wall for government subsidized airlines. The Court said in *French Merchant Seamen*, that air transport remains "on the same basis as the other modes of transport, subject to the general rules of the Treaty." Since the Court decided, in *Belgian Railways*, that rail transport is subject to Article 92 concerning state aid (despite Article 77), then it follows logically that Article 92 is also applicable to air transport. If that was not enough to provoke the reluctant Council, there was one other ramification that is even more threatening to the protected flag carriers of Europe.

The Court's application of Article 92 (State Aids) to railway transport left no obstacle to the imposition of Articles 85 and 86 on the EC aviation industry. Article 92 comes under the same Treaty Title as Articles 85 and 86 ("Rules on Competition"). The Court said, in *French Merchant Seamen,* that "air transport . . . remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty."[28] Since rail transport was now subject to the Rules on Competition, then arguably, air transportation was also subject to the Rules on Competition. The Rules on Competition (Articles 85 and 86) are the basis of the EC's anti-trust law. Article 85 prevents price fixing that has a detrimental effect on competition.[29] This could be worrisome for European airlines who are accustomed to fixing their prices in the International Air Transport Association.[30]

Article 86 proscribes "any abuse by one or more undertakings of a dominant position. . . ." It is likely that the European carriers are all dominant in at least one market. The abuse of their dominant positions could be in the form of price fixing, capacity limitations in bilateral agreements, discrimination in airport user fees, etc. Since most, if not all, European carriers are implicated in at least one of the above activities, they would have much to fear if the Court generally applied Articles 85 and 86 to their industry. The effect of these two cases was to put the Council in a difficult

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common law court, but its decisions are brief and with few citations. In addition, an Advocate General writes an opinion before the Justices do, much like French judicial procedure.

27. "Aids shall be compatible with this Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of public service." Treaty of Rome art 77.

28. *Supra* n. 22.

29. Treaty of Rome art. 85(1)(a).

30. Dempsey, Aviation Law and Regulation, European Aviation Law, Butterworth (1992). "The International Air Transport Association is composed of more than 100 air carriers, including airlines from all EC Member States except Luxembourg. More than 70% of IATA member rates involve Europe. As one of the most influential airline organizations in the world, the IATA organizes conferences for the coordination of tariffs."

position: it could either adopt a detailed policy for aviation or risk the Court's application of the Treaty of Rome's provisions on competition.

THE COMMISSION'S RESPONSE

After *French Merchant Seamen*, the Commission took an active role in promoting legislation for air transportation.[31] In 1979, the Commission submitted its first proposal to the Council on the regulation of aviation.[32] The proposal, known as *Memorandum 1*, sparked a debate among EC and private organizations.[33] Despite the Commission's efforts, the Council was unable to develop the political will to subject the European carriers to greater competition.[34]

In 1984, amidst a climate characterized by recession and an apparent success with deregulation in the United States, the Commission issued *Memorandum 2*.[35] "This memorandum put together principles and proposals for a common air transport policy in more precise detail than before."[36] It called for less regulation and greater competition on flights between Member States.[37] After issuing the memorandum, the Commission took an extraordinary step to encourage action by the Council.

RE: OLYMPIC AIRWAYS AE

The Commission has the authority under Article 89 to investigate any suspected infringements of Articles 85 and 86. "If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision."[38]

The Commission acted on a complaint that Olympic Airways enjoyed a monopoly in the provision of baggage handling services at Greek airports.[39] The Commission requested business records from Olympic Airways to determine whether it was "abusing" its dominant position.[40]

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31. Dempsey, *Aerial Dogfights Over Europe: The Liberalization of EEC Air Transport*, 53 J. AIR L. & COM. 615, 657 (1988), "The Commission has been the most active and impatient body in the EEC government in pursuit of a transport policy and liberalization of airline regulations."

32. *Id.* at 658; P. HAANAPPEL, EEC AIR TRANSPORT POLICY AND REGULATION, AND THEIR IMPLICATIONS FOR NORTH AMERICA 14 (1989).

33. P. HAANAPPEL, EEC TRANSPORT POLICY AND REGULATION, AND THEIR IMPLICATIONS FOR NORTH AMERICA 14-15 (1989).

34. Ebke, *Liberalizing Scheduled Air Transport Within the European Community: From the First Phase to the Second and Beyond*, 19 DENV. J. INT'L L. & POL'Y 493, 503 (1991).

35. *Supra* n. 33 at 17. *See also* P. DEMPSEY, LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION 100 (1987) and Dempsey, *Aerial Dogfights Over Europe: The Liberalization of EEC Air Transport*, 53 J. AIR L. & COM. 615, 658 (1988).

36. *Supra* n. 33 at 18

37. *Supra* n. 31 at 659.

38. Treaty of Rome, art. 89(2).

39. Re: Olympic Airways AE (85/121/EEC), [1985] 1 C.M.L.R. 730.

40. "Abuse. . .of a dominant position" is the antitrust wording in Article 86.

Olympic Airways refused to relinquish their records, maintaining that Articles 85 and 86 do not apply to air transport.[41] The Commission, in its reasoned decision, stated that "[t]here is no legal basis for claiming, as Olympic Airways claims, that Articles 85 and 86 do not apply to air transport."[42] It went on to justify this statement by citing *French Merchant Seamen* and the *Belgian Railways* cases. This opinion, by the Commission, gave greater strength to the two ECJ decisions. More importantly, it paved the way for the ECJ to apply Articles 85 and 86 to air transport.

THE TRANSPORT POLICY DECISION

The Treaty of Rome's provisions on the establishment of a Common Transport Policy (Articles 74-84) set-up a time frame within which the Council must establish the common policy.[43] The European Parliament became impatient with the Council's inability to develop that policy.

In September of 1982, the Parliament began threatening the Council that it would bring a claim under Article 175 for "failure to act."[44] The parliament remained unsatisfied after a series of communications with the Council. Finally, on January 24, 1983, the European Parliament filed a claim against the Council.[45]

Although Article 84 exempts air transport from being part of the Common Transport Policy (unless the Council decides otherwise), both the Parliament and the Commission[46] argued that the obligation to adopt a common transport policy extended to air (and sea) transport. Thus, the Court had another opportunity to further EC aviation law.

On February 7, 1985, Advocate-General Lenz filed his opinion of the case.[47] He agreed with the Parliament and Commission's view that the Common Transport Policy includes air (and sea) transport.[48] It appeared that the Court was now in a position to rule that the Council was obligated to adopt a common aviation policy.

Before addressing the Court's decision, it is fruitful to point out some differences between the *Transport Policy Decision* and the earlier cases where the Court made an activist move.

The disputes in the *French Merchant Seamen* and *Belgian Railways*

41. *Supra* n. 39 at 731.
42. *Id.* at 732.
43. Treaty of Rome, art. 75.
44. (Case 13/83) European Parliament v. E.C. Council, [1986] 1 C.M.L.R. 138, 141.
45. *Id.* at 192.
46. The Commission was an intervening party in the case.
47. In ECJ judicial procedure, after all of the arguments are presented, an advocate-general drafts on opinion. This opinion is then presented to the justices who draft the opinion of the Court. The justices are not bound by the advocate-general's opinion, they merely use it as an advisory opinion. Both opinions are published in the reporters.
48. *Supra* n. 44 at 170.

cases pertained only to a specific industry in one Member State. The decisions would have ramifications throughout the EC, but the disputes themselves were largely localized. Furthermore, the claims had to do with mild infringements of the treaty by a Member State. In short, they were not the kind of cases that attract a lot of attention. Nor were they the kind of cases whereby one would expect a decision of great significance to EC aviation laws.

On the other hand, the *Transport Policy Decision* was a very high profile case. The Parliament's claim against the Council was the first of its kind. This alone made it stand out. More importantly, the European Parliament demanded that the Council adopt a policy for all Member States in their most important transportation modes: road and rail.[49] On its face, the claim was sure to have far-reaching impacts on the Member States' economies. Governments, industries, and consumers all had a stake in the decision. The press was attracted and all eyes shifted to the Court of Justice.[50]

The Court's decision was very conservative in light of the possibilities available to it. The Court determined that the Council had breached its treaty obligation to "ensure freedom to provide services in the sphere of international transport and to lay down the conditions under which non-resident carriers may operate transport services in a Member State."[51] The Court did not go so far as to say that the Council had an enforceable duty to introduce a Common Transport Policy,[52] nor did it even discuss air transport. Despite its anti-climax, the *Transport Policy Decision* had two significant effects on the development of aviation law.

First, the decision sped up the process of developing a common transport policy for surface transport. It required the Council to introduce legislation on the freedom to provide transportation services within a reasonable period of time.[53] The decision, and the case in general, put transportation at the head of the EC's agenda. The pressure on the Council to take greater steps in transportation certainly gave more strength to calls for an aviation policy.

The second significant effect of the Court's decision on aviation was

49. Inland waterways also come under the Common Transport Policy provisions.

50. For an idea of the extent of the press coverage, *see Transport; Guilty, Every One*, THE ECONOMIST Sept. 11, 1982, p. 58 (U.S. Edition p.46); *Dateline: Strasbourg, France*, REUTERS NORTH EUROPEAN SERVICE Sept. 16, 1982; *Court Officials say Euro Governments Breached Treaty of Rome*, REUTERS NORTH EUROPEAN SERVICE Jan. 23, 1985; *European Court Rules Against Community Member States*, REUTERS NORTH EUROPEAN SERVICE May 22, 1985.

51. *Supra* n. 44 at 206, 208.

52. *Id.* at 139, 203. The Court focused on the absence of measures that would define a common transport policy. The rationale it used is that since the meaning of "common transport policy" is imprecise, it cannot constitute an enforceable duty.

53. *Id.* at 206, 208.

the confirmed availability of an enforcement tool for the Commission and the Parliament. Since the Court gave the European Parliament standing under Article 175 to bring a claim against the Commission for failure to act, the Council could be threatened with a lawsuit if the argument could be made that it was obligated to develop a common aviation policy. In fact, the day after the Court issued its opinion, Transport Commissioner Stanley Clinton Davis threatened to take legal action against the Council for not taking steps to allow greater competition in aviation.[54]

NOUVELLES FRONTIÈRES

On April 30, 1986, the European Court of Justice issued its decision on several joined cases.[55] The combined case, known commonly as *Nouvelles Frontières*, involved criminal prosecution of Air France, British Airways, KLM, Air Lanka and a number of travel agents, most notably Nouvelles Frontières.[56] The defendants were charged by the French Minstere Public with violating the French Civil Aviation Code which requires government approval for all air fares.[57] Each of the defendants had sold tickets under the officially sanctioned rate. As is customary under Article 177 of the EEC Treaty, the French tribunal referred several questions of EC law to the Court of Justice. The airline and travel industries watched closely for what many expected would be a major decision.[58]

The Court's decision is a masterpiece in that it pleased everyone,[59] and at the same time, furthered its agenda of integration. The Court's pronouncement that the Treaty of Rome's Competition provisions (Articles 85 and 86) were applicable to air transportation[60] surprised nobody. The Court and the Commission's activism in this area had started more than ten years prior to the *Nouvelles Frontières* decision.[61] By moving slowly toward this major change in EC aviation law, the Court's pronouncement seemed conservative.

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54. *Commissioner Threatens Legal Action Over Air Fares*, REUTERS NORTH EUROPEAN SERVICE May 24, 1985.

55. (Cases 209-213/84), Ministére Public v. Lucas Asjes, [1986] 3 C.M.L.R. 173.

56. Comment, *Competition and Deregulation: Nouvelles Frontières for the EEC Air Transport Industry?*, 10 FORDHAM INT'L L.J. 808 (1988). Which states that Nouvelles Frontières has been used over one hundred times for illegal discounting. Nouvelles Frontières is France's second largest travel agency and is known for its very low air fares and its impact on the French travel industry.

57. FRENCH CIVIL AVIATION CODE, art. L330-3, R330-9, 330-15.

58. *European Court Rules Air Fair Price Fixing Illegal*, REUTERS NORTH EUROPEAN SERVICE Apr. 30, 1986.

59. *Supra* n. 56 at 823. "Media reaction following the case decision heralded the end of Europe's air cartel and the inauguration of an era of 'open skies'. Others, however, claimed 'nothing had changed'."

60. *Supra* n. 55 at 215.

61. *Supra* n. 14.

The next major issue the Court dealt with was whether Articles 85 and 86 have "direct effect" in air transport, or in other words, whether an EC citizen has rights protected by the Articles. This was very important because direct effect would have allowed immediate enforcement of Articles 85 and 86 in the national courts. The Court held that Articles 85 and 86 do not have direct effect when there are no regulations to further define the requirements of the Articles.[62] Thus, the Member States, who are interested in protecting their airlines, won on this issue.[63] However, the Court did outline two ways that Articles 85 and 86 could be enforced in national courts, even in the absence of secondary legislation.

The Court said that if either "the competent national authorities" or the Commission find that a breach has occurred, then the national courts can act upon complaints against the breaching party.[64] In other words, with a finding by either a Member State or the Commission, direct effect exists with respect to the breach in question.[65]

The basis for this holding is Articles 88 and 89, which allow Member States and the Commission to guard the principles of Articles 85 and 86. Article 88 authorizes the Member States to "rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 85 . . . and of Article 86."

Article 89, as alluded to above in *Olympic Airways*, allows the Commission to investigate suspected infringements of Articles 85 and 86. If an infringement is found, Article 89 only allows the Commission to "propose appropriate measures" and to "authorize Member States to take the measures." Neither Article 88 nor Article 89 mention anything about judicial enforcement, not to mention, judicial enforcement of private claims in national courts. But this is exactly what the Court read into these articles in *Nouvelles Frontières*.

As hinted above, the Court's decision is a strategic masterpiece. It is the equivalent of a sugar-coated poison pill. The Court spent the first part of the decision discussing jurisdictional issues. Then its discussion focused on the applicability of Articles 85 and 86 to air transportation, an

62. *Supra* n. 55 at 219. In a case decided after the adoption of the first liberalization package, the Court gave Articles 85 and 86 direct effect status in the aviation context Case 66/86. Ahmed Saeed Flvereisen and Silver Line Reisebüro v. Zentrale zur Bekampfung unlauteren Wettbrewerbs EV, *reprinted in* 38 ZEITSCHRIFT FÜR LUFT-UND WELTRAUMRECHT [ZLW] 124 (1989). This case is also significant in respect to this article since its holding is consistent with the theoretical perspectives set out in Part III.

63. *Supra* n. 15 for more on direct effect.

64. *Supra* n. 55 at 219.

65. For example, if the Commission determines in a reasoned decision that the European carriers are violating Articles 85 and 86 by fixing air fares in IATA, then passengers can bring antitrust suits against the airlines in the various national courts.

issue which by that time was accepted by the Member States. The Court then came to the smoke screen conclusion that there is no direct effect for Articles 85 and 86 in air transportation absent legislation from the Council. This appeared to be a huge victory for the Member States because Articles 85 and 86 would be unenforceable as long as they did not promulgate any secondary legislation. Then toward the end of the decision the Court said that national courts can apply Article 85[66] if a Member State or the Commission finds a breach of either Article 85 or Article 86. The part about a Member State finding a breach is a red-herring that makes the latter part more palatable. The Member States are not about to declare their airlines in violation of antitrust law. However, the Commission is, and if in fact the Commission does, then *de facto* direct effect exists. Since the Commission did not issue a "reasoned decision" prior to the adjudication, Nouvelles Frontières actually lost the case. Unless you read the fine print, you might think that the Court switched to the protectionist camp.

It follows from the decision that the Commission has the power to determine the situations in which Articles 85 and 86 are to be enforced by the national courts. This was a frightful prospect for the Member States and their protected carriers who wished to maintain the *status quo*. There could hardly be a greater incentive for the Council (Member States) to develop an agreeable aviation policy pursuant to the Treaty's provisions on competition.[67] In a case that drew criticism for being a non-decision,[68]

66. The Court said that national courts could "apply" Article 85(2). Article 85(2) makes agreements and decisions contrary to the Article void. Thus, the enforcement of Article 85(2) by the courts is *de facto* the application of the entire article.

67. P. Haanappel, *The External Aviation Relations of the European Economic Community and of EC member states into the Twenty-First Century*, 14 AIR LAW 69, 75 (1989).

> [T]he decision would constitute an important impetus towards the adoption under Article 87 of regulations implementing the competition rules of Articles 85 and 86 for air transport, since the Court allows national action and Commission action against air tariff agreements and their governmental approval, whereafter such agreements would be null under Article 85(2) of the Treaty. Obviously uniform EEC regulations in this field are preferable to different national actions possible under Article 88 and to Commission infringement procedures under Article 89.

68. *See* Clarke, *New Frontiers in EEC Air Transport Competition*, 8 NW. U.L. REV. 470, 475. (1987), which discusses "the decision's procedural shortcomings" and that "the conflict between Member State interests in nationalized airlines and a deregulated community air transport policy exacerbate the weaknesses in the Community's governing structure and in the Nw Frontiers decision itself. The result is an absence of uniformity and certainty as to what the law actually means." Actually, it's the threat of an absence of uniformity and uncertainty that impels the Council to develop a common policy under the Treaty, thereby strengthening the Community's governing structure. *See also European Court Blocks Bid to Halt Fare Regulation*, AVIATION WEEK AND SPACE TECHNOLOGY p. 34. "[T]he thoroughness with which the Court made this a non-judgment has been a surprise." *See also* Wassenbergh, *The Nouvelles Frontières Case*, AIR LAW 161 (1986). "*The decision* did not bring, however, a clear solution to the question of the *direct* applicability of the competition articles. . .[t]he decision at best inspires the Commission or

the Court surreptitiously took a large step toward free competition which effectively compelled the Council to adopt a common air transport policy.

LE COUP DE GRÂCE

The Commission was quick to act on the power afforded it by the *Nouvelles Frontières* decision. On July 9, 1986, the Commission asked the Member States to restrict the price-fixing activities of their airlines.[69] Later, the Commission sent letters to the airlines warning them to stop their cartel practices or be faced with a "reasoned decision under Article 89", which would open them up to litigation in accordance with *Nouvelles Frontières*.[70]

With this threat, the Commission was able to get all of the airlines around the bargaining table.[71] Despite the Treaty's authorization for the Council to develop air transport policy, the Commission used its *Nouvelles* power to create guidelines that could only be breached at the risk of legal action.[72]

THE COUNCIL ACTS

In June 1987, the Council of Ministers came very close to adopting a liberalization package on air transportation.[73] All Member States were in agreement, except Spain.[74] Since Article 84(2) of the Treaty of Rome demanded unanimity, the Council was still unable to adopt the proposals. But this lack of unanimity did not matter for long.

On July 1, 1987, the Single European Act (SEA) went into effect.[75] In addition to targeting December 31, 1992 for the completion of the Common Market, the SEA also changed the Council's voting procedure from unanimous to qualified majority.[76] As a result of the SEA, Article 84(2) now only requires a qualified majority instead of a unanimous vote.[77]

Finally, in December 1987, the Council adopted the First Package of

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member states individually to establish what they consider as violations of the competition rules. . .."

69. Clarke, *New Frontiers in EEC Air Transport Competition*, 8 NW. U.L. REV. 470 (1987).

70. *Id.*; *Supra* n. 30 at 47.

71. *Supra* n. 30 at 48.

72. *Supra* n. 31 at 671-672.

73. *Id.*

74. The Spanish veto was due to their dispute with Great Britain over Gibraltar. Gibraltar has an airport which would have been subject to the EC legislation as a British airport. Apparently, the disagreement centered on whether the airport lies in Spain or in the area of Gibraltar ceded to Great Britain in 1713 by the Treaty of Utrecht. *See supra* n. 33 at 20.

75. *See generally* P. KAPTEYN, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES (1989).

76. *Supra* n. 30 at 54-55.

77. *Supra* n. 67 at 72.

Liberalization for air transportation.[78] It took thirty years since the signing of the Treaty of Rome for the EC to have a common air transport policy. The legislation sets forth a uniform policy on setting prices, access to markets, capacity sharing, and other matters that create a unified and relatively complete legal regime for international aviation in the EC.[79]

III. THEORETICAL ANALYSIS

ULTRA VIRES JURISPRUDENCE

The line of cases analyzed in Part II raise several issues of significance concerning the development of law in the EC. One of the most notable aspects of the decisions is the Court's lack of respect for the plain meaning and intent of various provisions in the Treaty of Rome. Activism of this sort is not envisioned in the Treaty. The Treaty of Rome gives only a brief description of the Court's duty. Article 164 states *in toto* "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." The Court is *not* given a mandate to further the goals of the Treaty in an active sense. Absence of a mandate does not preclude it. What does preclude the Court from legitimately taking an active role are the numerous provisions[80] which leave that role to the Member States (Council), and on a more limited basis, the Commission.[81] Thus, the Court, which is actively establishing a constitutional system, operates as if it does not have to answer to its Constitution.[82] In *French Merchant Seamen*, the Court of Justice chose not to decide the case according to Article 84(2) which was clearly on point. In addition,

78. *See, e.g.*, Ebke, *Liberalizing Scheduled Air Transport Within the European Community: From the First Phase to the Second and Beyond*, 19 DENV. J. INT'L L. & POL'Y 510; *supra* n. 33.

79. *Id.*

80. *See, e.g.*, Article 6, "Member states shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty. . .." *See also*, Articles 6, 8, 8B[SEA], 8C[SEA], 27,64, and in particular Article 84(2).

81. This argument relies on the accepted maxim *expressio unius est exclusio alterius*. The task of carrying out the teleological function is divided among other actors. Furthermore, the Court is expressly given the duty to see to it that "the law is observed." Thus, the *expressio unius* argument has two prongs; both of which cast doubt on the legitimacy of the Court's approach.

82. The similarity of the ECJ with the U.S. Supreme Court in its infancy is striking. For example, *see* Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803) and McCulloch v. Maryland 4 Wheat. (17 U.S.) 316 (1819). In McCulloch, Marshall states that the power of the U.S. Constitution comes from the people, not the states who are yielding sovereignty. This view fits squarely with the ECJ's decision-making. Despite legal criticisms of the Court, it has accomplished much for citizens of the EC. If it is the citizenry, and not the Treaty, that the Court must answer to, then the Court has succeeded tremendously. This scenario, however, raises the question of limits on the Court. For an idealistic view that courts should respond to society, tempered with the recognition of the need for checks and balances, *see* M. CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 112-113 (1989).

the Court disregarded the spirit of the Treaty's provisions on transportation to hold that transportation, in a broad sense, is governed by the general rules of the Treaty.

In *Belgian Railways*, the Court refused to respect a treaty article which allows governments to subsidize their transportation industry.[83] Instead, the Court applied a general competition provision to deny Belgium's right to subsidize its railway.

In the *Transport Policy Decision*, the Court back-peddled. While the Court did not distort or ignore treaty provisions to further the integration of transportation, it seems to have twisted the remedy for failure to act in order to avoid compelling the Council to develop a common transport policy.[84]

In *Nouvelles Frontières*, the Court announced that the Rules of Competition would apply to air transportation. Then the Court devised a method by which the Rules could be enforced by every person in the EC through adjudication. This decision was the equivalent of removing Article 84 from the Treaty, and at the same time, rewriting Articles 88 and 89.

TELEOLOGY AND COVERT ACTIVISM

There has been a great deal of theoretical work aimed at describing the Court's jurisprudence. The perspective that is most important to our understanding of the aviation cases is that the Court decides cases to further the broader purposes of the Treaty of Rome.[85] Instead of seeking to objectively apply the positive law, the Court views itself as an actor in the attainment of the Treaty's goals,[86] namely the establishment of the Common Market.[87]

This teleological analysis fits squarely with the decisions that led up

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83. Treaty of Rome, art. 77.

84. The Court found a failure to act, but chose not to interpret the meaning of common transport policy, and therefore, did not compel the council. *See generally* Part II of this article.

85. A significant number of authors have addressed the merits of applying teleological analysis to the ECJ. *See, e.g.*, Chevallier, 1 C.M.L. REV. 21-35 (1964), and BREDIMAS, METHODS OF INTERPRETATION AND COMMUNITY LAW (1978).

86. *See* art. 1, 2 and 3 for the ultimate purposes of the EEC.

87. To get a better perspective on the Court's agenda, it is insightful to read the views of the judges. Judge Ulrich Everling stated that "the Court of Justice strives to balance the fundamental requirements of serving the Common Market with the legitimate need of Member States to adopt rules in the public interest." Everling, *The Court of Justice as a Decision making Authority*, 82 MICH. L. REV. 1305 (1984).

> President of the Court, Judge J. Mertens De Wilmars, states "the Court can be considered as the watchdog of the Common Market, that is, of the establishment of a single integrated market having as far as possible the characteristics of a national internal market. The task of the Court is not only to ensure that its judgments and the interpretation of Community Law do not operate as a barrier to the progress towards economic integration and that the political authorities can continue the way forward *but also to induce, at least to favor, such political development.*" (Emphasis added.) Mer-

to the First Liberalization Package of Air Transport. Clearly, the Common Market would be seriously lacking if transportation were outside of its scope. By disregarding specific Treaty provisions that lead to unfavorable results, the Court is able to pursue its agenda of greater integration. But despite its validity, teleology cannot explain the *Transport Policy Decision*. In that case, the Court passed up its greatest opportunity to bring transportation under the EC umbrella. The Court should have compelled the Council to develop a common transport policy (for surface transportation) according to the requirements of the Treaty, but the Court chose not to.

To understand this, it is necessary to understand that the Court is subject to political constraints. It derives its power from acceptance by the governments and people of the Community. Thus, to protect its power, the Court cannot afford to become disfavored. This avoidance of a negative image explains why the Court affected major changes in aviation law in the *French Merchant Seamen* and *Belgian Railways* cases. These cases were not important on their faces, and not likely to attract attention in aviation circles. By taking big steps in small cases the Court is able to avoid criticism which could erode its power. Thus, the Court prefers covert activism to accomplish its teleological mission most effectively.[88]

The *Nouvelles Frontières* Case attracted a fair amount of attention and was expected to be the definitive decision on aviation. The Court decided the case so that *Nouvelles Frontières* would lose the battle and the Member States would win on the smoke screen issue of direct effect. But the Court made it so that in the future, the full force of the Rules of Competition could be hurled upon the airlines at the whim of the Commission.

The *Transport Policy Decision* attracted the most attention of any of the cases. It had ramifications for every aspect of EC economics. Furthermore, since the largest and most important transportation companies in the EC have traditionally been partially or wholly owned by governments, the case also involved important issues of Member State sovereignty. The Court's political acumen steered it clear of conflict by not coercing the Member States to the extent the Treaty calls for. Nevertheless, the decision provided a strong impetus for the adoption of a common transport policy.

Aside from exhibiting the Court's decision-making, these four cases

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tens de Wilmars, *The Court of Justice of the European Communities and Governance in an Economic Crisis*, 82 MICH. L. REV. 177 (1984).

88. For a critical look at the Court's covert activism, *see* H. RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE, Chapter 12 (1986).

also demonstrate the extraordinary role that the Court of Justice plays in the EC polity.

THE SUPRANATIONAL ENGINE (OF INTEGRATION)

The Commission's purpose is to further the goals of the Treaty. In zealous pursuit of this teleological function, the Commission has strived for greater integration on all fronts. The built-in check on the Commission's aspirations is the Council. By not accepting the Commission's proposals, the Council is able to slow the process of integration. With the Court joining the Commission on its teleological mission, the scales have been tipped in favor of further integration. In effect, the balance of legislative power envisioned by the Treaty has been upset by the Court's teleological activism. The aviation line of cases exemplifies this remarkable phenomena. The following is a chronological review of the Court and Commission's activities leading up to the adoption of the First Liberalization Package.[89]

The Commission brings France to the Court in *French Merchant Seamen*. The Court keeps standing open for the Commission to haul in Member States who are suspected of violating the Treaty. The holding furthers the federalist agenda of the two institutions. Most notable for our purposes, the holding allows for the application of the general rules of the Treaty to air transport.

In the *Belgian Raiways* case, the Commission brings Belgium into the Court. The Court applies a competition rule to transportation. The two holdings together make a strong argument for application of the Rules of Competition to aviation. If the Rules of Competition are applicable, then detailed secondary legislation is necessary. The Commission submits its aviation liberalization proposal known as *Memorandum 1* to the Council.

The Commission takes action against Olympic Airways based on the Rules on Competition. The Commission cites *French Merchant Seamen* and *Belgian Railways*. This bolsters the status of those holdings and makes it easier for the Court to apply the Rules on Competition to aviation in the future.

The Commission argues in the *Transport Policy Decision*[90] that the Council is obligated to establish a common transport policy which includes aviation. The Court's Advocate General agrees. The Court confirms the Commissions ability to sue the Council for failure to act. The Council is threatened by Transport Commissioner Davis with suit for failing to take steps to allow greater competition in aviation.

89. For a more detailed analysis of these events, *see* Part II of this article.

90. Although the Parliament filed this claim, the Commission would have had standing had it acted instead. The Commission's arguments were made on intervention.

In *Nouvelles Frontières*, the Court announces that the Rules on Competition apply to aviation. The Court gives the Commission tremendous leverage by allowing the Commission to determine the aspects of the Rules that are to be enforced.

Then, the Commission threatens airlines with enforcement of the Rules unless they abide by the Commission's guidelines. As a result of *Nouvelles Frontières*, the Commission is creating *de facto* legislation and wields its powers of enforcement to ensure compliance.

Finally, the Council capitulates and accepts the First E.C. Aviation Liberalization Package.

What is fascinating is that the Council is composed of the Member States which created the Treaty of Rome.[91] Through the Treaty, the Member States agreed to create the Court and the Commission. They also agreed to reserve for themselves the right to make (and by implication the right not to make) a common air transport policy. The effect of the Court's teleological slant was to remove the Member States' power not to have an air transport policy, the power that the Member States reserved for themselves in Article 84(2).

By using and playing off of one another, the Court and the Commission were able to compel the Member States to establish a detailed air transport policy pursuant to the competition provisions of the Treaty of Rome. This meant liberalization of a government protected, and in many cases, government-owned industry.

IV. SUMMARY AND CONCLUSIONS

This paper has examined the events leading up to the adoption of the First Liberalization Package for aviation in the European Community. In particular, the analysis focused on the role of the European Court of Justice in bringing about the adoption of the Liberalization Package.

The conclusions reached in the analysis suggest that at least with respect to the aviation line of cases the Court does not decide cases according to the positive law of the European Community. Instead, the Court's jurisprudence is guided by its assumption of a teleological function. In the context of this study, the Court exploited its adjudicative authority to bring aviation under the control of EC law despite the contrary intentions of the Member States. In addition, due to an aversion of debilitating criticism, the Court employed covert activism in this line of cases.

Since the Court is effective in furthering integration, it has altered the balance of power between the Council and the Commission. The Court

91. Original signatories of the Treaty were France, West Germany, Italy, Belgium, Netherlands, and Luxembourg. *Supra* n. 1.

and the Commission have enough legal tools so that if they each carry the same purpose, as is witnessed in this study, they are able to take steps which compel the Member States to integrate further. This has tremendous implications not only for the future of aviation in the EC, but for the economic and political future of Europe as a whole.

It is the hope of this author that this paper raises more questions than it answers. The author would like to use his discretion to conclude by addressing a philosophical question.

The analysis of the Court of Justice's jurisprudence which has been offered in the analysis above begs the conclusion that there is something wrong with the Court's tactics. But before one evaluates the Court, one must have a standard of measure. If you feel that a court should apply the positive law as objectively as possible, then you are probably not satisfied with this Court. On the other hand, if you favor the integration of Europe, then the Court becomes your ally.

Perhaps in a democratic society, everyone should be taken into consideration when determining the standard by which a court (and law in general) is to be measured. In short, perhaps the test should be whether the court affects the lives of the citizenry in a way that positively relates to their collective values.[92]

It is the opinion of this writer that the benefits of the Court of Justice's activist furtherance of European integration are consistent with the net societal values of the European Community.

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92. What is meant by "collective values" is better understood by the phrase "net societal position." This is a paridigmatic attempt at determining a society's values from a constructivist perspective. Each has his own position (views) which causes the net societal position to sway in his direction the distance equal to one divided by the total number of members in the society. For a practical example, if two people have opposing values of the same magnitude, then they cancel one another out and effect no change on the net societal position. The paradigm assumes that the societal position is the sum of all its parts.