

# EUROPE'S NO FLY ZONE? RIGHTS, OBLIGATIONS, AND LIBERALIZATION IN PRACTICE<sup>1</sup>

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## Abstract

Market competition has always been a central goal of European integration. The European Commission claims that its competition policy benefits the lives of European Union (EU) citizens. Yet the EU citizen is poorly equipped to engage EU institutions to promote these benefits. As a consumer or tax-payer, the citizen is denied standing to challenge suspect practices. Only as an entrepreneur is an EU citizen capable of mounting legal claims based on EU competition rules. This stymies decentralized private enforcement, limiting efforts to enforce “dormant” treaty provisions or apply innovative European Court of Justice (ECJ) interpretation broadly. Because many economic sectors were originally “exempted” from the rigors of competition within the common market, the exclusion of individuals from legal arenas insulates enterprises and member states from a source of pressure for change, enabling them to reach compromises that privilege the interests of producers over consumers and tax-payers. This chapter explores the intersection of law, politics, and society in the air transport market. Acting on the basis of promising ECJ case law in the 1970s, the European Commission proved incapable of opening air transport to competition. A “consumer” legal challenge with the same goal was rejected by the ECJ. It was only the legal challenges of the European Parliament, entrepreneurs, and major carriers that resulted in the ECJ pressing other EU organizations to take action. Many legal barriers to competition dissolved in the aftermath of the three liberalization “packages” that the Council adopted between 1987 and 1992. But, global economic pressures, restrictive international agreements, and ongoing discriminatory access to airport infrastructure and services have limited the achievements of the Single Market in this field. The degree of competition that has developed reflect the limits of the law in achieving change and the voices who regularly gain effective access to EU decision-making channels.

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Market competition has been a central goal of economic integration since the founding of the European Economic Community (EEC) through the Treaty of Rome in 1957. Recognition that individual member states would privilege their own enterprises led to the creation of extraordinary supranational competence in this field alone. As a result, the European Commission, European Court of Justice (ECJ), and Court of First Instance formally exercise exclusive authority over competition policy within the European Union (EU). Today, the European Commission claims that its competition policy benefits the daily lives of EU citizens "...whether they be consumers, savers, users of public services, employees or tax-payers..." (European Commission 2000a, 1). Indeed the application of competition rules in the field of telecommunications led to dramatic improvements, liberating captive consumers from the excessive charges and limited service of national telephone operators. And vigilant prosecution of illegitimate state aids has the potential to save tax-payers a fortune.

Yet the EU citizen is remarkably poorly equipped to engage EU institutions in order to promote these potential benefits. As a consumer or tax-payer, the citizen is denied legal access to challenge practices that violate European competition law. Only as an entrepreneur is an EU citizen capable of mounting any legal claims based on EU competition rules. This dramatically limits opportunities for "decentralized private enforcement," widely considered to be a key element in the effectiveness of the EU legal system. It also stymies reform efforts that aim to enforce "dormant" treaty provisions or apply innovative treaty interpretation broadly. This limitation has been important because many sectors of economic activity were originally "exempted" from the rigors of competition within the common market. While the ECJ began to identify many exemptions as incompatible with treaty obligations as early as the 1970s, serious political efforts to liberalize protected sectors did not begin until the 1980s, and some sectors have yet to experience any significant competition. The exclusion of individuals from legal arenas insulates enterprises and member states from a potential source of pressure for change, enabling them to reach compromises with the European Commission that privilege the interests of producers over consumers and tax-payers. This chapter explores the intersection between law, politics, and society in the effort to liberalize the EU air transport market. The dynamics of change parallel those experienced in other fields and illustrate the promise and limits of current institutional arrangements in the EU.

After briefly describing the traditionally protected air transport regime in Europe, the following section identifies legal challenges to restrictions that surfaced during the 1970s and 1980s, traces the evolution of interests in the air transport sector in the 1980s and 1990s, and demonstrates that a shift in political interests was a key component of legal and political pressure for liberalization and institutionalization of the air transport regime at the EU level. Section 2 assesses the extent to which the air transport market has liberalized and realized the potential benefits of competition. Section 3 concludes with an evaluation of the relationship between individual action, institutions, and organizations in this sector and other areas of EU law.

## 1. Flying Low: From the Uncommon Market to a Single Market in Air Transport

Explicitly exempted from the provisions of the common transport policy along with sea transport under Article 80 (84 EEC), scheduled air transport historically constituted a sector characterized by nationally regulated and largely monopolized service. European airlines were traditionally comprised of national flag carriers that were not subject to the discipline of the market. Most airlines had exclusive control over their domestic routes, and the intra-EU market was organized by bilateral agreements between individual member states, which usually strictly limited entry and capacity. Access was granted to a single airline on many international routes, and fares were set primarily by agreement between the airlines (Civil Aviation Authority 1993, 1). The sole exception was chartered air services, which primarily deliver tourists to their destinations as part of holiday packages. Liberalized since the early 1970s, charters account for thirty percent of total European airline output in revenue passenger kilometers (rpks) and fifty percent of the output on international routes within Europe. This gives charters a much higher proportion of the aviation market than in other areas of the world, particularly the US. But, the market has been bifurcated, where scheduled services primarily transported business travelers and charter services primarily transported leisure travelers. As average consumers benefited from charter competition, business travelers paid the high prices associated with protected scheduled service. This divergence was most apparent in the United Kingdom (UK), Germany, and Spain, whose charters account for approximately 75 percent of total European charter output (Civil Aviation Authority 1993, 2-3).<sup>2</sup>

### 1.1 Legal Opportunities and Constraints

In 1974 an ECJ ruling held that general treaty provisions apply to transportation sectors excluded from the common transport policy, implying that competition rules should govern air transport.<sup>3</sup> But early efforts to capitalize on this decision by applying competition rules failed. Between 1975 and 1981, the European Commission made a few attempts to enforce the treaty's competition provisions despite the absence of an implementing regulation for the field of air transport. But after delays in an investigation of excessive fares, uncertainty about the legality of exclusive rights, and the lack of cooperation from member states in response to inquiries, the European Commission refrained from bringing any enforcement actions to court and instead proposed an implementing regulation for the application of competition rules to air transport in 1979. This proposal died in the Council of Ministers, however, and the European Commission allowed air transport to remain bound by restrictive regulations and agreements (Shawcross and Beaumont 2002, IX/50-51, paragraph 47; Balfour 1994, 1026, 1031).

In 1981 Lord Bethell, a Member of the European Parliament (MEP), took up the *individual consumer* interest by suing the European Commission for a failure to take action to establish a common, competitive air transport market. The United Kingdom (UK) was the sole party that intervened on behalf of Lord Bethell, while every national flag carrier except Luxair lined up to support the European Commission. This action on behalf of beleaguered consumers was futile, however, because the ECJ denied standing on the grounds that Lord Bethell merely had a general interest in the air transport

market.<sup>4</sup> Unlike many domestic courts, the ECJ has not yet recognized that “indirect” interests held in common by many are as deserving of judicial protection as the particular, targeted interest to which it reserves standing against EU institutions. Parties gain standing to challenge EU institutions only when they are the “addressee” or “potential addressee” of a specific EU legal measure. Both individual consumers paying high airfares and private airlines trying to offer services suffered in the traditionally protected air transport regime. But only an airline might ever prove that the European Commission had a duty to adopt or reject a particular decision that could bear directly on its interests. This restriction on standing against EU institutions allows enterprises to defend themselves to some degree while it leaves the European citizen at the mercy of the benevolence of the European Commission. And benevolence was certainly not forthcoming in this case, as the European Commission was the only party that asked for its costs to be covered by the loser. Moreover, Lord Bethell fared no better before the English High Court, which also rejected his case on procedural grounds.<sup>5</sup>

In addition to the restrictive rules on standing, the “loser pays” principle that governs the distribution of costs before the ECJ is an important impediment to litigation. Paying one’s own costs is sufficiently challenging for many potential litigants, but the risk of having to pay the winners’ costs as well certainly deters the average citizen from pursuing legal challenges. This risk even deters smaller airlines from seeking legal redress unless they are extremely confident that they will win. This confidence rarely develops in cases where references for preliminary rulings or direct actions before the ECJ or Court of First Instance are at issue because these cases involve long delays, feel very distant to clients and their lawyers, and involve significant uncertainty because complex economic arguments must be presented to generalists who are less predictable than local, familiar judges.<sup>6</sup> Hence, “sponsorship” by a wealthy party, or a willingness to risk significant financial loss, is a critical feature of EU litigation.

## **1.2 Exogenous Changes, the Internal Market, and Shifting Preferences**

As progress stalled in the EU, the United States deregulated its air transport system. Beginning in 1978, the advent of competition among US airlines provided an example of both the promise and perils of liberalization. Deregulation generated a wider choice of services for consumers, contributed to lower fares, and increased efficiency in the industry. Yet it also led to bankruptcies, liquidations, take-overs, and mergers, which along with the development of hub-and-spoke systems of travel, created a much more concentrated industry. After the Conservative victory in 1979, the UK government was among the first member states to promote liberalization (Johnson 1993, 4-5). It privatized its flagship carrier, British Airways (BA) by 1987 and encouraged competition on domestic and international routes. BA became the most profitable of the European flag carriers, and facing competition at home and abroad, became one of the most enthusiastic supporters of liberalization in the EU (Civil Aviation Authority 1993, 5; Staniland 1996, 12). The Netherlands was another early supporter of liberalization, and after the loss of the Dutch East Indies, its flag carrier KLM became more dependent upon transatlantic traffic. Because over fifty percent of KLM’s transatlantic passengers only transited through Amsterdam en route to other European destinations by 1974, KLM was also

interested in liberalization that would improve its access in the intra-EU market (Johnson 1993, 5; Staniland 1996, 15).

While the UK, the Netherlands, and their airlines were among the first to promote liberalization independently of European initiatives, the momentum to create a genuine internal market through the Single European Act (SEA) helped shift the preferences and expectations of other member states and their airlines. As an industry that physically linked the member states, aviation was symbolically important to the Single Market and granting an exception for it could only be expected to generate demands for exemption from a myriad of other sectors as well. The SEA would allow qualified majority voting for most air transport legislation, and with competition emerging within and between the US, UK, and Netherlands, the perception evolved that European liberalization would be necessary and inevitable. Support from Germany emerged after the election of a more pro-liberalization government of Christian and Liberal Democrats in 1982. German charters welcomed the potential for further opportunities to compete in a comprehensively liberalized air transport system, and Lufthansa eventually came on board as the management of Lufthansa decided that the airline could become a viable competitor.<sup>7</sup>

Dolores O'Reilly and Alec Stone Sweet argue that rising levels of intra-EU air traffic and trade spurred the mobilization of consumer organizations that demanded more efficient services in the 1980s (1998, 169-172, 176-78). Consumer interests were best represented and reflected by the UK government, which was accountable to the largest constituency of air transport users in Europe and which had also chosen to empower consumers with an organization funded by the state: the Air Transport Users Council (AUC) (Civil Aviation Authority 1993, 4). Similar to the UK Equal Opportunities Commission (EOC), the AUC is an independent body receiving public funding to investigate complaints and educate consumers about their rights, e.g. by distributing pamphlets in travel agencies. Although the European Commission funded the Brussels-based, transnational Federation of Air Transport Users Representatives in the EC (FATUREC) in 1982, official observers in the European Commission and the member states consider consumer lobbying to have been a relatively insignificant pressure for change at the national and EU level. Consumer organizational activity on the continent was insignificant compared with that in the UK, and it was not the most influential lobby for national governments or the European Commission. References to the consumer interest in liberalization were primarily deployed as a positive public justification for reform.<sup>8</sup>

By contrast, airlines' interests in and prospects under liberalization carried much more political clout. National governments' positions largely conformed with those of their flag carriers, and ministries of transport have actively helped airlines pursue their interests within the European Commission with regard to enforcement of treaty obligations and decisions on abusive dominant positions and state aid.<sup>9</sup> The most important opponents to liberalization included the organized labor forces of national flag carriers, whose favorable job security, wages, and working conditions would be threatened by competitive pressures to cut costs. Many of these dangers materialized in

the wake of liberalization, and organized labor disrupted service with strikes and clashes orchestrated to assail restructuring efforts in 1993 and 1994 (Blyton and Turnbull 1995, 14-15). Yet it was precisely the opportunity to restructure offered by liberalization that had proved compelling to the management of many flag carriers who were confident that their airlines could *become* competitive. As a consensus emerged among national governments that some type of reform would be beneficial, Europeans hoped to promote the benefits of liberalization while avoiding the problems of the US approach with a more gradual transition to a competitive regime.

In addition to setting an example, US deregulation also generated challenges for major European carriers. US airlines' international strategies of expansion led to a dramatic loss of market share on transatlantic routes for nearly all European airlines except British Airways. US gains were substantial in the second and third largest transatlantic markets: US airlines carried 47 percent of passengers to Germany in 1983, almost 50 percent in 1987, and nearly 60 percent by 1993. They carried 52 percent of passengers to France in 1983, 60 percent in 1987, and 67 percent by 1993. The US influx represented a major threat because the North Atlantic is the largest intercontinental air market in the world and accounts for almost half of all long-haul traffic from Europe (Civil Aviation Authority 1994, 3-5). Long-haul routes are particularly important to European airlines because, unlike their US counterparts, Europeans concentrated first on intercontinental, second on European, and third on domestic business. In 1997, approximately 74 percent of the mileage flown by members of the Association of European airlines in scheduled international air transport was on routes beyond Europe. And, although intra-European international passengers outnumbered long-haul traffic for each national airline, 69 percent of these airlines' output measured in rpk is on international routes outside of Europe. Shorter distances between European and domestic destinations expose European airlines to significant competition from railways and roads, which diminish profits. For example, British Airways derives 90 percent of its profits from long-haul routes, relatively low profits from intra-European flights, and nearly none from domestic service (Civil Aviation Authority 1993, 2; Staniland 1999, 8; 1998, 3; 1996, 8). By the 1990s, the US "invasion" altered the preferences of European airlines and member states regarding strategies to adapt to liberalization,<sup>10</sup> which would have important consequences for the degree of competition that would ultimately develop within the EU.

### **1.3 Politics Coincides with the Law to Extend the Single Market to Air Transport**

As political support for liberalization grew, two ECJ decisions reinforced the 1974 case that articulated the legal obligation to apply treaty rules to the transport sector. First, the European Parliament sued the Council of Ministers for failing to adopt a common transport policy in 1985. Unlike Lord Bethell's individual challenge as an air transport consumer, this claim by a formal EU *organization* did achieve standing and the ECJ agreed that the Council had violated its treaty obligations by failing to act in the field of transport. While the ECJ left it to "the Council to determine the aims of and means for implementing a common transport policy," it clearly demanded that the Council was required to extend the freedom to provide services to the transportation sector.<sup>11</sup> Second, *private enterprises* facing criminal prosecution for offering fares that violated the French

Civil Aviation Code successfully convinced the national criminal court hearing their case to make a reference to the ECJ to inquire about the compatibility of the national code with European law. In response, the ECJ ruled in the 1986 “Nouvelles Frontières” case that competition rules certainly did apply to air transport and that any national rules that required the pre-approval of airfares deprived Article 81 (85 EEC) of its effectiveness.<sup>12</sup> Together, these cases made the legal obligation to enable competition in this field explicit, obliging the Council to act to create an appropriate regulatory framework and clearly empowering the European Commission to enforce the competition rules in the treaty.

In the absence of European legislation to govern a liberalized air transport system, national regulation would be vulnerable to prosecution by the European Commission and legal challenges by private parties directly disadvantaged by restrictive practices. Since the European Commission is the investigator, enforcer, and legislator of competition policies under Articles 81 and 82 (85 and 86 EEC); can apply competition policy to state-owned enterprises and private enterprises granted exclusive rights under Article 86 (90 EEC); and approves or rejects state aid to industry under Articles 87-89 (92-94 EEC), vigorous enforcement could subject protected national carriers to the exclusive authority of the supranational EU organizations. The *Nouvelles Frontières* case could also be expected to encourage private airlines, charter companies, and travel agencies to challenge the protections of national regimes before national courts, or as in the French case, simply flaunt national regulations and await legal prosecution with an expectation of escaping punishment. This outcome was very unappealing to member states since it would exclude their control and the piecemeal case-by-case decisions would generate an incomplete and inconsistent legal framework.<sup>13</sup>

As a result, this ECJ case law was important as a source of pressure to facilitate compromise in Council negotiations to create a new EU regulatory framework for air transport. However, political support for liberalization remained crucial to reforms. National governments had been vulnerable to the “shadow of the law” since 1974, and the cases that reinforced this shadow *over a decade later* emerged out of disputes that reflected a growing interest in liberalization. The legal threat became serious, therefore, only because the political will for change was strengthening among those actors who could credibly bring meaningful legal challenges. Organizations, whether governmental, private, or public-interest based, are usually the only actors with the resources to initiate and sustain legal activity that can generate significant pressure for policy change (Conant 2002).

After 1986, the European Commission was indisputably capable of generating legal pressure through its ability to regulate abuses of dominant positions, commercial agreements between undertakings, mergers and acquisitions, state aid, and the application of competition rules to public enterprises or enterprises granted exclusive rights. Yet the European Commission’s actual enforcement activity coincided with or followed the progress of legislative reform in the Council. In the immediate aftermath of *Nouvelles Frontières*, initial infringement proceedings against airlines led nowhere, and outstanding issues were resolved only after the Council ultimately adopted its third package of

regulations to liberalize air transport. No enforcement of Article 81 (85 EEC) took place before approval of all three packages of reform, and a few initial isolated incidents of enforcement of Article 82 and 86 (86 and 90 EEC) occurred between 1988 and 1992, all of which followed at least the Council's first package of liberalizing measures. State aid investigations and decisions began only in 1991, after the Council had approved two packages of reform, and most inquiries ultimately led to the approval of aid as a normal investment measure or necessary assistance in restructuring efforts designed to prepare airlines for competition (Shawcross and Beaumont 2002, IX/52-53, paragraph 49; Balfour 1994, 1035-1041). Enforcement decisions that broadly affected market access and competition were based on the Council's third package of liberalization, not on the European Commission's efforts to apply the treaty itself (European Commission 1993, 1994a and b, 1995).

Although the European Commission regularly does draw attention to its formal powers and threatens or initiates infringement proceedings in order to nudge national governments toward legislative compromises and changes in practices, its use of regulatory authority over competition law has been consistent with the status of political consensus in the Council. Its delayed enforcement activity in air transport is comparable with how it promoted the extension of the Single Market in other traditionally monopolized sectors: while the European Commission opened telecommunications markets with its own directives under Article 86 (90 EEC), it refrained from such *legally justifiable* action in electricity, where liberalization was more politically contentious (Conant 2002).

Due to the narrow range of interests that the ECJ protects, private and public-interest organizations must be able to demonstrate direct interests themselves, or find and support those parties who have a direct interest. In the field of air transport and competition policy more generally, this means that service providers, as opposed to consumers, need to be at the root of legal challenges that demand reform. The specter for these claims emerged as an increasing number of airlines came to see their interests as consistent with liberalization during the 1980s and 1990s. This manifested itself most dramatically when BA, SAS, KLM, Air UK, Euralair, TAT, and British Midland sued the European Commission to annul its approval of a massive state aid to Air France in 1994. Four years later, the Court of First Instance granted a victory to the airlines and annulled Commission Decision 94/653 of 27 July 1994 concerning the capital increase of Air France.<sup>14</sup> This challenge was no ordinary feat: the risk of its costs, long delay, and complex economic argumentation required the support of major airlines with "deep pockets."<sup>15</sup> It benefited from supportive interventions from Denmark, Maersk Air, Norway, Sweden, and the UK. The case also got a hearing in the best possible venue for the challengers because the UK stayed its own challenge before the ECJ so that the airlines would be assured representation in the Court of First Instance, where economic analysis challenging the conclusions of the European Commission, rather than mere procedural irregularity, might be taken into consideration.<sup>16</sup>

Liberalization, and the institutionalization of the air transport regime at the EU level, ultimately proceeded on the basis of three packages of regulations adopted by the



Council of Ministers between the end of 1987 and the summer of 1992. While the first package was approved over a year after *Nouvelles Frontières*, it was only the third package, adopted six years later and in force as of 1 January 1993 that finally granted the freedom to provide services and freedom of establishment to the air transport sector. And, full access to domestic routes was opened to all EU-established airlines first in July 1997, well over a decade after the legal obligation to liberalize was completely explicit (Council of Ministers 1987, 1990, 1992). While many official observers in member states and the European Commission credit ECJ case law with helping to “speed” reforms along, they still attribute the eventual achievement of reform to the evolution of a political consensus among national governments in the Council. The ECJ pressed for change by indicating what was prohibited, but the Council did all of the rule-making about how liberalization would actually proceed. Without the convergence of preferences among member states, no institutionalization of the Single Market in air transport would have emerged.<sup>17</sup> And, rightly so according to officials in the European Commission and the French Directorate General for Civil Aviation: while the former commented that the EU does *not* have a government of judges, the latter expressed thanks that politics drove the process further than judicial decisions because “c’est la démocratie.”<sup>18</sup>

## **2. Legal Freedoms, Network Constraints, and Market Competition**

The implementation of the third package removed the legal obstacles to a free market, enabling competition to develop in air transport. New carriers did enter the market: the number of airlines performing commercially significant scheduled operations increased from 132 to 164 from 1993 to 1998 (Economic and Social Committee 2000, 5). The total number of airlines serving intra-EU cross-border scheduled routes increased by 6 between 1992 and 1995, and by 1994 over a third of all intra-EU journeys were on routes served by three or more airlines. Larger flag carriers took the opportunity to establish airlines based in other countries: BA’s acquisition of TAT in France and *Deutsch BA* in Germany helped bring some competition to these domestic markets. Lufthansa and KLM did the same with *Lauda Air* in Austria and *Air UK*, respectively. Charter airlines started operations in scheduled domestic markets in France, Italy, and Spain, and competition increased significantly in these markets, accompanied in some instances by alleged predatory pricing from the former monopoly flag carrier (European Commission 1996, 2-3; Air Transport Users Council 1995, 10).

This liberalized market has increased the supply of air transport services, improved airline productivity, and led to strong competition in special “promotional” discount fares. However, monopolized operations persist on 64 percent of EU routes due to low demand, productivity among the ten largest EU carriers still trails that of the ten largest US airlines, and business and flexible fares have generally climbed or remained at pre-liberalization levels. The entry of carriers that competed on price for the business market, such as *British Midland* and *Air One* in Italy, did produce a few notable exceptions where business fares fell (European Commission 1998, 3; 1996, 3-4; Economic and Social Committee 2000, 6, 8; Air Transport Users Council 1995, 11-12). Complaints about passenger rights have also surfaced, and the European Commission recognizes that the proliferation of tariffs, over-booking, availability of seats at the most

publicized promotional fares, growth in frequent flyer programs, code-sharing and airline alliances all have made it more difficult for consumers to compare offers. In light of increasing over-booking and delays, the Economic and Social Committee wants the regulation providing for an improved system of compensation for denied boarding and other inconveniences to enter into force and demands that passenger rights be enshrined in the law (Economic and Social Committee 2000a, 7, 10).

Competition continues to be limited in important ways due to the emergence of concentration and cooperation between airlines and inadequate or discriminatory access to airport infrastructure and services such as slots and ground-handling. Many of the airlines' strategic choices about cooperation and ownership are responses to global market pressures and restrictions that international bilateral arrangements impose, regardless of the Single Market achievements within the EU. European airlines made more cross-border alliances and share-holding agreements with non-EU carriers than with EU carriers, with US partners being the prime goal (European Commission 1996, 1-2; Staniland 1996, 17-18). Forming an alliance and code-sharing with US airlines has been a much more promising strategy to expand market access since transatlantic cooperation offers both sides access to extensive "domestic" networks. By contrast, freedom of establishment and freedom to provide services in the Single Market did not provide any opportunities for extra-EU expansion since restrictive bilateral arrangements limit who can fly between countries. For example, even if EU law allows BA to fly from Paris to New York, the US could use BA's "UK nationality" to ban its access to New York from France (European Commission 1998, Economic and Social Committee 2000; Staniland 1998; 1999). The fact that the EU is not recognized as a "nation" in international agreements dramatically limits the utility of the Single Market in air transport for an industry that relies so heavily on long-haul routes and the transatlantic market in particular.

The European Commission has wanted to overcome the dilemmas associated with bilateral arrangements by representing the entire EU in negotiations with the US. Parallel to their airlines' preferences for US partners, however, many national governments have been content to negotiate separate "open-skies" agreements with the US, which allow "national" carriers to fly from any point to any point in each country. The open-skies agreements effectively result in member states and their airlines competing against each other for the best ways to draw transatlantic traffic. What began with the Netherlands and KLM poaching passengers from neighboring areas rapidly spread to other small European states and eventually encompassed Germany as well. Meanwhile, the UK has been particularly resistant to EU level negotiations led by the European Commission because it has historically enjoyed one of the most tightly regulated bilateral agreements with the US and its forty percent share of transatlantic traffic is by far the largest of any member state (Civil Aviation Authority 1994, 1; Economic and Social Committee 2000, 5-7, 9; Staniland 1996, 12, 15-16). The failure of the European Commission to negotiate an EU "open-skies" agreement with the US, combined with its (and the US) tolerance of alliances that are functionally equivalent to mergers, have contributed to substantial concentration of the industry and reduced competition. Martin Staniland argues

we can discern an almost-feudal hierarchy of major and minor European carriers, linked to larger alliance systems. This hierarchy, in fact, resembles (and is linked to) corresponding hierarchies within the US and (increasingly) elsewhere. Through a range of devices, the larger carriers have both created alliances among themselves and have attached the smaller carriers to themselves as “clients” feeding traffic into a set of international hubs. Such a hierarchy is intentionally exclusive in character. It is intended to exclude upstarts such as easyJet and Virgin Express from competing on regional routes (in this case, those within Europe), and to exclude rival alliances from central hubs by starving them of feeder traffic from their international services (1999, 12).

Therefore, forces external to the EU, including US competitive pressures over the North Atlantic and a pre-existing international system of restrictive bilateral agreements, have combined to stymie much of the potential promise of the Single Market in air transport.

Moreover, congested airports and preferential arrangements for slots, ground-handling, and fees that are artifacts of past traffic flows and nationally monopolized services remain as practical obstacles to fair competition. Shortages of slots, which inhibit competition on existing routes and deter the development of new routes, pose serious distributive dilemmas that are not easily resolved through market mechanisms. In a 1998 speech, then Competition Commissioner Karel Van Miert observed, “economic analysis is based on the assumption that there is a market for slots. A market requires buyers and sellers. In congested airports like Heathrow we know the buyers but who are the sellers? ... The likelihood is that slots would be sold and bought only once, for the benefit of the few already dominant carriers” (European Commission 1998, 9). Ongoing scarcity in slots prevents new entrants from competing with established airlines, and existing EU mechanisms of slot allocation remain unsatisfactory (Economic and Social Committee 2000, 7, 9-10; Air Transport Users Council 1995, 14). Furthermore, a steady stream of infringement proceedings has been necessary to root out discriminatory landing fees, taxes, and access to ground-handling services, all of which have advantaged national flag carriers at the expense of new competitors. Included among the enforcement actions is prosecution of the bilateral open-skies agreements individual member states have pursued at EU expense (European Commission 2002, 24-25; 2001, 27, 43-44; 2000b, 42, 56; 2000c, 34-36; 1999, 37, 52-53).

### **3. Conclusion: Individual Action, Institutions, and Organizations in the EU**

This chapter demonstrates that a shift in interests among air transport providers and member states ultimately drove the EU process of air transport liberalization. Acting “alone” in the 1970s, on the basis of the treaty as the core EU institution, the ECJ and European Commission were fundamentally incapable of opening this sector to competition. Individual legal action, articulating the consumer interest, was soundly quashed by the ECJ itself. According to restrictive European institutions on standing, it was only the legal action of EU organizations, entrepreneurs, and eventually major carriers such as BA, KLM, and SAS that gained access to the ECJ. While the European

Parliament had the consumer interest in mind when it sued the Council for a failure to act, it was the shifting interests among enterprises, as private organizations, that generated the prospect of ongoing legal pressure through enforcement by the European Commission, in response to complaints, and potentially the individual legal challenges (or defenses) of private organizations themselves.

Institutions, such as the competition rules enshrined in the treaty, require the support of organizations to bring them to life. And, formal organizations such as the European Commission and ECJ need organizational allies if they are to implement institutions in practice. Member states administer the majority of European law, and national governments are responsive to organized constituencies. Combating the monolithic resistance of economic and other societal organizations in pursuit of a general public interest is a difficult task for any democratically elected government. But challenges to existing practices become possible as organizations emerge that have competing interests relative to the status quo. In this case exogenous regulatory and market forces altered the preferences of private and governmental organizations, which provided the ECJ with disputes that allowed it to clarify institutional requirements in the field of air transport. And, crucially, the emergence of organizational support gave the European Commission the allies it needed to push reforms in the Council of Ministers.

It was only after the European Commission achieved a legislative consensus on liberalization that it pushed hard to enforce access to airport infrastructure and services. The persistence of the European Commission in this enforcement has been critical to efforts to liberalize, due to enterprises' fundamental lack of trust in the likelihood of achieving adequate legal recourse through national courts. Airlines have strongly preferred to complain to their national ministries and the European Commission to resolve problems because they have little confidence in the application of competition law by national courts in general, and particularly in the "foreign" national courts of the member states where they seek market access.<sup>19</sup> This preference is consistent with a general tendency for actors privileged with access to officials to seek negotiated outcomes rather than submit to potentially adverse judicial decisions. But, it also reflects the perceived, and actual, limits to the institutionalization of national courts as "Community" courts, where independent interpretation of EU law varies and references for preliminary rulings are not certain (Conant 2002, 79-94). As liberalization progressed, the European Commission's attention to private organizational interests continued: convinced that the industry needed to consolidate in order to become globally competitive, the European Commission deferred to the interests of airlines in their pursuit of alliances and ownership arrangements that threaten consumer interests in more vigorous competition.

These dynamics between individual action, institutions, and organizations, are not unique to the case of air transport liberalization. The important role of governmental, private, and /or public-interest organizations in mobilizing legal and political pressures to realize EU institutions has been documented in efforts to use the doctrine of mutual recognition to advance the internal market (Alter and Meunier-Aitsahalia 1994), to achieve greater gender equality in the UK (Alter and Vargas 2000), to advance immigrant

rights (Givens and Luedtke 2003), to eliminate nationality discrimination in access to public-sector employment and social welfare benefits, and to liberalize the telecommunications and electricity sectors (Conant 2002). Organizational forms of support have also been necessary features of constitutional “rights revolutions” in a number of liberal democracies (Epp 1998). Because the EU lacks many of the institutions that help average individuals to organize their legal action, such as class actions and legal aid, and has few effective public-interest organizations to assist citizens with European legal claims (Conant 2001), the EU legal system is most often effectively engaged by economic enterprises and, and through national courts, by societal groups that are well-organized domestically or supported by government-sponsored organizations such as the AUC or EOC in the UK. Since societal interest organization and government organizations to support public interests vary substantially across member states and issue areas, effective access to justice varies considerably throughout the EU.

The paucity of EU institutions to support individual action can be partially attributed to the relative “youth” of the EU as a political system. On the positive side, the European Commission has advocated the creation of an EU system of legal aid to assist individuals with cross-border disputes (European Commission 2000d). Dan Kelemen also points to a number of potentially promising avenues for future organizational support (2003). Most actual legal developments, however, have been carefully constructed to limit individual legal access in important ways. For instance, under Article 73 p of the Amsterdam Treaty, only courts of last instance are able to request references for preliminary rulings for measures under Title IV of the EC, which extended ECJ jurisdiction to issues that had been regulated under the previously entirely “intergovernmental” pillar of Justice and Home Affairs. Both the need to appeal through the national judicial hierarchy and the relative disinclination of most courts of last instance to make references create obstacles to individual legal action on issues related to visas, asylum, immigration, and the free movement of persons (Conant 2002, 85, 235). The incorporation of the European Convention on Human rights into British national law reflects a similar dynamic, where the institutional design of the Human Rights Act reduces the impact of judicial protection of individual rights in the UK. Tony Blair’s government abandoned the proposal for a Human Rights Commission that might have dredged up a flood of complaints, it adopted a restrictive “victim” standing test that eliminated the possibility of representative standing for non-governmental organizations, and it abolished civil legal aid for many proceedings. Finally, even successful actions cannot bring relief to litigants since courts have no power to grant remedies and declarations of incompatibility do not “affect the validity, continuing operation, or enforcement of the provision in question, and ... the declaration is not binding on the parties to the case” (Nicol 2001, 246). All of these features significantly reduce the interest and capacity to litigate. If European governments and EU organizations intend to advance the interests of average EU citizens, as opposed to economic and social elites, it is high time they began to democratize access to justice by investing in the institutions and organizations that help make individual legal rights a reality. The formal institutionalization of law, without a corresponding development of organizational support, creates nothing but hollow rights that are meaningless in practice.

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<sup>2</sup> Interviews with an official in the Federal Ministry of Transport, Bonn, 25 January 1996 and Civil Aviation Authority, London, 25 July 1995.

<sup>3</sup> *Commission v France* C-167/73 (1974) *European Court Reports* (E.C.R.) 359; European Commission, Commission Decision 94/290/EC, *Official Journal of the European Communities* L 127 (1994a): 30; European Commission, Commission Decision 95/259/EC, *Official Journal of the European Communities* L-162 (1995): 30.

<sup>4</sup> *Nicholas William, Lord Bethell, v Commission* C-246/81 (1982) E.C.R. 2277.

<sup>5</sup> *Lord Bethell v Sabena* (1983) *Common Market Law Reporter* 1, English High Court.

<sup>6</sup> Interviews with a lawyer representing British airlines, London, 13 July 1995 and an official in the Department of Transport, London, 26 July 1995.

<sup>7</sup> Interviews with an official in the Federal Ministry of Transport, Bonn, 25 January 1996; European Commission Directorate General VII for Transport, Brussels, 13 September 1995; and Civil Aviation Authority, London, 25 July 1995.

<sup>8</sup> Interviews with an official in the European Commission Directorate General IV for Competition, Brussels, 19 September 1995; two officials in the European Commission Directorate General VII for Transport, Brussels, 13 and 26 September 1995; an official in the Federal Ministry of Transport, Bonn, 25



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January 1996; Civil Aviation Authority, London, 25 July 1995; and Department of Transport, London, 26 July 1995.

<sup>9</sup> Interviews with two officials in the European Commission Directorate General VII for Transport, Brussels, 13 and 26 September 1995; an official in the Federal Ministry of Transport, Bonn, 25 January 1996; Civil Aviation Authority, London, 25 July 1995; Department of Transport, London, 26 July 1995.

<sup>10</sup> Interviews with an official in the Federal Ministry of Transport, Bonn, 25 January 1996 and Civil Aviation Authority, London, 25 July 1995.

<sup>11</sup> *European Parliament v Council* C-13/85 (1985) E.C.R. 1513.

<sup>12</sup> *Ministère Public v Lucas Asjes and Others* C-209-213/84 (1986) E.C.R. 1425.

<sup>13</sup> Interviews with two officials in the European Commission Directorate General VII for Transport, Brussels, 13 and 26 September 1995.

<sup>14</sup> *British Airways et al v Commission* T-371 and 394/94 (1998) E.C.R. II-2405.

<sup>15</sup> Interview with a lawyer representing British airlines, London, 13 July 1995.

<sup>16</sup> Interview with an official in the Department of Transport, London, 26 July 1995.

<sup>17</sup> Interviews with officials in the European Commission Directorate General IV for Competition, Brussels, 19 September 1995; European Commission Directorate General VII for Transport, Brussels, 13 and 26 September 1995; French Directorate General for Civil Aviation, Paris, 23 February 1996; Federal Ministry of Transport, Bonn, 25 January 1996; Civil Aviation Authority, London, 25 July 1995; Department of Transport, London, 26 July 1995.

<sup>18</sup> Interviews with an official in the European Commission Directorate General IV for Competition, Brussels, 19 September 1995 and French Directorate General for Civil Aviation, Paris, 23 February 1996.

<sup>19</sup> Interviews with a lawyer representing British airlines, London, 13 July 1995 and an official in the Department of Transport, London, 26 July 1995.