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EC AIR TRANSPORT REGULATION AND THE CHICAGO CONVENTION

– *a study of possible violations* –

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LIST OF ABBREVIATIONS

AASL	Annals of Air and Space Law
AEAP	Association of European Airlines Presidents'
Transit Agreement	1944 International Air Services Transit Agreement
Transport Agreement	1944 International Air Transport Agreement
AJIL	American Journal of International Law
App.	Application
ASL	Air and Space Law
CAA	Civil Aeronautics Authority (UK)
CAB	Civil Aeronautics Board (US)
CMLR	Common Market Law Reports
CMLRev.	Common Market Law Review
Cmnd.	Command (paper)
COM	Commission Communication
Conf.	Conference
Dec.	Decision
Dir.	Directive
Dkt.	Docket (US)
Doc.	Document
Docs.	Documents
DOT	Department of Transportation (US)
e.g.	exempli gratia, for example
EC	European Community
ECAC	The European Civil Aviation Conference
ECB	European Commission Bulletin
ECJ	European Court of Justice
ECR	European Court Reports
ed.	edition, editor
eds.	editors
EEC	European Economic Community
Eng.	English
EPIL	Encyclopedia of International Law
EU	European Union
f.n.	footnote

FAA	Federal Aviation Administration (US)
Fares Regulation	Council Regulation 2409/92
GPS	Global Positioning System (‘Satellite Navigation’)
IATA	International Air Transport Association
ibid.	ibidem
ICAN	International Commission for Air Navigation
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Iss.	Issue
ITA	International Transport Association
JAA	Joint Aviation Authorities
JALC	Journal of Air Law and Commerce
Licencing Regulation	Council Regulation 2407/92
LNTS	League of Nations Treaty Series
LOSC	1982 UN Convention on the Law of the Sea
Market Access Regulation	Council Regulation 2408/92
MJGT	Minnesota Journal of Global trade
MS	Member State(s) of the EC/EU
NILR	Netherlands International Law Review
NJIL	Netherlands Journal of International Law
No.	Number
OECD	Organization for Economic Co-operation and Development
OJ	Official Journal of the European Union
p.	page
para.	paragraph
paras.	paragraphs
PCIJ	Permanent Court of International Justice
pp.	pages
pt.	part
pts.	parts

Publ.	Publication
ref.	reference
Rep.	Reports
Res.	Resolution
Rev.	Revision
RIAA	Reports of International Arbitral Awards
SAS	Scandinavian Airline System
SEA	Single European Act
Ser.	Series
Sess.	Session
Stat.	Statue
Supp.	Supplement
SÖ	Sveriges överenskommelser med främmande makter
TIAS	Treaties and other International Agreements of the United States of America
UN	United Nations
UNTS	United Nations Treaty Series
v.	versus
VCLT	1969 Vienna Convention on the Law of Treaties
vol.	volume
WTO	World Trade Organization
YBILC	Yearbook of the International Law Commission

CHAPTER 1: INTRODUCTION

1.1 GENERAL

In December 1944, representatives of 52 states signed in Chicago the Convention on International Civil Aviation.[1] Today, over 55 years later, the Chicago Convention is still the legal backbone for the regulation of civil aviation worldwide.[2] However, six Chicago Convention member states decided in the late fifties to initiate a grand project of closer economic and political cooperation in Europe when signing the EC Treaty[3] – then known as the EEC Treaty[4] – in March 1957. This cooperation has today resulted in a complete regional liberalization of air transport between the fifteen EC member states. The introduction of new regulatory realities in a regional context exclusively between a few of the Chicago Convention member states represents a legal challenge to the old multilateral system and raises several compatibility issues on the level of both international and EC-law.

1.1.1 A Brief History of Air Law

The Wright Brothers performed the first successful take-off by an engined powered heavier-than-air-aircraft in 1903. When the first international air route was opened only a few years later, the international rules of the air were already forming. During the first decades of the 20th Century, commercial air traffic expanded quickly producing a large number of new legal problems. In order to secure the future of international aviation, these problems had to be solved without further delay. Governments realized this new situation and started to take the issue of regulating the airspace seriously and as a result, the Paris Conference of 1910 was hastily assembled.[5] At the conference it was recognized for the first time that airspace belonged to individual states.[6] Consequently, the result was not an adoption of the 'freedom of the air theory', but rather a recognition of the growing tendency among states in favor of the sovereignty of states in the air space above their territory.[7] The Conference ended without achieving further substantial results due to disagreements over some of the other central issues discussed, but it did

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[1] 1944 Convention on International Civil Aviation, ICAO Doc. 7300/6, 15 UNTS 295 (1945) [hereinafter Chicago Convention].

[2] Truly worldwide, since presently over 185 states are parties to it. See http://www.icao.int.

[3] 1997 Consolidated version of the EC Treaty incorporating the changes made by the Treaty of Amsterdam, OJ No. C340 (1997), at p. 173. The EEC Treaty was renamed through article G.1 MF of the Maastricht Treaty, and will hereinafter be called the EC Treaty.

[4] 1957 Treaty Establishing the European Economic Community, 298 UNTS 11 (1957). Also called the Treaty of Rome [hereinafter EEC Treaty].

[5] B. Cheng, *The Law of International Air Transport* (1962), p. 3.

[6] R.I.R. Abeyratne, *The Air Traffic Rights Debate – A Legal Study,* AASL, Vol. XVIII-I (1993), pp. 3-37, at p. 21.

[7] I.H.Ph. Diederiks-Verschoor, *An Introduction to Air Law* (1997), at p. 2. The concept of airspace sovereignty will be discussed further under section 2.1.2 *infra*.

provide states with the first significant opportunity to exchange views on this new area of law.[8]

The Paris Convention[9], concluded in 1919, was the first influential international legal instrument to enter into force in the domain of international air law. It was ratified by 32 nations and managed to end several controversies by explicitly confirming the above-mentioned principle of aerial sovereignty of states.[10] At the same time, it also established that the skies were open for commercial activities and exchange.[11] In the peacetime between 1919 and 1939, civil aviation continued to expand and soon became a considerable economic factor. A large number of air-related treaties – multilateral as well as regional and bilateral – were concluded during this period.[12] Aware of this development, the growing airline industry prompted states to amend the 1919 Paris Convention. The idea was to apply an 'open ports policy' by further liberalizing some already quite liberal air transport provisions in the Convention.[13] Regrettably, this initiative failed and the freedom of international commercial aviation ended quickly as states refused to give up their newly won rights of sovereignty.[14]

The polarization of opposing views presented here is in many ways a trademark of the regulation of international civil aviation.[15] On the one hand, states are aware of the need for an international regulatory framework in order to promote aviation, but on the other hand, they try to preserve their illiberal rights and economic interests. This rough ground pattern was clear in the beginning of air law and still exists beneath today's system of international air regulations. Consequently, the international regulatory framework governing civil aviation may be characterized as the direct consequence of a balancing between the egotistic interests of states and the common needs of the world community.[16] Twenty-five years later in Chicago, when states decided to meet again to address new legal issues relating to international civil aviation, this balancing of interests was still very much present.

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[8] The conference did however provide for the first bilateral agreement on International air services between France and Germany. See B. Cheng, *Air Law*, EPIL, Vol. 10 (1987), pp. 5-11, at. p. 6.

[9] 1919 Convention Relating to the Regulation of Aerial Navigation, 11 LNTS 173 (1922) [hereinafter Paris Convention].

[10] Paris Convention, article I; See B. Cheng, *supra* note 5, at p. 120.

[11] Paris Convention, articles II, XV-XVIII.

[12] I.H.Ph. Diederiks-Verschoor, *supra* note 7, at p. 6.

[13] P.P.C. Haanappel, *Bilateral Air Transport Agreements*, International Trade Law Journal, Vol. 5 No. 1 (1979), pp. 234-250, at p. 241.

[14] A. Loewenstein, *European Air Law – Towards a New System of International Air Transport* (1991), at p. 18.

[15] *Ibid.*

[16] *Ibid.*

1.1.2 The 1944 Chicago Convention

At the end of 1944, US President Roosevelt invited all the allied powers as well as some neutral governments to assemble in Chicago for a conference on civil aviation.[17] Expectations were high, but due to the very unequal economic bargaining power of the 52 parties involved, the negotiators presented fundamentally different concepts of what their governments desired to achieve at the Conference.[18] Despite the different proposals, there was at least one thing that united most states: they refused to give up the principle of sovereignty over the airspace above their territory.[19] This principle, born in the early years, thus remained the legal standard in international civil aviation. After one month of intensive negotiations, the Chicago Convention was signed. Two other agreements were also signed – with different grades of participation – and were annexed to the Convention: the International Air Services Transit Agreement[20] and the International Air Transport Agreement.[21] At present, over 185 states have ratified or acceded the Chicago Convention, and it is only fair to say that it has maintained the status as one of the most successful multilateral documents ever produced, still growing and constantly adjusted to technological and social progress.[22]

The Chicago Convention is basically a framework Convention.[23] Under this framework, eighteen Annexes provide technical rules in order to implement the articles of the Convention.[24] Several negotiating states wanted one single and harmonized legal and economic regime covering all aspects of international air traffic.[25] However, due to the fundamental differences between states about the content of such a document, the Conference instead decided to elaborate three particular agreements, which the different states were free to join. The Conference had to distinguish between institutional and technical questions on the one hand, and economic and commercial matters on the other hand. The Chicago Convention and the Transit Agreement cover the first two. The other two, being the important economic and commercial rights, were laid down in the Transport Agreement with the intention that it would achieve worldwide acceptance. However, these agreements were quite unevenly accepted among states. The documents providing for institutional and technical matters gained almost global acceptance, whereas the agreement based on freedom of economic competition concepts, aiming at

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[17] B. Cheng, *supra* note 5, at p. 7.

[18] See R.I.R. Abeyratne, *Would Competition in Commercial Aviation Ever Fit into the World Trade Organization*, JALC, Vol. 6 No. 3 (1996) at pp. 793-808.

[19] I.H.Ph. Diederiks-Verschoor, *supra* note 7, at p. 9; B. Cheng, *supra* note 5, at p. 120.

[20] 1944 International Air Services Transit Agreement (The Two Freedoms Agreement), ICAO Doc. 7500, 84 UNTS 389 (1951) [hereinafter Transit Agreement].

[21] 1944 International Air Transport Agreement (The Five Freedoms Agreement), ICAO Doc. App. IV-2187, 171 UNTS 387 (1953) [hereinafter Transport Agreement].

[22] M. Milde, *The Chicago Convention – After Forty Years*, AASL, Vol. IX (1984), pp. 119-131, at p. 121; B. Stockfish, *Opening Closed Skies: The prospects for Further Liberalization of Trade in International Air Transport Services*, JALC, Vol. 57 No. 3 (1992), pp. 599-652, at p. 606.

[23] B. Cheng, *supra* note 5, at p. 63.

[24] See I.H.Ph. Diederiks-Verschoor, *supra* note 7, pp. 10-11, for the contents of the Annexes.

[25] R.I.R. Abeyratne, *supra* note 18, at pp. 795 *et seq.*

multilateral exchange of commercial aviation rights, failed to attract the interest of states.[26] This inadequacy of the Conference to deal with all the important issues of international air transportation left several problems – especially in the economic field – unsettled. The issue of fixing the tariffs for international civil aviation services was instead entrusted in the air carriers of the world. They met in Cuba in 1945 and created a private organization, the IATA to deal with these questions.[27] Other essential issues that the Chicago Convention failed to regulate were the exchange of commercial traffic rights and the control of route access, route capacity and route frequencies. These issues remained controversial and were left open for subsequent bilateral or multilateral regulation. States had to turn to reciprocity as a basis for regulating these issues, and consequently engaged in the exchange of bilateral air transport agreements – usually referred to as 'bilaterals'.

From a legal point of view, the Chicago Convention has two fundamental functions.[28] The first is the progressive codification of public international air law, stipulating rights and duties of states. The second is its function as the constitutional instrument of the International Civil Aviation Organization [hereinafter ICAO], defining its aims and functions. The ICAO is a United Nations Specialized Agency, designed above all to foster the safe and orderly development of international civil aviation, and membership in the organization is nowadays almost universal.[29] Its functions cover most aspects of international civil aviation and its main organs are the plenary Assembly and the permanently represented Council which carry out most functions of the organization with the assistance of various subsidiary organs.[30] The constitutional structure of the organization falls outside the scope of this work and will not be considered further, but as the Convention sets the basic structure carrying the whole system of public international air law, a more thorough presentation of its fundamental principles will be made *infra* under chapter 2.

1.1.3 Towards EC Air Transport Regulation

Back in 1957, several economic and physical barriers existed between the European states – barriers including custom duties, import and export quotas, as well as control over movements of citizens, business and capital.[31] At the same time there was a widespread recognition of the need for an economic and political stabile Europe, and together with the concerns for preserving and strengthening peace, this motivated Europeans to seek a united Europe. The signing of the 1951 ECSC Treaty[32] marked the

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[26] A. Loewenstein, *supra* note 14, at p. 20.

[27] 1945 International Air Transport Association, Articles of Association, adopted in Havana, Cuba (1945) [hereinafter IATA]. The IATA was founded in 1945 as a purely private organization of the scheduled air carriers but has a prior history that dates back to 1919. See I.H.Ph. Diederiks-Verschoor, *supra* note 7, at p. 7.

[28] M. Milde, *supra* note 22, at p. 123.

[29] P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (1997), at p. 200.

[30] B. Cheng, *supra* note 5, at pp. 31-56.

[31] S. Weatherill & P. Beaumont, *EC Law*, 2nd ed. (1995), at pp. 1-2.

[32] 1951 Treaty Establishing the European Coal and Steel Community, 261 UNTS 140 (1951).

first step toward the necessary economic integration, and the success of that pilot project encouraged the formation of the 1957 EEC Treaty[33] and the 1957 EAEC Treaty[34]. Subsequent changes to these constituting instruments began in 1987 with the Single European Act[35], aiming at an accelerated creation of the internal market.[36] The next fundamental amendment was made in 1992, when the European Union was created.[37] This time the changes were quite substantial, and the EEC Treaty was renamed the EC Treaty.[38] Further changes to the EC Treaty were made after the 1997 meeting in Amsterdam.[39] It is important to note that throughout all these revisions of the constituting EC Treaty, the establishment of a common c or internal – market has been one of the most important objectives to be achieved. As for transport, it is quite clear that the efficiency of all modes of transport is an essential ingredient for a fully functioning common market. Transport in general is one of the major industries within the EU, representing more than 10 % of the gross domestic product.[40] Given this size, and the importance of smooth intra EU transportation, full liberalization of all modes of transport will undoubtedly play a fundamental role in the realization of the Common Market.[41] This is of course also valid for air transportation being a truly international transport activity as such. The special characteristics in the economic and geographical structure of Europe can, furthermore, be seen as additional factors pointing even stronger towards the need for integrated EC air transport regulation.[42]

Community objectives for the air transport sector have been achieved largely through a combination of important ECJ judgments concerning the application of primary EC Law and the gradual introduction of secondary air transport legislation. The first obstacle to achieving progress in the field of air transport is the EC Treaty itself. By contrast to all other sectors where the basis of a common policy is established within the EC Treaty, there is no such basis for a common air transport policy.[43] The only occasion on which air transport is specifically mentioned in the EC Treaty is for the purposes of excluding

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[33] 1957 EEC Treaty, *supra* note 4. The EEC Treaty is also called the Treaty of Rome.

[34] 1957 Treaty Establishing the European Atomic Energy Community, 298 UNTS 167 (1957).

[35] 1986 Single European Act, OJ No. L169 (1987), p. 1, 2 CMLR 741 (1987) [hereinafter SEA].

[36] S. Weatherill & P. Beaumont, *supra* note 31, at p. 5.

[37] 1992 Treaty on European Union, OJ No. C191 (1992), p. 1 [hereinafter Maastricht Treaty]. Consolidated version with changes by the Treaty of Amsterdam: OJ No. C340 (1997), at p. 145.

[38] *Supra* note 3. The EEC Treaty was renamed through article G.1 MF of the Maastricht Treaty.

[39] 1997 Treaty of Amsterdam, OJ No. C240 (1997), p. 1 [hereinafter Amsterdam Treaty]. Note that all further references to articles in the EC Treaty will be made according to their revised numbering introduced through the Amsterdam Treaty.

[40] *EU Transport in Figures – Statistical Pocket Book 1998* (Updated 29 January 1999), on the EU Transport in Figures Home Page, http://europa.eu.int/en/comm/dg07/tif.

[41] Commission Communication COM (92) 434, in OJ No. C216 (1993), at p. 15, *Air Transport Relations with Third Countries*.

[42] The size of the market is one such factor, and Europe's geographical situation cannot be more favorable in order to generate, receive or transit air traffic of the world – Europe is a natural axis for international air traffic. A. Loewenstein, *supra* note 14, at p. 50 *et seq*.

[43] B. Adkins, *Air Transport and EC Competition Law* (1994), at p. 3.

it from the general provisions of the treaty. This is stated in article 80(2) of the EC Treaty, specifying that measures on air transport shall be taken as and when the Council so decides with qualified majority and in accordance with the rules of procedure in article 71.[44] The exact meaning of this article was clarified by the ECJ through a series of judgements, beginning with the *French Seamen Case*.[45] From this case it became clear that the exclusion of air transport in article 80(2) does not prevent the application of the "general rules" of the Treaty to that area, unless these general rules contain a specific exception for transport.[46] Later, the ECJ stated in the *Nouvelles Frontiers Case*[47] that air transport was subject to the competition rules in articles 81 and 82, as "part of the general rules" of the EC Treaty.[48] The next important case was the *Saeed Flugreisen Case.*[49] This time, the Court clarified the situation further, declaring that an activity would be prohibited under article 81 only if and when the Council enacted implementing Regulations under this article regarding the concerned activity.[50] It was also held that article 82 was fully applicable to the whole of the air sector without further actions by Community organs.[51] At almost the same time, and after a long period of legislative inactivity, the Council finally decided to address the issue.[52] It was decided that the aerial liberalization would take place under a phasing plan through what became known as 'the three liberalization packages', according to the following plan:

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[44] Before the introduction of the SEA, measures under article 80(2) (at that time article 84(2)), required unanimous voting, making any decision on the subject virtually impossible.

[45] *Commission v. French Republic (French Seamen Case)*, Case 167/73 [1974] ECR 359.

[46] *Ibid.*, at pp. 370-371.

[47] *Ministère Public v. Lucas Asjes et al. (Nouvelles Frontiers Case),* Joined Cases 209-213/84 [1986] ECR 1425.

[48] *Nouvelles Frontiers Case, ibid.,* at p. 1466.

[49] *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs (Ahmed Saeed Case)*, Case 66/86 [1989] ECR 803.

[50] *Ibid.*, at pp. 847.

[51] *Ibid.*, at pp. 848-851.

[52] M.J.B. Swinnen, *An Opportunity for Transatlantic Civil Aviation: From Open Skies to Open Markets?* JALC, Vol. 63 No. 1 (1997), pp. 249-285, at p. 259.

THE THREE EC LIBERALIZATION PACKAGES		
THE FIRST PACKAGE 1987[53]	THE SECOND PACKAGE 1990[54]	THE THIRD PACKAGE 1992[55]
1. Applicability of Competition articles 81 and 82 to the civil aviation sector. 2. Block exemptions of airline cooperation agreements, computer reservation systems, and ground handling agreements. 3. Rules on airfares. 4. Rules on capacity sharing and market access.	1. Amendments to the Regulations in the First Package. 2. New Regulations on air fares, market access, capacity sharing, and block exemptions for fares, capacity and slot access.	1. The Community Air Carrier-licencing Regulation (Licencing Regulation). 2. Regulations for access to intra-Community air routes (Market Access Regulation). 3. New rules on airfares and rates for air services (Fares Regulation).

The first package of 1987 had only limited effects on the air transport regulation but provided for at least some relaxation of the provisions contained in many bilateral agreements between member states that limited the ability of their airlines to compete.[56] The second package of 1990 was, like the first package, intended to be an intermediate step to be revised later. Accelerating measures were the object of the third package of 1992. This package can be seen as a giant leap forward for the liberalization of air transport within the Community and the most important and far-reaching of all three packages. The launch of this package of rules was the final stage in a long process that today has resulted in the virtual completion of the internal air transport market. In conformity with the ambitious goal of a single European aviation market, the Council laid the groundwork for complete freedom of access to routes for Community air carriers within the European Union. The initial effect of the new Market Access Regulation has been limited to traffic between member states, but the Regulation provides for complete freedom, that is *full cabotage*, on domestic flights from April 1st 1997. This means that any Community carrier now has access to any route within the Community. In other words, they enjoy full third, fourth, fifth, sixth, seventh and eight freedom of air rights on intra-Community routes.[57] It should be pointed out that the measures introduced in the three packages exclusively have dealt with internal EC

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[53] Council Regulation 3975/87, OJ No. L374 (1987) at p. 1; Council Regulation 3976/87, OJ No. L374 (1987) at p. 9; Commission Regulation 2671/88, OJ No. L239 (1988) at p. 9; Commission Regulation 2672/88, OJ No. L239 (1988) at p. 13; Commission Regulation 2673/88, OJ No. L239 (1988) at p. 17.

[54] Council Regulation 2342/90, OJ No. L217 (1990) at p. 1; Council Regulation 2343/90, OJ No. L217 (1990) at p. 8; Council Regulation 2344/90, OJ No. L217 at p. 15; Commission Regulation 82/91, OJ No. L10 (1991) at p. 1; Commission Regulation 83/91, OJ No. L10 (1991) at p. 3; Commission Regulation 84/91, OJ No. L10 (1991) at p. 5.

[55] Council Regulation 2407/92, OJ No. L240 (1992) at p. 1 [Hereinafter Licencing Regulation]; Council Regulation 2408/92, OJ No. L240 (1992) at p. 8 [Hereinafter Market Access Regulation]; Council Regulation 2409/92, OJ No. L240 (1992) at p. 15 [Hereinafter Fares Regulation].

[56] See Commission Report COM (89) 476 (1989), *Commission's report on the first package.*

[57] M.B.J. Swinnen, *supra* note 52, at p. 262. These concepts will be defined *infra* in section 2.2.

aviation relations. A more detailed inspection of the EC Regulations of topical interest will be made *infra* under sections 3.3 and 3.4.

1.2 PURPOSE AND DELIMITATION

The primary purpose of this thesis is to investigate whether or not certain aspects of EC air transport regulation violate the traditional legal system under the Chicago Convention. For the purposes of this thesis, the locution "the system under the Chicago Convention" will be used as a synonym for the Chicago Convention and related instruments. As an additional objective, some legal issues regarding the continuing use of bilateral air transport agreements between EC member states and non-member states will be considered. This compatibility test necessarily involves several interesting juridical aspects. From an international law point of view the relevant rules governing the situation in relation to the EC member states and other Chicago Convention member states can be found in the 1969 VCLT[58] rules concerning successive treaties, i.e. article 30, and the rules concerning modifications to multilateral treaties between some of the parties only, i.e. article 41. From an EC-law point of view, the relevant rules are primarily found in article 307 (former article 234) of the EC Treaty governing the position of old agreements between member states and non-member states in the EC legal order.

The temporal element is also important when performing a compatibility assessment between treaties. The basic problem is that contracting states often amend their treaties, and, within complex treaty regimes such as the EC, the shape and contents of the cooperation are constantly modified through subsequent secondary legislation. The result is that treaties will include different material substance depending on when the compatibility assessment is performed. This will of course affect the outcome of the evaluation. The problem might be best understood by giving an example. When assessing if secondary EC legislation in the field of air transport adopted in the late 1980's is violating any of the rules under the Chicago Convention, the following questions must be answered: Should we look at this secondary legislation as inseparable from the EC Treaty as such, and consequently only compare the contents of the EC Treaty in 1958 with the contents of the Chicago Convention in 1944? Or is it more accurate to view secondary EC legislation as essentially amendments – i.e. additional elements – to the EC Treaty and compare these new components of law with the Chicago Convention as it looked at the time of the adoption of the EC legislation? It is submitted that the latter view is the correct one. Any other method would essentially ignore the development, amendments and continuing adoption of rules within inter-governmental cooperations. Accordingly, when assessing the compatibility between EC air transport regulation and the Chicago Convention, the following temporal approach to the different treaties will be used:

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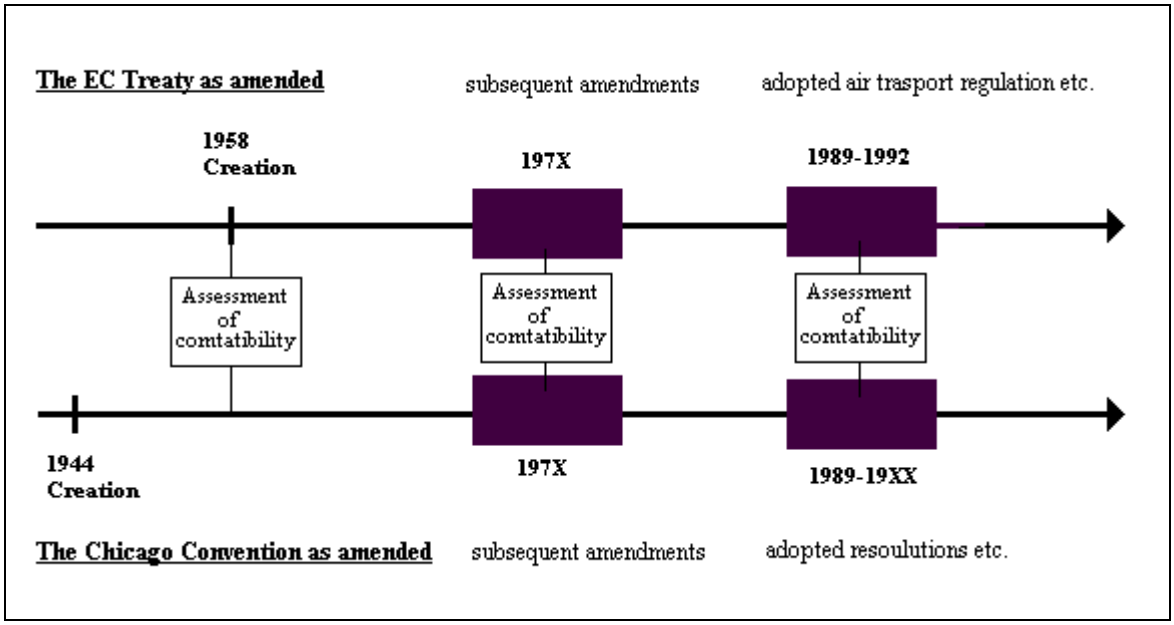
[58] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 332 (1980) [hereinafter VCLT].

Temporal Aspect of the Compatibility Assessment



It should be emphasized that the purpose is not to examine whether the member states violated the Chicago Convention simply by means of signing the EC Treaty. Furthermore, the scope of possible violations between EC air transport regulation and international air law will be limited to a few interesting issues which are interconnected in many ways: the new concept of Community air carriers and related issues: the introduction of Community cabotage; and the problems associated with the continuation and renewal of bilateral air transport agreements in order to obtain traffic rights. Other areas of interest for a more complete picture of the system of EC air transport regulation, such as the application of EC competition law to air transport, will only be dealt with very briefly. Non-scheduled and general, or private aviation, will not be considered at all.

1.3 Disposition and Method

The disposition of the thesis is as follows: Initially a presentation of the selected characteristics of international air transport regulation under the Chicago Convention will be made, followed by an examination of the regional system of EC air transport regulation. When these principles have been clarified, a consideration of possible violations will follow. The legal consequences of possible violations will be discussed in the last chapter, which also contains a summary of the findings and concluding remarks.

The method used in this thesis is a literature study combined with an analysis of different sources of law. The literature used consists of textbooks in the relevant fields of law, articles from qualified authors published in leading legal periodicals, and collections of treaties and agreements. Speeches, notes and reports from international conferences, material from the work of international organizations have been used as an additional source of information.

CHAPTER 2: CHARACTERISTICS OF AIR TRANSPORT REGULATION UNDER THE CHICAGO CONVENTION

While the international air transport industry has been described as "probably the most complicated field of endeavor ever attempted by man",[59] the legal regime which governs it can be reduced to the very simple axiom that "all commercial international air transport services are forbidden except to the extent that they are permitted".[60] In this chapter some of the characteristics of international air law will be analyzed. The features introduced here will appear throughout the later comparative study of international and EC air transport regulation.

2.1 AIRSPACE

In its preamble, the Chicago Convention records the signatory state's agreement to the fundamental principle that all states should be able to participate in air transportation on a basis of equality.[61] Subsequent interpretations of this principle of equality among states go even further, asserting that each state has a right to "the effective participation in the international air traffic market".[62] However, the implementation of this principle of equal participation is severely hampered by the limitations of rights that states can impose on each other. These limitations originate from the already mentioned principle of sovereignty of the state over the airspace above its territory as expressed in article 1 of the Chicago Convention. The importance attached to this principle merits further elaboration.

2.1.1 Sovereignty under International Law

It would of course be impossible, in a work of this size, to thoroughly examine this issue, but some guideposts to its content will be made. It is possible to trace the theory of sovereignty all the way back to Roman times and Justinian's Corpus Juris Civilis,[63] but a more precise proposition is that the contemporary concept was born in an attempt to analyze the internal structure of a state, and as such dates back to the sixteenth century.[64] Sovereignty is, furthermore, closely related to the accepted criterias of

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[59] M.J. Lester, *reviewing C. Codrai, European AirFares and Transport Services (1982),* in European Law Review, Vol. 8 (1983), p. 212.

[60] C. Thaine, *The Way Ahead from Memo 2: The Need for More Competition – A better Deal for Europe*, Air Law, Vol. 10 No. 2 (1985), pp. 90-98, at p. 91.

[61] International air services must be established "taking due account of the equal right of all states to participate in the traffic", according to the Chicago Convention, Preamble; See I.H.Ph. Diederiks-Verschoor, *supra* note 7, at p. 11.

[62] E.g. H.A. Wassenbergh, *De-regulation of Competition in International Air Transport*, ASL, Vol. XXI No. 2 (1996), pp. 80-89, at p. 80.

[63] E.g. proposed by R.I.R. Abeyratne, *supra* note 6, at pp. 16-18; *Justinians's Digest*, as cited in A.K. Kuhn, *Beginnings of an Aerial Law*, 4 AJIL (1910), pp. 109-132, at p. 123.

[64] P. Malanczuk, *supra* note 29, at p. 17. See also H. Steinberger, *Sovereignty*, EPIL, Vol. 10 (1987), pp. 397-418, at pp. 397-408, for the history of the concept of sovereignty.

statehood.[65] In theory, if the criteria of statehood are fulfilled, the ideal state would control a defined territory according to its 'title to territory' and would in principle have monopoly within this territory to exercise power over everyone therein, and would also enjoy the exclusive right to represent the state towards other states.[66] Clearly this type of state is an illusion and has never existed. Quite on the contrary, when international lawyers use the expression "sovereignty", they basically mean that the state is separate from other states and is independent to some extent.[67] That is, not directly dependent on other states but free from direct orders and control by other states. They do not mean that the state is above public international law, that the state can do anything it whishes, or that the state is totally independent from its surroundings.[68] This is important to keep in mind when discussing the international law aspects of sovereignty. It should also be noted that this is as valid in the state's external relations with other states as it is in its internal relations with its own population. The independent state exercises what we can call exclusive competence or jurisdiction within its territory, but this capacity is rigorously limited by public international law – in the form of customary law or treaties.[69] This principal competence is arbitrary referred to as sovereignty, but perhaps the position may best be summoned up in the notion that essentially the term "sovereignty" will never be more than a shorthand term for a combination of power relationships and general interdependence between states.[70]

2.1.2 Territorial and Aerial Sovereignty

Territorial sovereignty is a special attribute of this form of competence, and may be defined as the "right to exercise therein, to the exclusion of any other state, the functions of a state".[71] Accordingly, no state may perform any governmental act in the territory of another state without its consent.[72] But this rule is not unlimited. Other states may, by treaty or custom, acquire rights over the territory, such as a right of way across it.[73] A state's territorial sovereignty extends over the designated landmass, sub-soil beneath,

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[65] See e.g. P. Malanczuk, *ibid.*, at pp. 75 *et seq.*

[66] M. Melin & G. Schäder, *EU:s konstitution*, 3rd ed. (1998), at pp. 22-23.

[67] P. Malanczuk, *supra* note 29, at p. 17. Replacing the term sovereignty with independence can, however, only be seen as a rough simplification of a very complex issue. See H. Steinberger, *supra* note 64, at p. 414. According to P. Malanczuk, *ibid.*, at p. 18: "In so far as sovereignty means anything in addition to independence, it is not a legal term with any fixed meaning, but a wholly emotive term".

[68] H. Steinberger, *ibid.*, p. 408.

[69] *Ibid.* Also G. Lysén, *International Claims to Territory*, in Current International Law Issues – Nordic Perspectives, Essays in Honor of Jerzy Sztucki (1994), ed. by O. Bring and S. Mahmoudi, pp. 109-133, at p. 111.

[70] G. Lysén, *ibid.*

[71] Arbitrator Max Huber in the *Islands of Palmas Case*, Permanent Court of Arbitration, 2 RIAA 829 (1928), at p. 838; G. Lysén, *ibid.*, at p. 112.

[72] P. Malanczuk, *supra* note 29, at p. 109.

[73] *Ibid.*, at p. 147.

the water enclosed therein, the land under that water, the seacoast to a certain limit[74], the territorial sea and the airspace over the landmass.[75] Thus, aerial sovereignty is an integral part of the territorial sovereignty of a state and can consequently be defined as the "right to exercise the functions of a state to the exclusion of all other states in regard to its airspace".[76]

As already mentioned, international air law is firmly based on the concept of state sovereignty in the airspace.[77] The Chicago Convention recognizes this by stating that "every state has complete and exclusive sovereignty over the airspace above its territory".[78] The principle is widely accepted, and it is correct to conclude that it is a part of customary international law.[79] Article 2 of the Chicago Convention specifies, for the purposes of the Convention, the horizontal limits of this area, by defining the meaning of state territory as "the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such state". The term airspace – and its vertical limits – is not further defined in the Chicago Convention.[80] It has been suggested that the modern concept of air sovereignty contains at least three principles: that each state has exclusive right to its airspace, that each state has complete discretion as to the admission of any aircraft into its airspace, and that airspace over the high seas and other areas not subject to a state's jurisdiction is *res nullis* and is free to the aircraft of all states.[81] From this principle of aerial sovereignty follows that no flight craft may fly in, into or through a state's national airspace without its permission, acquiescence or tolerance. Conversely, flight over the high seas is free for all crafts of the air. International law does not recognize the right of innocent passage through national airspace, similar to the right of innocent passage that exists in international maritime law.[82] Aerial trespass may be met with appropriate measures of prevention, but does not justify instant attack with the object of destroying the trespasser.[83]

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[74] 12 nautical miles is the maximum allowed under the 1982 UN Convention on the Law of the Sea, 21 ILM 1261 (1982), article 3 [hereinafter LOSC].

[75] D. Brownlie, *Principles of Public International Law*, 5th ed. (1998), at p. 105; R. Jennings and Sir A. Watts, *Oppenheim's International Law*, Vol. 1, Introduction and pts. 1-4, 9th ed. (1996), at p. 572 [cited as: *Oppenheim's*].

[76] C.N. Shawcross & K.M. Beaumont, *Air Law* (1977), at p. 15.

[77] See the text accompanying footnote 19.

[78] Chicago Convention, article 1.

[79] B. Cheng, *supra* note 5, at pp. 3 and 120; P. Malanczuk, *supra* note 29, at p. 198; I. Brownlie, *supra* note 75, at pp. 116-117; M. Milde, *Sovereignty Over Airspace*, EPIL, Vol. 11 (1989), pp. 297-299, at p. 297.

[80] In the wake of outer space exploitation, it is now recognized that there is an upward limit, but what this limit is, has yet to be established. See R.M.M. Wallace, *International Law*, 3rd ed. (1997), at p. 104, and B. Cheng, *ibid.*, at. p. 121, for examples of ways to define an upper limit.

[81] O.J. Lissitzyn, *International Air Transport and National Policy* (1983), as quoted in R.I.R. Abeyratne, *supra* note 6, at p. 23.

[82] LOSC articles 17-26. However, the right for ships and aircraft to enjoy transit passage through international straits, LOSC articles 37-44, is almost equivalent to innocent passage.

[83] I. Brownlie, *supra* note 75, at p. 117.

2.2 THE EIGHT FREEDOMS OF THE AIR

The failure of the 1944 Chicago Conference to provide rights for aircraft from one state to fly into the airspace of other states forced the participating states to attempt to mitigate the potential impact of the unconditional application of the principle of unlimited aerial sovereignty.[84] Participating states to the Conference were clearly conscious about the fact that the future of international aviation would largely depend on the free use of international airways. As a result, a minimum of commercial rights to fly in other state's airspace was introduced. This is reflected in articles 5 and 6 of the Chicago Convention. Article 5 covers non-scheduled air traffic, while the more important article 6, submits the major part of air traffic – scheduled air traffic – to the exclusive right that states have to their own airspace. Consequently, these articles establish in principle two different regimes.

Scheduled and non-scheduled air traffic differ in that the latter is not carried out according to a published timetable, and is not subject to the rates and tariffs applicable to regular scheduled air traffic.[85] It should be recalled that non-scheduled traffic will not be dealt with in this thesis. Scheduled international traffic, however, is not allowed to be operated over or into the territory of a contracting party, except with "special permission or other authorization of that state, and in accordance with the terms of such permission or authorization", according to article 6 of the Chicago Convention. Consequently, this article can be seen as the legal consequence of the stipulation of aerial sovereignty recognized under article 1. The inability of the contracting states to reach multilateral agreement on uniformity in the award of traffic rights, forced the participants to negotiate the Transit Agreement and the Transport Agreement, mentioned above.[86] The privileges covered by such an 'authorization' by a state to enter its airspace – whether included in unilateral, bilateral or multilateral agreements – are commonly divided into eight so called "freedoms of the air".[87]

The first two freedoms are called *transit rights*. The first freedom is the right to fly over the territory of another country without landing, and the second freedom is the right to make a technical landing in another country. These freedoms are included in the Transit Agreement. This Agreement has attracted more than 100 ratifications to date, indicating that the majority of states in the world recognizes the first two freedoms.[88] The remaining freedoms are called *traffic rights*, of which the first three are listed in the Transport Agreement. The third freedom enables a state to carry passengers and cargo from its own territory to a foreign state. The fourth freedom provides for the return flight. It makes it possible for the returning flight to transport passengers and cargo from the foreign state back to its own territory. The fifth freedom deals with the privilege to carry traffic between another state and other third states along the route. Under this freedom, a state has the right to carry traffic between two countries outside its own territory as long as the flight originates or terminates within its own territory. The

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[84] A. Loewenstein, *supra* note 14, at p. 22.

[85] ICAO Doc. 7278-C841 (1952), *Definition of a Scheduled International Air Service.*

[86] See *supra* section 1.1.2.

[87] B. Cheng, *supra* note 5, at pp. 14-15.

[88] I.H.Ph. Diederiks-Verschoor, *supra* note 7, at p. 13.

inclusion of this freedom in the Transport Agreement has been the main reason for the reluctance of states to adhere to that Agreement, as it is generally seen as a source of inbalance between states.[89] The sixth freedom also applies to the carriage of traffic between two foreign countries via the home state. It is a combination of the third and fourth freedoms secured by the trafficking state from two or more different states producing the same effect as the fifth freedom in relation to the foreign states.[90] The seventh freedom constitutes a right for a state to operate international air traffic entirely outside its own territory. Finally, the eighth freedom is the right for a foreign state to carry traffic from one point within the territory of another state to other points in the same state – this kind of traffic is usually called domestic traffic – or cabotage.[91] The entire system of international air routes is set up in accordance with these freedoms, and as some freedoms will be discussed later in this thesis, the following schematic picture will be helpful to visualize the complexity.

Type of Freedom	Name	Provided by	Included
1st Freedom: The Right of an airline of one country to fly over the territory of another country without landing.	TRANSIT RIGHT	TRANSIT AGREEMENTS	Seldom in bilaterals
2nd Freedom: The right of an airline of one country to make a technical landing in another country for non-traffic purposes, such as maintenance or refueling, while en route to another country.	TRANSIT RIGHT	TRANSIT AGREEMENTS	Seldom in bilaterals
3rd Freedom: The right of an airline of one country to carry traffic from its country of registry to another country.	TRAFFIC RIGHT	TRANSPORT AGREEMENTS	Normally in bilaterals
4th Freedom: The right of an airline of one country to carry traffic from another country to its country of registry.	TRAFFIC RIGHT	TRANSPORT AGREEMENTS	Normally in bilaterals
5th Freedom: The right of an airline of one country to carry traffic between two countries outside its own country of registry as long as the flight originates or terminates in its own country of registry.	TRAFFIC RIGHT	TRANSPORT AGREEMENTS	Normally in bilaterals
6th Freedom: The right of an airline of one country to carry traffic between two foreign countries via its own country of registry. This is a combination of third and fourth freedoms.	TRAFFIC RIGHT	BILATERAL AGREEMENTS	Normally in bilaterals
7th Freedom: The right of a carrier to operate stand-alone services entirely outside the territory of its home state, to carry traffic between two foreign states.	TRAFFIC RIGHT	BILATERAL AGREEMENTS	Normally in bilaterals
8th Freedom: The right of an airline to carry traffic between two points within the territory of a foreign state – cabotage.	TRAFFIC RIGHT	BILATERAL AGREEMENTS	Normally in bilaterals

[89] *Ibid.* With unlimited fifth freedom routes, US airlines would dominate Europe's domestic aviation markets. A US carrier would be able to fly into Sweden and continue its route to Germany or any other EC member state. If one looks at the European Union as one single market, this creates in practice a right to carry traffic from one inland point to another inland point. EU Carriers would not have the same possibilities on the US market.

[90] Suppose that Germany fails to obtain traffic rights from Singapore, on its route Singapore-Frankfurt-New York, but gets traffic rights from Singapore for Singapore-Frankfurt and from the US for Frankfurt-New York instead. By combining freedom 4 and 5 to carry traffic between Singapore and New York, Germany would be using the sixth freedom. The definition is not settled. See B. Cheng, *supra* note 5, at pp. 13-16.

[91] See *infra* section 2.3.

All of these freedoms – or traffic rights as the result is called when any of the commercially important freedoms 3 to 6 are used – are extremely important for airlines since they have to rely on them for the daily performance of their air services. However, it is not the airlines that hold the rights but governments, and even though the holder of the authority to operate air services between two states usually is an airline, states have final authority over them.[92]

2.3 CABOTAGE

As shown, article 6 of the Chicago Convention deals exclusively with international operations into and out of a state's territory. It does not cover commercial aviation within national boundaries. Such traffic is instead covered by article 7. For historical reasons, this type of traffic is called cabotage. In international law, cabotage was a creation of maritime law, originally held to apply to a state reserving to itself the right to restrict all coastal navigation between two points within its territory for the exclusive use of its own subjects with the object to protect its own navigation.[93] For the purposes of international air law, cabotage has been defined neutrally as "the carriage of passengers, cargo, and mail between two points within the territory of the same state for compensation or hire",[94] but also peremptorily as "a sovereign right that has traditionally been reserved to the exclusive use of that state's national carriers".[95]

Article 7 of the Chicago Convention has double functions. First it confirms the rule of aerial sovereignty inasmuch as it prescribes that a state "shall have the right" to reserve air transport within its own territory to itself. At the same time this opens up the possibility for a state to allow other states to operate within its territory. But if a state uses this possibility, then the second function activates, as it limits the discretionary power of the state in this regard by introducing an element of non-discrimination. Article 7 stipulates that no state must obtain exclusive privileges from another state, or to enter into arrangements which "specifically" grant any such privilege "on an exclusive basis" to another state.[96] The nature of this restriction in the second sentence of the article, has been the cause for quite some uncertainty and the issue whether it is liberal or not, has proven to be controversial. There is presently a tendency to broaden the interpretation of cabotage in such manner that it constitutes an obstacle to free aviation.[97]

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[92] J. Naveau, *International Air Transport in a Changing World* (1989), at p. 87.

[93] I.H.Ph. Diederiks-Verschoor, *supra* note 7, at pp. 18-19.

[94] W.M. Sheehan, *Air Cabotage and the Chicago Convention*, Harvard Law Review, Vol. 63 (1950), pp. 1153-1161, at p. 1157. Aerial cabotage "applies to air transport between any two points in the same political unit, that is to say, in the territory of a state as the term is used in air law", according to B. Cheng, *supra* note 5, at p. 314.

[95] B.F. Havel, In Search of Open Skies – Law and Policy for a New Era in International Aviation (1997), at p. 49.

[96] This can be understood as either a "most favored nation clause", or as a provision entitling the states to grant exclusive rights as long as it is not explicitly stipulated that these rights are exclusive. See *infra* section 4.3.3.

[97] I.H.Ph. Diederiks-Verschoor, *supra* note 7, at p. 19; B. Cheng, *supra* note 5, at pp. 315-317.

2.4 NATIONALITY AND REGISTRATION OF AIRCRAFT

2.4.1 Nationality in International Law

Nationality in international law may be defined as the status of belonging to a state for certain purposes in international law.[98] It indicates a specific legal relationship between a person and a state, and the specific rights and obligations that are derived from that legal relationship.[99] The general rule in international law is that states themselves can determine the criteria for the acquisition and loss of nationality, but also that treaties can limit this discretion.[100] However, the establishment of nationality requires more than a purely formal element, as international law sets up the additional element of 'a genuine link' between the state and the subject claiming its nationality for specific purposes.[101] This requirement is applicable to both persons and companies.[102] When the concept of nationality is used in connection with legal persons, ships and aircraft, it is quite clear, however, that nationality in this sense is something different from the nationality of an individual, appearing more as an attribution of function and less as a formal and general status of the kind relating to individuals.[103]

2.4.2 Nationality of Aircraft and the Concept of National Carrier

The concept of nationality of aircraft was first expressed in article 6 of the Paris Convention[104], and has ever since then been strictly obeyed by states. It has been appropriately suggested that the concept is a principle based on customary international law.[105] This rule has been restated in article 17 of the Chicago Convention stipulating that an aircraft has the nationality of the state in which it is registered. According to article 18, an aircraft cannot be validly registered in more than one state at a time, but the registration may be changed from one state to another. Three other articles are also of importance for the realization of the principle of nationality. According to article 19, the registration – or transfer of registration – of an aircraft in contracting states, should be made in accordance with its laws and regulations, and article 20 requires that nationality marks must be clearly visible on all aircraft engaged in international navigation. Article 21 prescribes the formal obligation of registration in a national register and the necessity of a national institution registering all national aircraft.

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[98] *Oppenheim's, supra* note 75, at p. 857; I. Brownlie, *supra* note 75, at p. 410.

[99] *Oppenheim's, ibid.*; I. Brownlie, *ibid.*

[100] *Nationality Decrees in Tunis and Morocco Case (Tunisia v. Morocco)*, 1923 PCIJ Rep. Ser. B, No. 4, at p. 24; P. Malanczuk, *supra* note 28, at p. 263.

[101] *Nottebohm Case (Liechtenstein v. Guatemala)*, ICJ Rep. 1955, p. 4 at. p. 23. The concept of genuine link was later confirmed by the Iran-United states Claims Tribunal, D.J. Bederman, *Saghi v. Islamic Republic of Iran*, AWD 544-298-2, Iran-United states Claims Tribunal, January 22nd 1993, 87 AJIL (1993) p. 447-452 at p. 450.

[102] *Barcelona Traction Case (Belgium v. Spain)*, ICJ Rep. 1970, p. 3 at p. 42.

[103] A. Randelzhofer, *Nationality*, EPIL, Vol. 8 (1985), p. 416-424, at p. 424.

[104] Paris Convention, *supra* note 9.

[105] I.H.Ph. Diederiks-Verschoor, *supra* note 7, at p. 23.

The principle of nationality in air law has also gained influence in a different way. Most of the general rights under the Chicago Convention concern aircraft registered in the contracting states, without reference to the nationalities of their owner or operators. However, traffic rights for scheduled international air services are generally exchanged between the contracting states, towards each other's airlines.[106] The standard way to exchange such traffic rights is by using bilateral air transport agreements, and in such bilateral agreements the practice has been to include a 'substantial ownership' and 'effective control' clause, stating that the designated airlines must be substantially owned and effectively controlled by the state designating them or its nationals.[107]

The requirements of 'substantial ownership' and 'effective control' are also included in the Transit and Transport Agreements. The purpose is to guarantee that the airlines providing traffic between the two states concerned are vested in nationals of the respective states, thereby avoiding 'flags of convenience'.[108] It was previously explained that the requirement of a 'genuine link' exists as a supplementary element in public international law in order to establish nationality.[109] With the introduction of the demand for 'substantial ownership' and 'effective control' of airlines engaged in using traffic rights, the requirement of a 'genuine link' also finds its application in international air law.[110] The practical result is that the airline has to have a specific nationality in order to participate in international navigation. This patriotic preference for national ownership has had the significant impact on airlines that they have not become multinational corporations. Instead they have largely been owned and controlled by their sponsoring states where they provide domestic services or by which they are designated to fly negotiated international routes. This has in turn created the well-known concept of *National Carriers*. It should also be mentioned that article 77 of the Convention provides that the ICAO Council has the authority to determine how the provisions on nationality of aircraft shall apply to aircraft operated by international operating agencies. The application of this provision was under consideration when Air Afrique was created in 1961 and questions arose concerning the registration and nationality of aircraft of this multinational airline. A solution was provided by the Council that enabled the creation and operation of the airline, but the requirement that there had to be a state of registration prevailed. The possible future application of article 77 could be of vital importance for the creation of a jointly owned European airline or a joint European aircraft register and will be discussed in section 4.2.4 *infra*.

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[106] B. Cheng, *supra* note 5, at p. 128.

[107] *Ibid.*, at p. 375.

[108] L. Weber, *Air Transport Agreements*, EPIL, Vol. 10 (1987), pp. 15-18, at p. 16.

[109] *Supra* section 2.4.1.

[110] D. Brownlie, *supra* note 75, at p. 430-421 and pp. 495-496.

2.5 BILATERAL AIR TRANSPORT AGREEMENTS

When the Chicago Convention failed to provide for multilateral exchange of traffic rights and it became clear that it would be impossible to obtain more freedom in the air by means of exchanging the first five freedoms in a multilateral convention, states turned to bilateral air transport agreements in order to grant each other commercial traffic rights instead.[111] It should be noted, however, that when the desired overflight and technical landing rights are covered by the multilateral Transit Agreement, and the states involved are signatories to that agreement, bilateral recourse may of course be excluded.[112]

2.5.1 Early Bilateral Agreements and the Bermuda Agreements

In order to achieve a certain amount of standardization in the bilateral negotiations of bilateral agreements on traffic rights close at hand, the states attending the Chicago Convention adopted the Standard Chicago Bilateral Agreement.[113] This was a frame agreement that included, among other things, the exchange of the first five freedoms of the air. Early agreements were typically very liberal and placing few restrictions on capacity and pricing.[114] The standard agreement became the model for the first major bilateral agreement under the principles set out in the Chicago Convention. This agreement was negotiated between the US and the UK in 1944 and became known as *Bermuda I.*[115] It quickly secured its place as the worldwide model for numerous other bilateral air transport agreements concluded between states.[116] The agreement was superseded in 1977 by the more restrictive, so-called *Bermuda II* agreement.[117]

Since most bilateral agreements follow the principles set by Bermuda I, it is of interest to examine a few of its characteristics. It is typical for this type of treaty to only lay down basic elements in the text and to give necessary precision, interpretation and technical details in its annexes.[118] The reason for this arrangement is to give more

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[111] B. Cheng, *supra* note 5, at p. 229.

[112] The same is of course valid for the Transport Agreement – but that issue is not so relevant since that it failed to attract the interests of states. See *supra* section 1.1.2.

[113] 1944 Standard Form of Bilateral Agreements for the Exchange of Commercial Rights of Scheduled International Air Services, included in the Final Act of the Chicago Conference in Conference Proceedings, Vol. II Conf. Doc. 19 at p. 1268 (1944).

[114] D.H. Hedlund, *Toward Open Skies: Liberalizing Trade in International Airline Services*, MJGT, Vol. 3:231 (1994), pp. 259-299, at p. 268.

[115] 1946 Agreement Between the United Kingdom and the United states, 3 UNTS 253 (1947) [hereinafter Bermuda I].

[116] P. van der Tuuk Adriani, *Some Observations on the newly born Bermuda II*, Air Law, Vol. II (1977), pp. 190-192, at p. 190.

[117] 1977 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of United states concerning Air Services, British Command Papers, Cmnd. 7016, Treaty Series No. 76 (1977) [hereinafter Bermuda II].

[118] R.D. van Dam, *Regulating International Civil Aviation – An ICAO Perspective*, in *Air and Space Law – De Lege Ferenda: Essays in honour of H.A. Wassenbergh* (1992), ed. by T.L. Masson-Zwaan & P.M.J. Mendes de Leon, pp. 11-25, at p. 11 *et seq.*

flexibility to the instrument, since the annexes normally can be modified in an informal way, without the process of ratification.[119] The agreement usually contains a clause whereby the two parties expressly declare their intention to confer certain rights on each other. Thus, the agreement contains a very strong condition of reciprocity, which does not only involve formal reciprocity, but also that the rights granted to both sides be of comparable value and that "the delicate balance of interests arrived at should not be disturbed".[120] Furthermore, the parties normally grant each other the right to designate one or more airlines that are allowed to operate the specified routes. When the agreement allows for designation of more than one carrier, the concept is called 'multiple designation'. The provisions also demand that the air carriers designated must comply with the requirement that 'substantial ownership' and 'effective control' of the carrier must be in the hands of the designating state or its nationals.[121] These standard provisions often create the right to revoke, suspend or limit the operation of the agreement if this condition is not fulfilled.

Nowadays the international air traffic system consists of more than 4000 bilateral air transport agreements, creating a complex web of air traffic rights.[122] Every single bilateral agreement is based on reciprocity and introduces individual elements. This lack of uniformity is one of the main drawbacks of the system presently used. Another, more serious deficiency, is that this use of a strict regulating regime effectively limits free competition. But the system has historically grown as a result of strong aviation states separately bringing their positions to the bilateral negotiation table, and it has the apparent advantage of being flexible, adaptable and able to take in consideration that every state and every route show different structures to which the legal and economic instruments can respond.[123]

2.5.2 The US Open Sky Bilateral Agreement

In response to some of the inherent deficiencies of the commonly used bilateral air transport agreements, the US DOT proposed a new bilateral format called the Open Sky Agreement in early 1992.[124] This was a reaffirmation of earlier US attempts to introduce a more liberal international air transport regime that started already in 1978.[125] The open sky initiative offers a highly liberalized interpretation of each of the key Chicago system negotiating points. The first truly liberal and modern open skies agreement was

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[119] A. Loewenstein, *supra* note 14, at p. 40.

[120] B. Cheng, *supra* note 5, at p. 289.

[121] See *supra* note 107 and the accompanying text.

[122] M.J.B. Swinnen, *supra* note 52, at p. 251 note 12.

[123] L. Weber, *supra* note 108, at p. 17.

[124] The term "Open Sky" generally it indicates an agreement that at least includes open entry on routes, unrestricted capacity and frequency on routes, and unrestricted traffic rights. See *In the Matter of defining "Open Skies,"* US DOT Order No. 92-8-13, Docket No. 48 (1992). A model bilateral open skies transport agreement can be found in 35 ILM 1497 (1996).

[125] Officially the process begun in the US when the Congress passed the 1978 Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 (1978). See M.W. Lacy, *Freedom in the Air: The 1995 Canada – United states Bilateral Air Transport Agreement*, AASL, Vol. XX-II (1995), pp. 139-160, at p. 148.

concluded between the US and the Netherlands in 1992, giving US and Dutch airlines open entry into each other's markets, unrestricted capacity and frequency on all routes, and the greatest possible degree of freedom in setting fares.[126] Similar agreements have subsequently been signed with other European countries.[127] Each of these agreements grants unrestricted access and fifth freedom rights traffic, providing US carriers with great route-advantages within the European air market,[128] and the goal of the US DOT in negotiating these bilateral agreements is to create "[m]ultilateralism through bilateralism in an effort dedicated to creating a new global aviation market".[129] It should be noted, however, that the US open skies experiment remains very much a creation loyal to the old Chicago system in its homage to both cabotage and nationality principles. Indeed, the DOT has explicitly rejected any tampering with either of these principles, indicating its unwillingness to fully open the US skies to foreign countries.[130]

2.6 SUMMARY

There is little doubt that the most conspicuous feature of the international air transport system is its profound homage to the state as the supreme power in air-related matters. The effect is that states have exclusive control of the airspace above their territories. Accordingly, whether within their domestic or international provinces, states have kept air transport as a concessionary activity, where market access is not the product of individual initiative but depends on a right of access conceded by the state. In conclusion, it is submitted that the legal characteristics of international air transport presented in this chapter may be regarded as the innovatory formulas that states have used in order to secure this control over civil aviation and over other activities in the airspace.

In this highly international yet very protective and regulatory framework, several states in different regions have made considerable effort to seek a liberalization of air transport. In the next part, one such effort on a regional scale will be discussed – the characteristics of EC air transport regulation.

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[126] See the 1992 Agreement to Amend the Air Transport Agreement, and the Protocol Relating to the United states-Netherlands Air Transport Agreement of 1957, TIAS No. 11976 (1992).

[127] These countries are Austria, Belgium, Denmark, Finland, Germany and Sweden.

[128] The cumulative effects of these agreements must not be underestimated. US airlines enjoy fifth freedom rights within Europe, while EC Carriers do not have the same cabotage-like possibilities in the US. See P.P.C. Haanappel, *The External Aviation Relations of the European Economic Community and of the EEC Member states into the 21st Century – Part II*, Air Law, Vol. XIV No. 3 (1989), pp. 122-146, at p. 126.

[129] US DOT official goals as cited in M.W. Lacy, *supra* note 125, at p. 149.

[130] B.F. Havel, *supra* note 95, at p. 23.

CHAPTER 3: CHARACTERISTICS OF EC AIR TRANSPORT REGULATION

3.1 THE PLURILATERAL EXCHANGE OF AIR TRAFFIC RIGHTS

In the previous chapter it was explained that the Chicago Convention failed to provide an acceptable multilateral solution covering all aspects of international civil aviation, and that states turned to the standard procedure for exchanging air traffic rights under bilateral agreements instead. This bilateralism has today found a late retirement among the EU member states with the introduction of EC air transport regulation. The cooperation within this common system is plurilateral as such, and introduces a new solution to the exchange of air traffic rights in a regional setting. It should be noted, however, that there have been other efforts seeking similar internationalization of civil aviation.[131] The main effect of these regional organizations has traditionally rested in the harmonization of procedures and the standardization of equipment and they have unfortunately failed to make any additional impact as they often suffer from internal lack of coherence and are merely consultative to their nature.[132] Thus, it is only fair to say that the successful introduction of a truly plurilateral system within the EC is so far unsurpassed in the regulation of civil aviation in the world.

3.2 THE TRANSFER OF COMPETENCE TO THE COMMUNITY

One of the cornerstones of the traditional system of air law is the principle laid down in article 1 of the Chicago Convention, that "every state has complete and exclusive sovereignty over the airspace above its territory".[133] Based on this rule, the Convention stipulates that the competence to regulate flights in, from, and to, the territory lies within the state's own legislative domain. When looking at the European arrangement, it is possible to argue that this traditional approach has been by-passed: the member states of the Community have through their membership transferred some of their competence to legislate in different areas to the EC.[134] This would appear to be equally valid within EC air transport regulation: member states, subject to article 1 of the Chicago Convention, have gradually transferred competence to regulate air transport to the Community – an organization not bound by the Chicago Convention.[135] Commentators arbitrarily refer to this as "a transfer of sovereignty to a supranational organization".[136] It is submitted, however, that such an analysis fails to take into consideration the fact that states are themselves the original and final legislative powers in international relations, and that

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[131] I.H.Ph. Diederiks-Verschoor, *supra* note 7, at pp. 44 *et seq*; W.J. Wagner, *International Air Transportation as Affected by state Sovereignty* (1970), chapter IV.

[132] J. Naveau, *supra* note 92, at p. 79.

[133] See *supra* section 2.1.2.

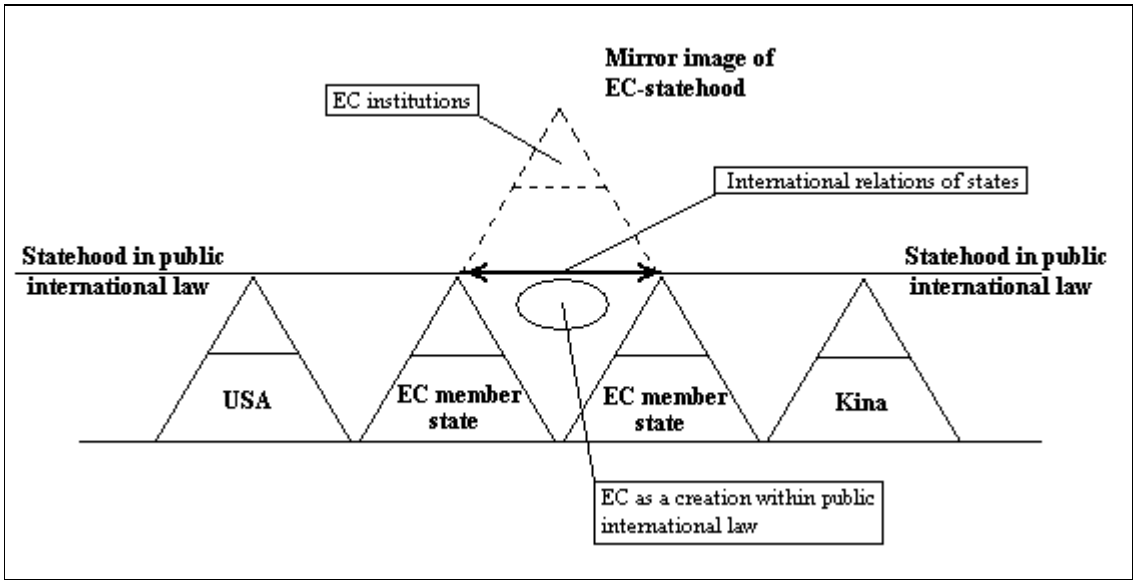
[134] M. Melin & G. Schäder, *supra* note 66, at pp. 18-24.

[135] Only states can be members to the Chicago Convention according to articles 91-93.

[136] E.g. A. Loewenstein, *supra* note 14, at p. 126. Also L. Weber, *External Aspects of EEC Air Transport Liberalization*, Air Law, Vol. XV No. 5/6 (1990), pp. 277-287, at p. 280.

any supranational quality of the Community is merely an illusory mirror image of a contractual relationship within public international law.[137]

EC as a mirror image of a contractual relationship within public international law



In short: the EC is not a supranational entity. Furthermore, the territorial sovereignty of member states is clearly unaffected by the cooperation within the EC which means that no transfer of either territorial nor aerial sovereignty is taking place.[138] What is taking place, is that certain rights that normally belong to independent states – for example the right or competence to issue binding regulations on air traffic – to some extent is transferred to the EC in order to be settled within a common procedure by the institutions of the EC.[139] This transfer is hardly of the same nature as what the arbitrary use of the expression "transfer of sovereignty" implies. Arguably, at a certain stage it will be possible to say that sovereignty has been transferred to the Community; the latter will then take on a new personality, it will then have become some new kind of international legal person (perhaps even a federal state). However, in the meantime the expression discussed here must be used in a cautious way, otherwise it will cause more hardship than it solves. It is more productive for the present purpose to consider that a part of the member state's competence to regulate air traffic within and outside its borders has today been transferred to the Community. This arrangement may be considered as one of the characteristics of EC air transport regulation.

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[137] G. Lysén, *The European Community as a Self-Contained Regime*, Europarättslig Tidskrift, No. 1 Årgång 2 (1999), pp. 128-135, at p. 132.

[138] See *supra* section 2.1.1 for an elaboration on the concept of sovereignty.

[139] The expression "suveränitetsrättigheter" (in english: "rights of sovereignty") has been used to describe what it is that the states are actually giving up to the Community. See M. Melin & G. Schäder, *supra* note 66, at p. 24.

3.3 THE LICENCING REGULATION

The first two phases of the liberalization of air transport within the Community did not disturb the relationship between a member state and air carriers licenced by it. However, it was provided that the Council should adopt rules governing the licencing of air carriers by 1992.[140] In due course, the Commission forwarded a proposal for such rules, which resulted in the 1992 Licencing Regulation. Common provisions for the licencing of aircraft is of course an important pre-condition for liberalization. On the basis of article 12 of the EC Treaty, discrimination between member states or their nationals on grounds of their nationality is prohibited, and according to article 43 the freedom of establishment of nationals of a member state in the territory of another member state shall be protected. In order to give full effect to these principles, a carrier with seat in the EU must be entitled to operate within all member states under the same conditions as national carriers. These principles are effectuated by the Licencing Regulation that employs the concept of 'Community air carrier', and contains important provisions affecting the nationality and registration of aircraft operated by such carriers. By doing this, the Regulation enhances, to a remarkable extent, the possibilities for all EU nationals to establish or acquire air carriers within any other member states. These are truly radical changes, and the most important features of the Licencing Regulation will be considered in the next two sections.

3.3.1 Community Air Carrier

While the concept of Community air carrier is not defined *per se* in the Licencing Regulation, it is determined in the Fares Regulation as "[a]n air carrier with a valid operating licence granted by a member state in accordance with the Licencing Regulation".[141] For that reason, the Licencing Regulation includes two important basic features aiming at air carriers within the Community: 1) It harmonizes licencing policies, which previously differed greatly between member states, and 2) It prevents member states from blocking the emergence of air carriers in their territory on policy grounds by requiring member states to recognize the right of establishment in the air transport sector within their territory, which in effect makes it possible for nationals and carriers from other member states to establish or acquire air carriers there.[142] Thus, it establishes a common licencing system that allows a carrier licenced in any member state to operate without discrimination as though licenced in any other member state. The Regulation formulates a rule that requires undertakings established in the Community to possess an 'operating licence' in order to carry passengers, mail or cargo by air within the Community, and to require member states not to grant or maintain in force these operating licences unless specific requirements are met.[143] The Regulation

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[140] Council Regulation 2343/90, *supra* note 54, article 3(2).

[141] Fares Regulation, article 2(b).

[142] Licencing Regulation, articles 1(1), 3(2), 4(1) and 4(2).

[143] *Ibid.*, articles 3(1) and 3(3).

only applies to carriers whose principal place of business is in a member state.[144] The corollary to the main rule is that any undertaking that meets these requirements must be granted an operating licence by the local civil aviation authority.[145] No further restrictions may be posed onto air carriers applying for an operating licence. However, it should be noted that the mere possession of an operating licence does not in itself confer any specific rights of access to routes.[146] Instead, it entitles a Community air carrier to apply for the access rights granted by the Market Access Regulation. This will be discussed further under section 3.4.1 *infra*. It is also important to note that traffic rights on all extra-Community routes will continue to be governed by the relevant bilateral air transport agreements and not the EC Regulations.[147]

The criteria of topical interest, that an undertaking must fulfil in order to be qualified for an operating licence – and to be called a Community Air Carrier – are the following:

1. It must be "majority owned" and "effectively controlled" by member states and/or nationals of member states. Such states or such nationals must furthermore effectively control it at all times;
2. Its principal place of business and registered office must be in the member state granting the licence.[148]

The requirements stipulated in the Regulation are exhaustive. However, member states may restrict an operating licence to certain types of carriage if justified on financial or technical grounds.[149] It is for the applicant air carrier to demonstrate to reasonable satisfaction that it meets the criteria according to article 5(1)a.

A few words should be said about the criteria of 'ownership' and 'effective control'.[150] The test of 'ownership' is relatively clear and objective. In the case of a company, the result of the requirement is that one or more member states or their nationals must own more than 50% of its issued share capital.[151] The precise meaning of 'effective control' is less clear, but at the same time important, as it determines the size of stakes which non-Community nationals and airlines may have in Community air carriers.[152] A definition was included at the suggestion of both the Economic and Social Committee (ECOSOC) and the Parliament in order to prevent confusion. This definition is similar

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[144] Licencing Regulation, article 4(1)a. See J. Balfour, *Factortame: The Beginning of the End for Nationalism in Air Transport?* Air Law, Vol. XVI No. 6 (1991), pp. 251-266, at pp. 263-264.

[145] Licencing Regulation, article 3(2).

[146] *Ibid.*

[147] For example: A wholly owned Swedish subsidiary of a Dutch airline will not have access to the benefits of the new "Open Skies" bilateral agreement between the US and Sweden.

[148] Licencing Regulation, articles 4(1) and 4(2).

[149] See the Commission's guidelines 715/93 (1993).

[150] The same locutions can be found in almost all the bilateral air transport agreements in the world as well as in most domestic aviation laws.

[151] J. Balfour, *European Community Air Law,* 1st ed. (1995), at p. 37.

[152] On this issue, see B.J.H. Crans, *The Third EC Aviation Package – Its Impact on the Leasing Industry*, ASL, Vol. XVIII No. 3 (1993), pp. 102-108.

to the definition of control in the 1989 Merger Resolution[153], and some guidance may be obtained from decisions of the Commission on the question of control for the purposes of that Regulation.[154] The term 'national' is not defined in the Regulation, but according to Community law, it is for each state to settle its own rules as to the acquisition of its nationality, provided such power is exercised with due respect for Community law.[155] It seams clear, however, that the requirement is one of nationality only, and that the place of residence is immaterial.[156]

Another important principle introduced by the Licencing Regulation is article 4(4), that restricts ownership of Community air carriers for foreign – i.e. non-EU – interests, by prescribing that:

> Any undertaking that *directly* or *indirectly* participates in a *controlling shareholding* in an air carrier *shall meet* the requirements of paragraph 2. (Italics by author).

The result is that any prospective undertaking interested in owning a European airline must itself be 'majority owned' and 'effectively controlled' by member states and/or their nationals. It is thus not possible for a non-Community national to avoid the requirement of Community control by owning an air carrier in the Community through the medium of a company incorporated in a member state.[157] Nor would the interposition of several such companies assist, due to the locution "indirectly". It is not entirely clear what the phrase 'controlling shareholding' means in this context, but it is submitted that it aims at a shareholding which, either in itself or in conjunction with any other rights or contracts, confers effective control. Consequently, influential foreign interests in the European air market are barred from effective participation. It may be somewhat unclear in a particular situation whether a shareholder will satisfy these requirements. Therefore, three examples of different structures of ownership will be suggested here in order to understand the limitations put on third state involvement in Community air carriers:

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[153] Council Regulation 4064/89, OJ No. L257 (1990), at p. 14.

[154] I. van Beael & J-F Bellis, *Competition Law of the European Community*, 3rd ed. (1994), at sections 620 *et seq.*

[155] *Micheletti v. Delegación del Gobierno en Cantabria*, Case 369/90 [1992] ECR 4239. See S. Weatherill & P. Beaumont, *supra* note 31, at p. 571.

[156] J. Balfour, *supra* note 151, at p. 39.

[157] *Ibid.*, at p. 38.

Carrier 1	Majority owned and effectively controlled by own MS and/or nationals from own MS. ➢ The ownership composition is acceptable according to article 4(2). A Community licence may be granted. This was the traditional ownership requirement behind the creation of strong national carriers.
Carrier 2	Majority owned and effectively controlled by other MS and/or nationals from other MS. ➢ The ownership composition is acceptable according to article 4(2). A Community licence may be granted. This represents a development to the traditional ownership requirements and was not possible before.
Carrier 3	Involvement by an undertaking from non-MS and/or its nationals, directly or indirectly participating in a controlling shareholding that do not fulfill the criterias of ownership and control in article 4(2). ➢ The ownership composition is *not* acceptable according to article 4(4) in combination with 4(2), and no Community licence will be granted!. The requirement of effective control will for example require a majority of the Board of the undertaking to be representatives of EC member states and/or its nationals. This will severely limit foreign involvement in the European air operator industry.

It is interesting that through the insertion of Community-wide restrictions on ownership and control, this part of the Regulation converts a hallmark feature of the traditional Chicago based system and makes it into a fundamental principle of EC law. The Regulation requires the would-be licencee to have its principal place of business and its registered office located in the licencing member state and then 'regionalizes' the Chicago nationality rule by providing that this would-be licencee must be owned and continued to be owned directly or through majority ownership by a member state or its nationals.[158] Because of these limitations, the liberalizing effect will be different to that of other industries within the EC as they will distort the structure of airlines by treating them differently from any other industry.[159]

3.3.2 Nationality and Registration of Aircraft Operated by Community Carriers

The Licencing Regulation also regulates other aspects of the operating conditions of a Community air carrier as it contains provisions affecting the carrier's use and registration of aircraft. The provisions should be analyzed with due regard to the legal principles of nationality of aircraft in the traditional system of air law. The relevant provisions are contained in article 8, and the basic rule stated is that any aircraft used by a Community air carrier must be registered in a member state – that is: any member state. By way of exception to this rule, a member state may permit 'short-term leases' of aircraft not so registered to "meet temporary needs of the air carrier or otherwise in exceptional circumstances".[160] Clearly, the Regulation permits different interpretations as none of the permitted exceptions to the rule have been further defined. It has been suggested that the short-term leases to take care of such "temporary needs" normally cover periods up to a traffic season so that no carrier should become dependent on aircraft not registered in member states.[161] The significance of the locution "in exceptional circumstances" is also unclear, but has been held to apply in respect of

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[158] Licencing Regulation, at p. 1, article 4.

[159] See R. Doganis, *Relaxing Airline Ownership and Investment Rules*, ASL, Vol. XXI No. 6 (1996), pp. 267-270, at p. 269, for a critical analysis of the rules on ownership and control.

[160] Licencing Regulation, article 8(3).

[161] R. Ricketts & J. Balfour, *Aircraft Use, Registration and Leasing in the EC*, ASL, Vol. XVIII No. 1 (1993), pp. 25-28, at p. 25.

aircraft of uncommon types that are not easily available or not easily imported.[162] Moreover, the Regulation provides that the receiving state may require registration on its own register, but not if the aircraft is registered in another member state, or if the aircraft is leased under an arrangement approved by the national licencing authority, or if such registration would require structural changes to the aircraft.[163] A member state is also required to accept onto its register, without discrimination or delay, any aircraft registered in other member states or owned by nationals of other member states wherever registered.[164] Finally, any Community air carrier that leases an aircraft from or to another undertaking must obtain prior approval from the appropriate licencing authorities, and the conditions of approval must form part of the lease agreement.[165]

In sum there are some uncertainties concealed within this part of the Licencing Regulation that will most likely require clarifying in the near future. At the same time it is noteworthy that the principles of nationality and registration in the Regulation still require registration in a – i.e. any – member state. The traditional Chicago based rule on national registration is thus not abandoned, only modified to fit the Community program. However, it has been argued that this preference for national registration must be rejected in order to achieve a complete common aviation market.[166] A 'Community registration' process should be introduced instead, leaving little room for the arbitrariness of the licencing authorities in different member states. Nevertheless, the new principles of nationality and registration introduced by the Regulation modify the traditional system to a certain extent, and are certainly characteristics of EC air transport regulation.

3.4 THE MARKET ACCESS REGULATION

The Licencing Regulation described in the previous section does not confer any specific traffic rights on the Community air carrier. The procedure for obtaining such rights is instead contained in the Market Access Regulation. This Regulation sets the rules on market access to air services on routes within the Community. As already described, the state or states in which the points of origin and destination are situated, typically controls access for air carriers to air routes.[167] Bilateral air transport agreements have traditionally been used in order to exchange traffic rights between states, while the domestic traffic has been reserved for a state's own carriers according to the principle of cabotage. However, the traditional system of regulating route access is without a doubt inconsistent with the general EC objectives of the free, internal market,[168] and

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[162] J. Balfour, *supra* note 151, at p. 45.

[163] Licencing Regulation, article 8(2).

[164] *Ibid.*, article 8(4). The receiving state may apply its own laws on registration (e.g. airworthiness certification), where these have not yet been harmonized within the EC.

[165] *Ibid.*, article 10.

[166] E.g. M.L. Luebker, *The 1992 European Unification: Effects in the Air Transport Industry*, JALC, Vol. 56 No. 2 (1990), pp. 589-639, at p. 629.

[167] See *supra* section 2.5.

[168] EC Treaty articles 2, 3 and 14.

accordingly the EC Treaty provides that the Council may adopt measures on air transport policy.[169] Consequently, the Market Access Regulation was adopted in 1992 and its contents of topical interest will be examined in the next two sections.

3.4.1 The Concept of Full Community Route Access

The basic rule for Community route access for Community air carriers can be found in article 3(1) of the Market Access Regulation:

> Subject to this Regulation, Community air carriers *shall* be permitted by the member state(s)s concerned to exercise traffic rights *on all routes within the Community.* (Italics by author).

The clear and definite formulation of this article leaves little room for interpretation, and it ensures full fifth freedom rights for Community air carriers as of 1993, and full cabotage – that is eighth freedom – rights as of 1997.[170] As a result, Community air carriers now enjoy both unlimited access to international intra-Community routes and full access to the domestic air transport markets of other member states. The consequences of the Regulation are far-reaching. For example, neither Belgium nor France can today prevent SAS from operating a service between Brussels and Lyon, an opportunity that in fact SAS has used.[171] This development is quite unique in the world.

When this Regulation was introduced, some states and commentators believed that, because of the absence of any express provision on the matter, carriers would not be required by member states to obtain any form of prior authorization for the operation of routes.[172] However, from the Commission's decision concerning *Viva Air*[173], it became clear that this was not the case.[174] It is important to note that there are exceptions within the regulation to the automatic granting of traffic rights, such as the public service obligation, exclusive concessions, regional services, rules on safety, the protection of the environment, and the allocation of slots.[175] In the *Viva Air* decision, the Commission found that member states are required to grant authorization where none of these specified exceptions or restrictions apply.[176] Furthermore, member states are permitted to impose formal notification and authorization procedures – albeit very limited – in view of these various exceptions to the principle of freedom to exercise traffic rights.[177] According to subsequently issued Commission Guidelines[178], this must, however, be

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[169] *Ibid.*, article 80(2). See the discussion under section 1.1.3 *supra*.

[170] Market Access Regulation, article 3.

[171] J. Balfour, *Air Transport – A Community Success Story?* CMLRev., Vol. 31 No. 5 (1994), pp. 1025-1055, at p. 1029.

[172] J. Balfour, *supra* note 151, at p. 58.

[173] Commission Decision 93/347, OJ No. L140 (1993) at p. 51.

[174] B. Adkins, *supra* note 43, at pp. 225-227.

[175] Market Access Regulation, articles 4, 5, 6 and 8.

[176] Commission Decision 93/347, *supra* note 173, at pp. 54 *et seq*.

[177] *Ibid.*

[178] Commission Guidelines COM (93) 715 (1993).

kept to the minimum necessary for the operation of the exceptions.[179] In sum, the result is of course that formal authorization by member states of the right to exercise traffic rights is effectively circumscribed, and in most cases states will be required to grant the traffic rights more or less automatically.

3.4.2 The Concept of a Community Cabotage Area

The European Commission regularly uses the term "Community cabotage area" when describing the new model of unconditioned and effective exchange of traffic rights for Community air carriers based on the two regulations previously mentioned.[180] This term is also well known and used in legal literature dealing with air law.[181] Applied to its full extent, it would have the consequence that flights of airlines from third countries within the EU would be viewed as "Community assets", and the Community, from the outside world, as "one entity".[182] According to the Commission, this would mean that all the traffic within and between the member states would be considered equivalent to cabotage and in principle reserved for Community air carriers.[183] However, it has been explained under section 2.3 that the notion of cabotage relates only to the operation of services between two points within the territory of one state. It has also been explained under section 3.2 that the territories of EU member states continue to exist as legally separate units, which means that the validity of the term introduced by the Commission may legitimately be called into question. The apparent confusion about the concepts probably emanates from the assumption that the European cooperation is something more than just a traditional cooperation of individual states.[184] Different from common international treaties, the European agreements, and the secondary law created by Community organs on the basis of these treaties, form an independent legal order "which can no longer be adequately grouped with categories of general international law."[185] This entity has been qualified in many ways, for example as a "more integrated international organization", as an "entity *sui generis*", as a "prefederated organization", and even as a "supranational organization".[186] However, a political union – where the elimination of all political boundaries is a truism – is not a feature of the EU enterprise yet. The member states of the European Union continue to be separate legal entities

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[179] The formalities must be kept to a minimum and the period for replying must be kept short. If a reply is not received within the stated period, authorization will be implicit. *Ibid.*

[180] Commission Communications COM (89) 373 final, in OJ No. C258 (1989), at p. 3, and COM (89) 417, in OJ No. C248 (1989), at p. 7, *Commission Proposal for a Council Regulation amending Regulation 3975/87,* and COM (90) 17, in OJ No. C216 (1993) p. 15.

[181] E.g. P.P.C. Haanappel, *supra* note 128, at pp. 135 *et seq*.

[182] Commission Communication COM (89) 373, *supra* note 180, at pp. 11 and 12.

[183] *Ibid.*

[184] E.g. P. Malanczuk, *supra* note 29, at p. 96; *Oppenheim's*, *supra* note 75, at pp. 70 *et seq*.

[185] P. Malanczuk, *ibid.* The ECJ has held that the "Community constitutes a new legal order of international law" in the *Van Gend en Loos v. Nederlandse Administratie der Belastingen Case*, Case 26/62, [1963] ECR 1, at p. 12. See also the *Costa v. ENEL Case*, Case 6/64 [1964] ECR 585, at p. 593, where the ECJ stated that, unlike ordinary treaties, the "EC Treaty has created its own legal system".

[186] Examples as cited in A. Loewenstein, *supra* note 14, at p. 125.

under international law. For this reason, it is legally incorrect to use the expression Community cabotage area as though it is describing the Community as one entity in air transport related issues.

3.5 THE APPLICATION OF EC COMPETITION REGULATION TO AIR TRANSPORT

The application of EC competition rules to air transport within the Community was more or less suspended until member states finally decided to liberalize air transport within the Community, but today the rules are employed on a daily basis. This issue will be briefly examined here. The extraterritorial application of EC competition rules will not be dealt with in this thesis.

The procedural framework in which competition law is enforced within the air transport sector varies depending on the exact nature of the services in question and where such services are provided. Articles 81 and 82 of the EC Treaty apply to services ancillary to air transport in the same way the competition rules are applied in other sectors, namely through the application of the General Implementing Regulation.[187] With regard to the actual provision of air transport services, the applicable procedural framework depends on whether or not the flight in question is an intra-Community flight or an extra-Community flight. If, on the one hand, the flight in question is a flight between Community airports, Regulation 3975/87 and Regulation 3976/87 apply. If, on the other hand, the flight in question is between the Community and a third country, for the time being only the limited transitional regime of articles 84 and 85 will apply.

EC COMPETITION LAW AND AIR TRANSPORT		
ANCILLARY AIR SERVICES	INTRA-COMMUNITY AIR TRANSPORT SERVICES	EXTRA-COMMUNITY AIR TRANSPORT SERVICES
General implementing Regulation 17/62 applies	Special implementing Regulations 3975/87 and 3976/87 applies	Only articles 84 and 85 of the EC Treaty applies

Regulation 17/62 was made inapplicable to certain aspects of the transport sector by virtue of Council Regulation 141/62.[188] The exact range of this Regulations was, however, not entirely clear until the Commission further specified the scope.[189] The Commission clarified that Regulation 17/62 was applicable to activities that are ancillary to air transport.[190] In short, according to the Commission's view, violations of articles 81 and 82 that relate to services ancillary to air transport will be subject to the same regulation framework as alleged violations in other sectors, while violations relating to actual provisions of air transport services as such will be subject to a different and much more limited regime.

Special implementing Regulations 3975/87 and 3976/87 supply the formula for the general implementation of the competition rules to air transport between Community

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[187] Council Regulation 17/62, OJ No. L13 (1962) at p. 204.

[188] Council Regulation 141/62, OJ No. L124 (1962) at p. 2751, article 1.

[189] *Olympic Airways Decision*, 1 CMLR 730 (1985); *London European Airways v. Sabena Decision*, 4 CMLR 662 (1989).

[190] *London European Airways v. Sabena Decision*, *ibid.*, at para. 17.

airports.[191] The Regulations control all forms of air transport, including the carriage of passengers and freight by both scheduled services and non-scheduled charter services. Regulation 3975/87 does not apply to agreements and practices which are ancillary to air transport.[192] It gives the Commission powers similar to those under Regulation 17/62 with a view to fact-finding, stopping infringements and giving individual exemptions and preliminary decisions.[193] Council Regulation 3976/87 controls the application of article 81(3) of the EC Treaty on block exemptions and empowers the Commission to issue such exemptions in respect of certain categories of agreements.[194] It should be noted that some cases might fall partly within, and partly outside, the scope of these Regulations. This would be the case with an agreement that concerns both air transport and ancillary services.[195] In such cases, the agreement or practice in question is governed partly by these Regulations and partly by other applicable regimes.[196]

With regard to flights between the EC and third countries, none of the previously mentioned special enabling Regulations for the air transport sector apply. In the absence of enabling legislation, the operation of competition rules on extra-EC air services is very limited; only the transitional regime in articles 84 and 85 of the EC Treaty applies. Article 84 establishes the power of authorities in member states to apply articles 81 and 82 to areas where implementing legislation has not yet been passed by the Council pursuant to article 83. Article 85 gives limited authority to the Commission to investigate infringements of articles 81 and 82. The ECJ has clarified to what extent national courts may apply articles 81 and 82 in these situations in the *Saeed Flugreisen Case*.[197] The ECJ found that national courts do not have the authority to apply article 81 with regard to flights between the EC and third countries.[198] Article 81 would not be effective in connection with air transport between the EC and non-member states, unless and until action was taken by the national competition authorities or the Commission, under articles 84 and 85 respectively, and the ECJ clarified that there had been none so far.[199] It follows that, since national courts cannot directly apply article 81 (3) and the Commission cannot grant exemptions under article 81 (3) with regard to extra-Community air traffic, national courts cannot apply articles 81(1) and (2) regarding such flights. However, in relation to the application of article 82, the ECJ found that it may be applied by national courts to flights between the EC and third countries as well as to flights within the Community and services ancillary to air transport services.[200]

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[191] The Regulations was amended in 1992 to also apply to air traffic within one and the same member state.

[192] Council Regulation 3975/87, *supra* note 53, preamble, and article 1 *é contrario*.

[193] *Ibid*., articles 3(1), 4(3), 5, 10, and 11.

[194] *Ibid.*, article 2(2).

[195] See B. van Houtte, *Community Competition Law in the Air Transport Sector (pt. I and II),* ASL, Vol. XVII No. 2 (1993), at pp. 61-70 (pt. I), No. 6 (1993), at pp. 275-287 (pt. II).

[196] See e.g. Commissions Notice OJ No. L258 (1990) at p. 33.

[197] *Ahmed Saed Case, supra* note 49.

[198] *Ibid.*, at p. 845.

[199] *Ibid.*, at p. 847.

[200] *Ibid.*, at p. 848.

Commission proposals exist both to extend the scope of Regulation 3975/87 to cover extra-Community flights, and to apply article 81 (3) of the treaty to such flights.[201] The Commission has strongly maintained this position and has repeatedly argued in Communications and Proposals to the Council for immediate action on this matter.[202]

3.6 SUMMARY

In this chapter, some of the most important underlying principles of the European regulatory system of the air have been clarified and prepared for the ensuing compatibility analysis. Accordingly, the components selected for this analysis are as follows: the plurilateral exchange of air traffic rights in a regional setting, the questions surrounding the transfer of competence to the EC, the introduction of the new concept of Community air carriers and accessory issues, the setting up of a Community cabotage area, and the distribution of exclusive Community cabotage rights to Community air carriers. Having so framed the basic ingredients specific to the European project for the comparative chapter – the analysis of possible violations will be performed in the next chapter.

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[201] Commission Communication COM (89) 417, in OJ No. C248 (1989) p. 10, *Commission Proposal for a Council Regulation on the application of article 81(3) of the treaty to certain categories of agreements and concerted practices in the air transport sector.*

[202] Commission Communication COM (92) 434, *supra* note 41; Commission Communication, COM (97) 218, in OJ No. C165 (1997) p.13, *Commission Proposal for a Council Regulation amending Regulation 3975/87.*

CHAPTER 4: POSSIBLE VIOLATIONS

4.1 GENERAL REMARKS

In this chapter the identified characteristics of EC air transport regulation will be compared with the corresponding principles of the system under the Chicago Convention, in order to answer the question whether the member states by means of subsequently adopted EC air transport regulation are violating the Chicago system. It should be noted once again that the question whether or not the member states violated the Chicago Convention simply by signing the EC Treaty will not be considered. Finally, a few legal issues regarding the continuing use of bilateral air transport agreements between EC member states and non-member states will be considered. EC air transport regulation will be compared to the Chicago Convention as the Convention looked at the time of the adoption of the EC legislation, including any subsequent amendments to the Convention and adopted resolutions binding all the parties to the Chicago Convention. This is a direct effect of the temporal element laid out in chapter 1. The legal consequences of possible violations will be discussed in the last chapter.

4.2 NATIONALITY AND REGISTRATION OF AIRCRAFT

According to the Community principles of non-discrimination between member states or their nationals, and the freedom of establishment, air carriers with a seat in the Community must be entitled to operate within all member states under the same conditions as national carriers.[203] However, the specificity of the traditional Chicago based system, with its web of bilateral air transport agreements containing strict rules on ownership and nationality of airlines, debarred Community airlines from the free exercise of their treaty based rights. As previously shown, the solution came in 1992 with the introduction of the concept of Community air carriers through the Licencing Regulation. Once a carrier is qualified for an operating licence – and thus entitled to be called a Community air carrier – it now enjoys full access to all intra-Community routes.[204] Compared to the traditional regulatory system where nationality was decisive for international route access, the criteria of nationality is no longer distinctive for carriers within the Community. However, nationality of aircraft is one of the fundamental legal principles under the Chicago Convention to which numerous obligations, international responsibility and authority over the aircraft is attached, and the question is whether or not the member states are violating the older system by means of this new concept. This question involves several aspects which will be considered in sequence below.

4.2.1 Article 17 of the Chicago Convention

According to article 17 of the Chicago Convention, aircraft must have the nationality of the state in which they are registered. The nationality, to which the rights and obligations are attached, is defined by the formal requirement of registration. Therefore, it is the place of registration which is decisive for the national status of the aircraft. The

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[203] See *supra* section 3.3.

[204] See *supra* section 3.4.1.

nationality of the owners is not of importance to the principle in article 17. The nationality of the airline operating the aircraft is irrelevant as long as the aircraft has been nationally or internationally registered so that a state or a recognized operating organization[205] bears full responsibility under public international law for the operation of the plane.[206] The concept of Community air carriers does not yet include a mandatory Community registration process to the extinction of the national registration rule, and therefore, article 17 of the Chicago Convention is not *a priori* violated by the Community air carrier concept.[207] In other words, for the time being, all aircraft belonging to Community air carriers, will continue to be registered in member states, deriving their legal status from that state and this will not cause any disagreement with the traditional rules on nationality.

4.2.2 National Licence *versus* Community Licence

As previously described, each party to the Chicago Convention is solely responsible for the regulation of air transportation within, to and from its territory.[208] This responsibility also includes the granting of national licences for international routes, traditionally granted in connection with the designation of air carriers under the respective bilateral air transport agreement.[209] The rules governing the grant and withdrawal of such licences are additional matters within domestic regulation. However, the Licencing Regulation has introduced a licencing system which applies throughout the Community, while the licence itself is granted by a specific member state, that is to say the member state where the air carrier has its principal place of business and/or registered office. It has been argued that this new system of licencing air carriers could be contrary to the traditional system, since the rules governing the grant and withdrawal of such licences is no longer an exclusive matter of domestic regulatory law.[210] It is however submitted that the licencing system under the Licencing Regulation is not the creation of a new Community licence system, but simply an extension of the already existing licencing system of the individual member states to a Community level. More accurately, the present conditions under which operating licences are granted have merely been coordinated between member states. Furthermore, the granting and revoking of licences is still *de facto* performed by states. This arrangement should therefore not be seen as violating the principles of licencing under the Chicago Convention.

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[205] Chicago Convention, articles 77 *et seq*.

[206] M. Milde, *Nationality and Registration of Aircraft Operated by Joint Air Transport Operating Organizations or International Operating Agencies*, AASL, Vol. X (1985), pp. 133-153, at p. 141.

[207] A. Loewenstein, *supra* note 14, at p. 134. It is, however, not unlikely that a Community Aircraft Register will be set up in the near future, see the discussion under section 4.2.4 *infra*.

[208] *Supra* section 2.1.2.

[209] B. Cheng, *supra* note 5, at p. 123.

[210] E.g. L. Weber, *The European Union and the Chicago Convention of 1944*, ASL, Vol. XIX No. 3 (1994), pp. 179-184, at p. 182.

4.2.3 The Transit Agreement

The application of the Transit Agreement raises a related question to the compatibility of the concept of Community air carrier with the traditional system.[211] This recognized instrument may be seen as an integral part of the Chicago Convention, exchanging the first and second freedoms on a multilateral basis. The interesting part of the agreement in this respect can be found in article 1 sect. 5, which states that:

> Each contracting state *reserves the right* to withhold or revoke a certificate or permit to an air transport enterprise of another state in any case where it is not satisfied that *substantial ownership* and *effective control* are vested in nationals of the contracting state.[212]

This provision explicitly requires national ownership and control of the airline, compared to the previously examined article 17 that only regulates the nationality of the aircraft. Thus, it sets up conditions for the airlines using the rights under the Agreement. However, according to the Licencing Regulation currently in force, any legal subject of the Community member states may own a Community air carrier – irrespective of nationality.[213] Correspondingly, in accordance with the Access Regulation, the carrier may even operate out of one member state and still be totally owned by citizens of another member state. All member states are contracting states of the Transit Agreement, and due to the extended possibilities under Community law of running airline business anywhere in the Community, it is eventually probable that some Community air carriers will no longer correspond with the legal conditions under the Transit Agreement required to enjoy the privileges under the Agreement. For these Community carriers, there is a risk that they might be subjected to the legal consequences under the Transit Agreement and be deprived of the privileges of overflight and landing for non-traffic purposes.[214] This could in the long run seriously affect the extra-Community air transport relations because the right of overflight is becoming more relevant.[215]

However, it is submitted that this does not constitute a direct violation of the Transit Agreement. The Agreement does not regulate the amount of ownership or control of airlines in general, it merely formulates a rule giving member states the right to suspend the operations of the airline if the requirements are not fulfilled. It may also be noted that the critical specifications of sect. 5, simply underline the discretionary power of the contracting states to the Chicago Convention, with regard to the revocation of the

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[211] The same problem is valid for the Transport Agreement, but as it has only been ratified by a few states, it is of less importance here.

[212] Italics by author. Most bilateral agreements, also include the substantial ownership/effective control requirement. This creates potential problems for the member states regarding their external aviation relations. See *infra* section 4.5.

[213] See *supra* section 3.3.1 *et seq*.

[214] Transit Agreement, article 1, sections 1 and 5.

[215] The environmental aspect of air traffic is attracting more attention, causing aircraft to take straighter routes to consume less fuel. In addition to this, GPS navigation techniques facilitate direct routing instead of following the traditional airways. The result will be overflights over an increased number of states in order to operate the shortest route. OECD, *The Future of International Air Transport Policy – Responding to Global Change* (1997), chapter 3.

privileges. It is not a compulsory obligation to withdraw the overflight rights and so far there has been no disapproval from third states to the European project.

4.2.4 Community Aircraft Registration

The expression Community air carrier suggests that European air carriers derive their legal status from the Community as such and not from one particular member state. However, as described under section 3.3.2, this is not yet the case since all European aircraft have to be registered in a member state. It is, however, possible that the Commission will, at a later phase of the integration process, suggest a common register for all or a part of the European aircraft fleet.[216] The idea of a common aircraft register – or even a single airline for the whole of Europe – is actually not at all new but was discussed at a very early stage in the European integration process.[217] Arguably, a Community aircraft register would be the logical complement to both the Community air carrier and Community cabotage area concepts, aiming at the removal of all differences with regard to the treatment of carriers by national authorities in the intra-Community air market.[218] The assumption that the Commission will propose such a register in the near future, brings about the question whether this would be a violation of the principles of nationality and registration in the Chicago Convention.

The starting point for this discussion is of course the rules of nationality and registration of aircraft in articles 17 and 18 of the Chicago Convention. However, as already described, the Chicago Convention provides for some deviation from these rules under certain circumstances. According to article 77, states may establish "joint air transport organizations" and "international operating agencies", and article 79 entitles states to participate in such arrangements through their governments or through airline companies. It is also provided in article 77 that all provisions in the Convention generally will apply to this arrangement, but also more specifically that the ICAO Council shall determine in what manner the provisions of the Convention relating to nationality of aircraft shall apply to their aircraft. Historically, the main problems when applying these articles have been twofold. Firstly, the two different types of arrangements are not legally defined in the Convention, creating uncertainty as to their content. Secondly, according to article 77, the ICAO Council will have the last word on the topically interesting question of nationality of aircraft. Accordingly, in 1967 the Council adopted a resolution on this matter, and regarding the "international operating agencies", the resolution established two possible regimes of registration, a "joint registration" and an "international registration".[219] However, it was also stated that both

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[216] This development is predicted by e.g. P.P.C. Haanappel, *supra* note 128, at pp. 131 and 143 *et seq*; H. Wassenbergh, *Public International Air Transportation Law in a New Era* (1976), at p. 138.

[217] As early as 1950, the *Bonnefous Plan* and the *Sforza Plan* envisaged a common European airspace and a single airline for the whole of Europe. The closest Europe came was the attempt to set up a joint operating airline company – AIR UNION – in the beginning of the 1960's. The draft convention on AIR UNION referred to articles 44, 77 and 79 of the Chicago Convention. See J. Naveau, *supra* note 92, at pp. 180-183.

[218] R. Ricketts & J. Balfour, *supra* note 161, at p. 26.

[219] 1968 Council Resolution on Nationality and Registration of Aircraft Operated by International Operating Agencies, ICAO Doc. 8722 - C/976 (1968), at p. 5.

regimes were set up for agencies established by contracting states operating the aircraft themselves, and the requirement of aircraft registration in a state was still necessary to some extent.[220] Later, in 1982, the ICAO Council made another statement under article 77 in the case of Arab Air Cargo, an international joint operating agency established by Jordan and Iraq. The Council reaffirmed the position taken in the 1967 Resolution by requiring aircraft registration in one of the states.[221] Bearing in mind that the primary reason for setting up a Community aircraft register would be to cut the link to individual member states, it is submitted here that the requirements set up by the ICAO Council appear to be unsuitable for a Community registration process because the link to individual member states would still be present. Thus, until the ICAO Council modifies this Resolution – which is still in force – the establishment of a Community aircraft register for the registration of aircraft operated by Community air carriers, would appear to violate the possible forms of international cooperation presently provided for by the Chicago Convention.[222] However, this can only be seen as a potential breach since a common register is not yet a reality.

4.2.5 Summary and Remarks

In sum, it can be established that the Community air carrier concept is compatible with basic provisions of the Chicago Convention, as long as aircraft remain registered in individual member states. This arrangement is therefore not violating the principles under the Chicago Convention. Furthermore, the new conditions under which operating licences are granted within the EC are not in violation of the Chicago Convention. In the event that a system of Community aircraft registration will be introduced in the Community, this may lead to conflicts with articles 17 and 77 of the Chicago Convention. Moreover, the Community air carrier concept may lead to conflicts with the requirements of "substantial ownership" and "effective control" in the Transit Agreement. This can, however, not be considered to be a direct violation of the Agreement. Finally, in the event that a Community aircraft register is introduced, some important problems have to be solved to avoid a conflict with the principles of registration in the Chicago Convention.

A few general remarks should be made here about the new concept of Community air carriers. It is true that the Community has come a long way towards a single European air market with the introduction of the concept. However, it is submitted that the new airline licencing system is essentially incomplete for the following reason. The ambition with the new licencing system seems to be twofold. Firstly, it is supposed to prevent member states from unilaterally imposing access restrictions on air carriers that can claim a European Union citizenship, thereby bringing air transport into compliance with the rules of non-discrimination in the EC Treaty. Secondly, it is supposed to increase the potential for the application of the freedom of establishment in the air sector by creating a theoretical predicate for intra-Union transnational mergers and acquisitions of airlines

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[220] *Ibid.* The same principles were later followed by the ICAO Council in the previously described Air Afrique situation in 1961. See *supra* section 2.4.2.

[221] Jordan had to act on behalf of both countries and fulfill the functions of the state of registry under the Chicago Convention. M. Milde, *supra* note 206, footnote 117 at p. 149.

[222] P.P.C. Haanappel, *supra* note 128, at p. 143, also suggesting a ICAO Council determination under article 77 of the Chicago Convention allowing Community Registration of aircraft.

by expanding the definition of ownership and control to encompass all member state nationals. However, a comprehensive Community aircraft register remains to bee seen, leaving the process of securing licences in the hands of the slow, and sometimes arbitrary, administrative process of the individual member states. Furthermore, the old nationality rule still occupies a central place in the new regulatory system despite all the commendable intentions. The result will in time be a combination between the old and new regulatory principles, creating air carriers under multi-European ownership with a fleet of single-state registered aircraft. For intra-Community flights this will not create any problems at all. On the contrary, as long as the air carrier is owned and controlled by nationals of any one or more member states, the Community air carrier licence will be granted, giving the carrier extensive rights of access to air routes within the Community. But, as between the Community and third states difficulties will arise. The complications inherent in the Transport Agreement have been discussed in this section as an example of these difficulties. Finally, the opportunities of intra-Union transnational mergers and acquisitions of ownership of airlines have so far not been used to any appreciable extent. On the contrary, the absence of cross-border merger activity within the EU air industry strongly supports the conclusion that the process of de-nationalizing of Europe's airlines is still a work in progress.[223]

4.3 CABOTAGE

With EC air transport liberalization a new classification of the Community airspace has been introduced, arbitrarily referred to as a "Community cabotage area".[224] All air routes within this confined area are correspondingly labeled "Community routes" to express a system of aerial freeways where "Community air carriers" enjoy full "Community cabotage rights".[225] The objective is, of course, to create a market without internal frontiers for aviation in Europe. In theory, once the airline is an approved Community air carrier, it more or less automatically will get access to all air routes within the Community. However, as already shown under section 3.2 *supra*, the used phraseology is clearly misleading since the EC member states continue to exist as separate legal entities under international law. For this reason it is strictly speaking incorrect to use the expression "Community cabotage" for air related issues. However, disregarding the careless use of terms, it is of course still necessary to examine the legal regime provided for by the relevant EC air transport regulation. The question that must be addressed is whether, and to what extent, the objective to give 'true' cabotage rights – that is domestic traffic rights – exclusively to Community air carriers, amounts to a violation of the Chicago Convention.[226] As previously shown, article 7 of the Chicago Convention

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[223] B.F. Havel, *supra* note 95, at p. 338. The airline industry has created transnational 'non-merger alliances' between airlines and the more recent 'code-sharing collaborations' in order to overcome the deficiencies of the traditional and the European systems of air law. However, none of these models of cooperation can measure up to full mergers and/or acquisitions.

[224] See *supra* section 3.4.2.

[225] Commission Communication COM (89) 373, *supra* note 180, at pp. 11 and 12

[226] According to the Market Access Regulation, article 3(1), Community air carriers shall be permitted by the member states concerned to exercise traffic rights on all routes within the Community – including domestic routes. See *supra* section 3.4.1.

regulates domestic air traffic in a manner granting exclusivity to national carriers in the first sentence, and limiting the possibility to treat other states in a discriminatory fashion in the second:

> Each contracting state shall have the right to refuse permission to the aircraft of other contracting states to take on in *its territory* passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting state *undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other state or an airline of any other state, and not to obtain any such exclusive privilege from any other state*. (Italics by author).

In order to answer the question properly, the legal status of Community routes must be clarified first. This will be performed in the following section as a preliminary issue in order to determine the correct legal framework in which the question should be handled.

4.3.1 The Legal Status of Community Routes

The question is whether routes between two member states continue to be international routes in the sense of the Chicago Convention, or should be considered 'domestic' Community routes instead. Nothing in the EC Regulations currently in force expressly define the term Community routes and the Market Access Regulation only concerns "access to *routes within the Community* for scheduled and non-scheduled air services" according to article 1(1). In addition, a special regime for access to such intra-Community air routes is provided for by article 3(1) of the Regulation. Turning to the traditional system of air law, the locution international route is not further defined in the Chicago Convention, but the Convention provides in article 96 (b) that:

> *International air services* means an air service which passes through the airspace over the territory of *more than one state*.[227]

Considering that the member states continue to be separate subjects under international law, the logical consequence must be that routes between airports in two different member states continue to be international routes, and that services provided between such airports continue to be international air services in the sense of article 96 of the Chicago Convention.[228] The result is thus that flights within the EC are submitted to two different international regimes: intra-Community flights between member states are international flights in the sense of article 6 and article 96(b) of the Chicago Convention, while intra-Community flights within one member state are submitted to article 7 as purely domestic flights (i.e. 'true' cabotage).[229] With this result it clearly becomes necessary to examine both the legality of the plurilateral exchange of international traffic rights and the legality of granting exclusive 'true' cabotage rights to each other within the Community.

4.3.2 The Legality of the Plurilateral Exchange of International Air Traffic Rights

As described in section 2.5, it is undisputed that the bilateral system has been the preferred way to exchange air traffic rights. However, it is submitted that this does not

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[227] Chicago Convention, article 96(b). Italics by author.

[228] L. Weber, *supra* note 210, at p. 180.

[229] This division is fundamental, and any changes to it must be made at the Chicago level.

necessarily mean that multilateralism has been abandoned as an option in inter-state aviation relations. First of all, it is important to note that the exchange of air traffic rights through bilateral agreements is just one element in the regulatory system.[230] For example, important transport rights are already exchanged on a daily basis in the mutual grant of institutional and technical rights for international aviation in the widely accepted Transit Agreement, and in the mutual grant of economic and commercial rights in the – albeit not so widely accepted – Transport Agreement. Fourth, and most important, article 6 of the Chicago Convention requires an access-seeking state to obtain separate permission from each state it would like to open a scheduled air service to. However, this article does not specifically require the conclusion of a bilateral air transport agreement for the exchange of those traffic rights.[231] Rather, it would seem that this provision does allow for the granting of rights within either a bilateral or a multilateral environment.[232] Thus, it is submitted that the member states are not violating the system under the Chicago Convention by using a plurilateral solution to exchange traffic rights. The immediate result is that states generally may resort to either bilateral or multilateral models when exchanging traffic rights.

4.3.3 The Legality of Granting Exclusive Community Cabotage Rights to Community Air Carriers

The next question is whether the objective to give true cabotage rights exclusively to Community air carriers is in accordance with the second sentence of article 7 of the Chicago Convention. Article 3(1) of the Market Access Regulation regulates the principle for access to Community routes in the single general declaration that "licenced Community Air Carriers *shall be permitted* by the member states concerned to exercise traffic rights on routes within the Community". Article 7(1) of the Chicago Convention creates no obstacle to this distribution of rights. It merely provides each ICAO contracting state with the discretion to refuse aircraft of other contracting states to carry domestic – or cabotage – traffic within its territory.[233] This is a discretion that states do not have to use if they do not want to. It is rather article 7(2) that is problematic. It forbids ICAO member states to "specifically grant" cabotage rights on an "exclusive basis" to any other state or airline thereof. It should be clarified that there is no doubt that the grant and receipt of cabotage rights on a non-exclusive basis is permitted by the Convention. To perform this on an exclusive basis is another matter.[234] On the face of it, article 7(2) could probably be considered as a strict most favored nation clause: where a state grants cabotage rights to another state or airline thereof, the first state cannot refuse to grant it to others upon request. However, the exact function of the rule depends on its interpretation.[235]

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[230] B. Cheng, *supra* note 5, at p. 493.

[231] L. Weber, *The Chicago Convention and the Exchange of Traffic Rights in a Regional Context*, AASL, Vol. XX-I (1995), pp. 123-133, at p. 124. B.F. Havel, *supra* note 95, at p. 52.

[232] L. Weber, *ibid.*, at p. 127; P.P.C. Haanappel, *supra* note 128, at p. 141, asserting that states, not the Chicago Convention, created the bilateral system.

[233] P.P.C. Haanappel, *ibid.*, at p. 138.

[234] B. Cheng, *supra* note 5, at p. 315.

[235] D.R. Lewis, *Air–Cabotage and Modern-Day Perspectives*, JALC, Vol. 45 No. XLV (1980) at pp. 1059-1088, at pp. 1063-1065; J.E.C. de Groot, *Cabotage Liberalization in the European*

According to one interpretation, cabotage rights are not to be granted to any state, and alternatively, if such rights are granted to one state, they must be granted to all states requesting such rights.[236] This interpretation clearly emphasizes the phrase "on an exclusive basis" and passes over the "specifically" element. The result is a restrictive approach similar to an unconditional most favored nations clause.[237] Interpreted as such, where member states of the Community grant each other and their airlines cabotage rights, they cannot refuse to grant similar rights to non-member states and their airlines desiring to operate on such domestic routes. In other words, this interpretation would essentially stop any Community attempt to exclusively grant each other traffic rights while excluding the rest of the world, since such exclusivity would be considered forbidden as such. However, it should be mentioned that, although it has been suggested that this interpretation could be justified by referring to the draft history and the purposes of the Convention,[238] no state praxis or judicial decision exist to support it.[239]

A second and more contemporaneous interpretation aims at the word "specifically" in article 7(2) and reaches for a more flexible approach, somewhat more promising to the Community aerial agenda. According to this interpretation, an exclusive grant of cabotage rights is possible as long as this exclusivity is not specifically mentioned in the relevant air transport agreement or other documents.[240] Therefore, the arrangement must not in any way be specifically exclusive in favor for one, two, or a group of states. The very limited state practice gathered in the application of article 7(2) actually supports this kind of interpretation. Back in 1951, Sweden, Norway and Denmark created the consortium SAS for the purpose of reinforcing the relatively weak position of the Scandinavian countries in external aviation relations, and to "expedite the harmonious expansion of European air transport in the worldwide competition".[241] In order to set up and operate SAS, the three countries granted each other cabotage rights.[242] However, the arrangements on cabotage did not explicitly state that the grant of cabotage was made on an exclusive manner, and furthermore, they included a 'safeguard clause' to the effect that the arrangement would expire if a third state also claimed these cabotage rights.[243]

Economic Community and Article 7 of the Chicago Convention, AASL, Vol. XIV (1989), pp. 139-190, at p. 157.

[236] J.E.C. de Groot, *ibid.*; L. Weber, *EEC Air Transport Liberalization and the Chicago Convention*, AASL, Vol. XVII-I (1992), pp. 245-262, at pp. 256-257.

[237] Under unconditional most favored nation treatment, when state A grants a privilege to state C while owing unconditional MFN to state B, state A must grant the equivalent privilege to state B, without necessarily receiving any reciprocal concession from state B. This kind of MFN inherently excludes a policy of exclusivity. See generally J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989), at pp. 136-138.

[238] E.g. A. Loewenstein, *supra* note 14, at p. 130.

[239] *Ibid.*

[240] B. Cheng, *supra* note 5, at p. 315; B.F. Havel, *supra* note 95, at pp. 53-54; P.P.C. Haanappel, *supra* note 128, at p. 138.

[241] Consortium goals as cited in J. Naveau, *supra* note 92, at p. 182. See also I.H.Ph. Diederiks-Verschoor, *supra* note 7, at p. 18;

[242] ITA Bulletin, *Cabotage in International Air Transport: Historical and Present-Day Aspects*, Vol. 5 No. 7E (1969), at pp. 14-15.

[243] *Ibid.*

This formulation, obviously constructed in an attempt to avoid the problems imposed by article 7(2) of the Chicago Convention, was later subject to detailed discussions within the ICAO.[244] The Scandinavian arrangement was finally declared compatible with article 7 of the Convention by the ICAO Council.[245]

However, when comparing that specific situation with the present, it is submitted that relevant EC air transport regulation clearly show that only Community carriers may be granted cabotage rights. Thus, his arrangement would appear to provide for explicit exclusiveness and would as such be forbidden. In the alternative, should the EC arrangement instead be seen as not explicitly providing for exclusive cabotage rights in line with the SAS example just mentioned, it is submitted that the arrangement would still appear to violate the Chicago Convention since it does not contain the necessary SAS safeguard clause. Consequently, by providing specific exclusivity with regard to the exchange of cabotage rights amongst themselves without the use of a SAS model escape clause, the member states, all of which are parties to the Chicago Convention, are clearly violating article 7(2). The consequences of this violation will be considered in more detail in the final chapter of this thesis.

4.3.4 Summary and Remarks

In sum, it can be established that the member states are not violating the system under the Chicago Convention by using a plurilateral solution to exchange traffic rights. However, it was also found that intra-Community flights within one member state are submitted to Chicago Convention article 7 as purely domestic flights. The fact that Community legislation in force provides for internal cabotage rights exchange between member states on these routes, motivated a compatibility assessment resulting in the exposure of a clear conflict situation with article 7(2) of the Chicago Convention. Given the clear disagreement between the two systems, and the fact that Community air carriers today actually enjoys full access to the domestic air transport markets of other member states through the operation of Market Access Council Regulation, it is appropriate to make a few remarks.

As already explained, it is possible that the EC arrangement could be regarded as compatible with article 7(2) of the Chicago Convention provided that the Community would use a SAS model escape clause to the effect that the granted cabotage rights would lapse if third states requested similar rights. However, the problems related to the use of such a clause would arguably overshadow the benefits for the following reasons. First, such an escape clause would eclipse the objective of the intra-Community grant of cabotage rights, since a massive exchange of cabotage rights by Community member states amongst themselves could result in claims by non-member states to similar rights. Second, even with the escape clause, a Community action on this subject would appear to be *per se* exclusive with regard to the member states, since it is in the nature of

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[244] See ICAO documents from the ICAO Council, the ICAO Assembly and the ICAO Executive Committee as cited in L. Weber, *supra* note 236, f.n. 20 at p. 256.

[245] *Ibid.*

Community measures to regulate matters concerning the member states only.[246] Third, given the fact that, from the viewpoint of the Community, access to internal cabotage rights would be a constituent and irreversible element of the single air transport market, it is rather doubtful that a safeguard clause of this type would be regarded as an acceptable solution.

However, another suggestion, realizes these problems and requires no safeguard clause. Instead this solution requires an alteration of article 7(2) of the Chicago Convention in order to let the Community pursue its objective without violating the Convention.[247] The most effective modification would be to completely delete the second part of article 7. In fact, it has been argued by states and legal authorities that this sentence has no essential purpose for modern air transport.[248] With the first sentence of article 7 still intact, states would then be free to refuse to grant cabotage rights to other states or airlines thereof. Inversely, if they would like to obtain cabotage rights in other countries, they would then have to negotiate and exchange them exclusively with the country or countries involved. However, an abrogation of article 7(2) is not probable within a reasonable short time perspective. According to article 94(a) of the Chicago Convention, any amendment to the convention must be approved by a two-third majority of the member states and must furthermore be ratified by at least that number, and of the 185 ICAO member states, only relatively few see the article as problematic. A more pragmatic and realistic alternative to this would perhaps be to request an ICAO Council definition of the concession of cabotage rights in the sense of article 7(2), even if it were only for the guidance of ICAO member states. Such a definition should in that case aim at regional cooperations in general. This could make the definition politically attainable, since it would be adopted, not in general worldwide terms nor only with a view to a common European air transport policy and market, but for all economic groupings of countries in the world.[249]

4.4 OTHER POSSIBLE VIOLATIONS

4.4.1 The Principle of Non-Discrimination within the Chicago Convention

Non-discrimination between EC member states and their nationals is one of the leading considerations behind the exclusive grant of traffic rights within the EC to Community air carriers. However, article 11 of the Chicago Convention announces the need for non-discriminatory treatment among carriers from all of the Chicago member states. Article 11 formulates the following rule:

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[246] Matters concerning association or cooperation with specific third countries may of course be regulated in association or cooperation agreements, but these are not subject of the present discussion. See further L. Weber, *ibid*., at p. 257.

[247] P.P.C. Haanappel, *supra* note 128, at pp. 138-139.

[248] An early proposal from Sweden suggested the deletion of article 7(2). See the *Explanatory Notes by the ICAO Secretariat on the Swedish Proposal for the Amendment of article 7 of the Convention on International Civil Aviation – Cabotage*, ICAO Doc. A-16 WP/8 Ex/2 (1969). See also P.P.C. Haanappel, *ibid.*; A. Loewenstein, *supra* note 14, at p. 130; J. Balfour, *supra* note 151, at p. 67, citing professor B. Cheng arguing in 1991 that article 7(2) "no longer serves any practical purpose".

[249] P.P.C. Haanappel, *supra* note 128, at pp. 139-140.

> Subject to the provisions of this Convention, the laws and regulations of a contracting state relating to the admission to or departure from its territory of aircraft engaged in *international air navigation* […], *shall be applied to the aircraft of all contracting states without distinction as to nationality* […].[250]

According to the market access regulation, important Community access rights may only be granted to Community air carriers.[251] A foreign carrier from an external third state can for example never acquire access rights to the Community sky on the same terms as a Community air carrier. Considering the fact that routes between airports in two different member states will continue to be international air routes, the question may be raised whether or not EC member states are violating this important principle of non-discrimination when excluding third states from the internal – but still international – EC air routes in this way.

The answer to this question depends on two factors. Firstly, the actual scope of article 11 must be clarified. It declares that the "laws and regulations" relating to the admission to or departure from the territory of a convention state must be applied equally towards all states operating air routes to that state. It has been authoritatively suggested that the article only deals with the "air navigation laws and regulations" of contracting states, and thus says nothing about the actual rules of "access to air routes".[252] According to this view, the article regulates the rules of the air, and not the rules of access to the air. Secondly, the phrase "Subject to the provisions of this Convention" must be taken into consideration. This phrase indicates that the article is secondary to any other rule on air access in the Convention, and as previously shown, aerial access to other states for scheduled commercial purposes are to be dealt with in separate bilateral or multilateral agreements since the Chicago Convention failed to provide for a multilateral solution.[253] This also became the formula chosen by states in exchanging aerial access rights, and must thus be seen as the main rule for scheduled access.[254] Therefore, it is not likely that article 11 should be interpreted in such way that this general rule would loose its meaning.[255] On the contrary, it shows that the article actually only deals with 'air navigation' laws and regulations. In sum, it is submitted that the rules introduced by the access regulation are in accordance with article 11 of the Chicago Convention. Consequently, the member states are not violating this article.

4.4.2 The Transfer of Competence to the Community

The competence of member states to regulate air traffic within and outside its borders has today to some extent been transferred to the Community in order to be settled within a common procedure by the institutions of the EC, instead of being agreed by separate states. It has been argued that article 1 of the Chicago Convention attaches the

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[250] Italics by author.

[251] Market Access Regulation, article 3.

[252] B. Cheng, *supra* note 5, at p. 328.

[253] See *supra* section 2.5.

[254] E.g. I.H.Ph. Diederiks-Verschoor, *supra* note 7, at p. 15.

[255] This solution is in accordance with rules on interpretation in the VCLT, article 31.

competence to regulate the airspace exclusively to states and that no other subject of international law should be able to exercise this competence, and that member states are violating the principles of competence in the Chicago Convention by means of this transfer.[256] However, as a general rule in public international law, states are entitled to transfer certain amount of competence to other subjects of international law, such as international organizations.[257] Furthermore, it may be argued that the Chicago Convention favors such solutions, since, for example, the preamble and articles 77 *et seq.* promotes international cooperation, and provisions in chapter XVI suggest certain transfers of national authority to inter-state bodies. Thus, neither international law nor the Convention should be generally interpreted as intending to exclusively reserve the air-related competence to states. Therefore it is submitted that member states have not violated the Chicago Convention by transferring competence in air related maters to the EC institutions.

4.5 ISSUES RELATING TO THE CONTINUING USE OF BILATERAL AIR TRANSPORT AGREEMENTS

The Commission has repeatedly indicated its determination to replace member states with the Community as a single collective negotiator on aviation matters with third states.[258] However, a unified Community negotiation process is not a reality yet, and therefore member states will continue to apply and renew their bilateral air transport agreements with third states.[259] Under these circumstances two issues relating to this continuing use of bilateral agreements with third states will be considered in this part. The first issue concerns the question whether member states are violating their obligations under EC Law towards other member states by means of the continuation and renewal of these bilateral agreements. The second issue concerns the question if member states are violating the previously discussed provisions in their bilateral treaties with third states by means of EC air transport regulation. The issue of the division of competence in external aviation relations between the Community and member states will not be dealt with in detail in this thesis.[260]

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[256] A. Loewenstein, *supra* note 14, at p. 126, erroneously referring to this as "a transfer of sovereignty".

[257] F. Capotorti, *Supranational Organizations*, EPIL, Vol. 5 (1983), pp. 262-269, at p. 264; P. Malanczuk, *supra* note 29, at p. 95; *Oppenheim's*, *supra* note 75, at p. 125; I. Brownlie, *supra* note 75, at pp. 289-292; H. Steinberger, *supra* note 64, at pp. 408-409.

[258] E.g. Commission Communications COM (90) 17, *supra* note 180, and COM (92) 434, *supra* note 41. See also Commissioner N. Kinnock, *The Future of the Global Airline Industry*, Speech before the 12th Annual World Aerospace and Air Transport Conference (3 September 1998), DN: SPEECH/98/165, http://europa.eu.int/en/comm/dg07/index.htm.

[259] Commissioner N. Kinnock: "Member states continue to hand out international traffic rights on the basis of antiquated ownership limits and narrow-minded bilateral agreements". Speech to the AEAP Assembly (30 October 1998), DN: SPEECH/98/224, *ibid.*

[260] See further J. Balfour, *European Community External Aviation Relations – The Question of Competence,* ASL, Vol. XXI No. 1 (1996), at pp. 2-9, and G. Close, *External Competence for Air Policy in the Third Phase – Trade Policy or Transport Policy?* Air Law, Vol. XV No. 5/6 (1990), pp. 295-306.

4.5.1 Are EC Member states Violating their Obligations under EC Law with the Continuation of Bilateral Air Transport Agreements with Third states?

The Licencing Regulation prohibits member states from requiring Community air carriers established in their territory be owned and controlled by their own nationals, to the benefit for EU-nationals. In that way, the Regulation reaffirms the principles within the EC Treaty of non-discrimination and the right of establishment of nationals from member states. At the same time, most bilateral agreements between member states and third states entitle each third state to revoke operating permissions if a carrier operating between the two states from the other state is not 'substantially owned' and 'effectively controlled' by that other state and/or its nationals. Thus, it is more or less impossible for a carrier from another member state to operate under the same operating conditions as the national Carrier of a particular member state, and above all, the carrier from the other member state will never be able to operate routes to the third state as provided for by the bilateral treaty. Does this separate treatment of carriers from other EC member states amount to a violation of the rules of the relevant Regulations on air transport, or perhaps of the principles of non-discriminatory treatment and the right to establishment in the EC Treaty?

4.5.1.1 Possible Violations of Secondary EC Regulation

The first issue is whether any of the Licencing- and Market Access Regulations, are violated. As found in section 3.3.1, the Licencing Regulation does not in itself confer any rights of access to specific routes or air markets.[261] It only provides rules requiring member states to grant operating licences to carriers meeting the specific requirements and hence it is hard to find that it is violated. Questions of access to intra-Community routes are instead dealt with by the Market Access Regulation, but as already explained in section 3.4.1, there exists no Community legislation dealing with access to routes between the Community and third states. Consequently, the limited scope of the Regulation suggests that there is no violation in this part either. The result is that it cannot be said that nationality clauses in bilateral agreements infringe Community Regulations on air carrier licencing and access *per se*. Therefore, if there is any infringement of EC Law it must be of provisions in the EC Treaty itself, in particular articles 12 and 43-48.

4.5.1.2 Possible Violations of the EC Treaty

Article 12 of the EC Treaty prohibits discrimination on grounds of nationality. However, in this article the prohibition is expressed to be "within the scope of application of this Treaty, and without prejudice to any special provisions contained therein." Thus, although it is today clear that article 12 can have legal effect of its own, and does not necessarily need to be read together with another treaty provision, it is necessary to consider whether any other provisions of the EC Treaty limits its effects in the field under consideration. It was unsettled for quite some time whether or not the commercial aspects of aviation relations with third countries belonged to the common commercial policy, and hence was governed by article 133 of the EC Treaty as opposed to the base for air transport legislation in article 80(2). However this debate has today

[261] Licencing Regulation, article 3(2).

lost its importance following *Opinion 1/94*[262] delivered by the ECJ on the question of Community competence in connection with the agreements comprised in the GATT Uruguay Round. For the purpose of the present analysis, the Court held that although cross-frontier supplies of services were not in principle excluded from the scope of the common commercial policy, it found that this was the case with transport services – such services were excluded from the scope of article 133.[263] Consequently, it is submitted that the domain of Community external aviation is governed exclusively by article 80(2) and not article 133. As a result, it must follow that article 12 does not apply to external aviation relations unless and until the Council has adopted legislation on the subject – except as regards fundamental EC Treaty provisions which are applicable to external air transport even in the absence of such legislation. Such Treaty provisions include the competition rules, but as shown under section 3.5 *supra*, only article 82 is applicable to external relations without further implementing legislation and this article concerns only the behavior of the undertaking rather than the obligation of member states to permit the establishment and operations of Community air carriers. Therefore, the result must be that article 12 does not cover the discussed situations, and consequently there is no violation of this article.

Articles 43-48 of the EC Treaty regulate the right of establishment and for our purposes it is article 43 that merits interest. The basis of the article is the rule against discrimination on grounds of nationality, and the ECJ has confirmed that article 43 is a specific implementation of that principle.[264] It is also clear from this case that the article has direct effect and that no secondary legislation is required for its implementation. The crucial point in the present context is that the article requires a member state to permit establishment on the same terms and conditions as those that apply to its own nationals. It is quite clear that there is a possibility of a violation of this rule under the discussed circumstances. However, it is submitted that the particularities of EC air transport regulation must be carefully considered when determining the possible violation. It has been clarified that the creation of EC air transport regulation has so far exclusively aimed at the internal market. This is for example expressed in the first recital of both the Licencing Regulation and the Market Access Regulation: "Whereas it is important to establish an air transport policy for the *internal market* [….]". Furthermore, as shown in section 3.5, the Commission has presented repeated proposals to expand the application of the Regulations to external aviation relations, but so far none of these proposals have resulted in any legislation. Consequently, it is questionable whether the rules of establishment can be considered directly applicable in regards to external aviation relations. It has also been suggested that the right of establishment only requires establishment to be possible on the same conditions as those which apply to local nationals, and that the conditions in this respect are in fact the same for both locally owned carriers and for carriers owned by nationals of other member states.[265] In any event, the position is highly uncertain, but to conclude, it is submitted that it is by no

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[262] *Opinion 1/94 of November 1994 on the Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property, Opinion 1/94* [1994] ECR I-5267, 1 CMLR 335 (1995) [hereinafter *Opinion 1/94*].

[263] *Ibid.*, I-5404.

[264] *Reyners v. Belgian state Case,* Case 2/74 [1974] ECR 631.

[265] J. Balfour, *supra* note 151, at p. 283.

means clear that nationality clauses in bilateral agreements with third states infringe the obligations of member states in connection with the right of establishment. However, the possibility of a violation in this part justifies a discussion on what the legal consequences with regard to the conflict of treaties would be. This issue will be discussed in the last chapter.

4.5.2 Are EC Member states Violating the Provisions of Ownership and Control in their Bilateral Agreements with third states by means of EC Air Transport Regulation?

Under applicable Community law the Finnish airline Finnair may be owned and controlled by EU nationals other than Finns.[266] But, if this was the case, each third state with which Finland has bilateral aviation relations would have the possibility to withdraw Finnair's operating authorization since the above mentioned provisions on ownership and control in the valid bilateral air transport agreement would not be fulfilled. Under these circumstances, the question is whether the EC member states are violating the provisions on ownership and effective control in their bilateral agreements with third states by means of EC air transport regulation. The subject matter of this issue has already been discussed under section 4.2.3 in relation to the Transit Agreement. The Transit Agreement contains identical provisions on ownership and control and it was suggested in that analysis that the member states are not violating the Agreement on this matter since the relevant provision in bilateral agreements only gives the optional right for the third state to revoke traffic privileges. The discretionary character of these provisions may be illustrated with an example from the 1944 Bilateral Air Transport Agreement between Sweden and the US:

> Each contracting party *reserves the right* to withhold or revoke a certificate or permit to an airline of the other party in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a party to this agreement.[267]

Consequently, it is submitted that EC member states are not violating the provisions of ownership and control in bilateral treaties with third states by means of EC air transport regulation.

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[266] Licencing Regulation, article 4.

[267] 1954 Agreement on amending the 1944 Agreement between the Government of the United states and the Government of Sweden Relating to Air Transport Services, SÖ 1954:44 (1954), article 6. The article is still valid. (Italics by author).

CHAPTER 5: Results, Possible Solutions and Concluding Remarks

5.1 SUMMARY OF THE RESULTS

The results of this study of violations may be best summarized in the following schematic way:

A. NATIONALITY/REGISTRATION			
The principle of national registration in article 17 of the Chicago Convention [sect. 4.2.1]	The use of "Community licences" issued by individual member states [sect. 4.2.2]	The provisions of ownership and control in the Transit Agreement [sect. 4.2.3]	The future objective to use Community aircraft registration – excluding national registration [sect. 4.2.4]
≥ No violation	**≥ No violation**	**≥ No violation**	**≥ Pending violation**

B. CABOTAGE	
The plurilateral exchange of international traffic rights exclusively for Community air carriers [sect. 4.3.2]	The plurilateral exchange of Community cabotage rights exclusively to Community air carriers [sect. 4.3.3]
≥ No violation	**≥ Violation**

C. OTHER POSSIBLE VIOLATIONS	
The principle of regulatory non-discrimination in article 11 of the Chicago Convention [sect. 4.4.1]	The transfer of competence to the Community to regulate domestic and international air related issues [sect. 4.4.2]
≥ No violation	**≥ No violation**

D. BILATERAL AGREEEMENTS	
Violation of secondary EC regulation by means of the continuation of bilateral air transport agreements [sect. 4.5.1.1]	Violation of primary EC regulation by means of the continuing use of bilateral air transport agreements [sect. 4.5.1.2]
≥ Licencing- and Market Access Regulations ≥ No violation	**≥ EC Treaty article 12 ≥ No violation ≥ EC Treaty articles 42-48 ≥ Possible Violation**
Violation of the provisions of ownership and control in bilateral agreements with third states by means of EC air transport regulation [sect. 4.5.2]	
≥ No violation	

Consequently, at least one *direct* violation [4.4.2] has been identified together with another *possible* area of violation [4.5.1.2]. In addition, a potential future area of violation has been detected [4.2.4]. With this result at hand it becomes essential to explain how and if the proposed conflicts of treaties can be solved using available conflict rules under international law, and EC-law. First, the violation concerning the plurilateral exchange of Community cabotage rights exclusively to Community air carriers will be considered, and second, the possible violation with respect to primary EC regulation by means of the continuing use of bilateral air transport agreements.[268]

[268] The pending violation created by a future Community aircraft register will not be considered separately, since the present discussion essentially covers it as well.

5.2 POSSIBLE SOLUTIONS TO THE CONFLICTS OF TREATIES

5.2.1 Violation of the Chicago Convention Rules on Cabotage

The EC member states are violating article 7(2) of the Chicago Convention by providing exclusive cabotage rights to Community carriers. It should be emphasized that they do not violate the whole Chicago Convention by means of this breach. However, a partial violation has been exposed. The first issue to be discussed in this part is how this violation could affect relations between EC member states and third states. The second issue is how the violation could affect the relationship between EC member states.

5.2.1.1 Applicable Rules

The described situation can be simplified and rephrased in the following way: a handful member states to a multilateral treaty have decided to modify the application of some of the rules in the multilateral treaty by means of subsequently adopted rules within the treaty regime, as between only themselves, by setting up a new treaty applicable to the same subject matter as the older treaty. In accordance with the temporal aspect as presented under section 1.2, the 'new treaty' in our case equals subsequently adopted secondary EC legislation on air transport within the EC Treaty régime. Thus, these new rules should be seen as amendments to the EC Treaty. What we have here is in essence two treaties entered into by states: the Chicago Convention on one side and the EC Treaty with subsequently made changes and amendments on the other. In this type of situation the applicable rules can be found in the VCLT – since it applies to treaties between states according to article 1.[269] Article 41 regulates the permissibility of this type of amendment, and is accordingly entitled: "Agreements to modify multilateral treaties between certain of the parties only". The article determines on what conditions certain parties to a multilateral treaty are allowed to conclude and apply a new treaty between them. When certain parties are allowed to conclude and apply a treaty *inter se*, those parties will not be internationally responsible to the other parties of the existing multilateral treaty.[270] If, on the other hand, the *inter se* modification does not meet the criteria set out in article 41, the *inter se* treaty will amount to an illegal modification, and the results will be different. The application of the unlawful *inter se* treaty by some of the parties may create international responsibility in relation to those parties that have not become a party to the *inter se* treaty; the conclusion and application of the inter se treaty breach the multilateral treaty. The *inter se* treaty will remain valid.[271]

If it can be established that the modification is illegal, the next issue will be to determine which treaty has priority – the earlier multilateral treaty or the new *inter se* treaty.[272] This process is performed under article 30: "Application of successive treaties relating to the same subject-matter". Article 30 is only applicable if and when the treaties in question crelate to the same subject-matter'. It is somewhat unclear what this limitation

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[269] See generally about the VCLT: I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984).

[270] J.B. Mus, *Conflicts Between Treaties in International Law*, NILR, Vol. XLV Iss. 2 (1998), pp. 208-232, at p. 226.

[271] *Ibid.*, at p. 225.

[272] *Ibid.*

includes, but it has been authoritatively suggested that a broad view must be taken as to what constitutes the same subject-matter.[273] This would mean that the requirement was fulfilled at the latest during the adoption of EC air transport regulation, since by then, the treaties comprise the same subject mater. Furthermore, article 30(2) of the VCLT acknowledges that treaties often contain provisions to resolve potential conflicts with other treaties, i.e. conflict clauses, and a preliminary question is whether such clauses are present here to solve the conflict situation. Article 82 in the Chicago Convention is titled "[a]brogation of inconsistent arrangements" and could be seen as such a clause at first. However, according to the ILC, the definition of a conflict clause is quite strict in that it must "intend to regulate the relation between the provisions of the treaty and those of another treaty [….] relating to the matters with which the treaty deals".[274] Article 82 of the Chicago Convention does not give priority or claim priority over subsequent inconsistent treaties, it only stipulates the rule that "[t]he contracting states […] undertake not to enter into any [inconsistent] obligations and understandings". Consequently, it should not be seen as such a conflict clause.

As for the EC Treaty, the basic rule concerning old treaties between member states and third states is article 307(1) by providing special rules for agreements between member states and third countries concluded before the 1 January 1958 or – for those states joining the Union at a later date – before the date of accession to the EC Treaty.[275] It stipulates that the rights and obligations arising from such agreements shall not be affected by the Treaty, but that the member states shall take "all appropriate steps" to eliminate any incompatibilities between them and the EC Treaty.[276] This rule can not be seen as a conflict clause in accordance with article 30(2) of the VCLT, for the same reasons as for article 82 of the Chicago Convention just mentioned.

5.2.1.2 Relations between EC Member States and Non-Member States

Having so framed the relevant rules for the present conflict of treaties, the solution should be as follows. The first issue is whether the new *inter se* treaty – i.e. the EC-Treaty with subsequently adopted Regulations introducing the idea of giving exclusive cabotage rights to Community carriers – amounts to a permissible or an impermissible modification of the Chicago Convention. Article 41(1a) of the VCLT states that it is allowed to conclude an agreement to modify the multilateral treaty as between themselves if the possibility of such a modification is provided for by the treaty. This relates to the question whether the multilateral treaty provides for an *inter se* modification and, if so, whether the *inter se* treaty at issue is in conformity with this provision.[277] Article 82 of the Chicago Convention was mentioned in the previous

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[273] *Oppenheim's*, *supra* note 75, at p. 1214, at §592, f.n. 2; P. Reuter, *Introduction to the Law of Treaties* (1989), at p. 102.

[274] *Reports of the ILC*, YBILC (1966), Vol. II, at p. 214.

[275] The Commission has pointed to this article as governing the situation until the EC has competence to negotiate bilateral agreements. See COM (90) 17, *supra* note 180, at article 5.

[276] It is submitted that the locution 'treaty' in article 307(1) includes all subsequently adopted legislation within the EC Treaty régime, in accordance with the temporal aspect laid out in section 1.2 *supra*.

[277] J.B. Mus, *supra* note 270, at p. 225.

section as a rule limiting the possibilities for Convention states to enter into inconsistent agreements. This rule should be read together with article 83, stating that: "Subject to the provisions of the preceding article [i.e. art 82], any contracting state may make arrangements not inconsistent with the provisions of this Convention […]." Considering the fact that the idea of giving exclusive cabotage rights to Community carriers has been declared inconsistent with the Chicago Convention in this thesis, it is submitted that this amendment to the Chicago Convention is not allowed. The modification is not in conformity with articles 82 and 83 of the Chicago Convention and is therefore illegal according to VCLT article 41.

After establishing the illegality of this modification, the next issue is to decide which treaty has priority. As described in the previous section, the situation is governed by article 30 of the VCLT as regards relations between EC member states and non-member states. To be more exact, it is article 30(4b) that is applicable to this situation, giving priority to the Chicago Convention to cover their mutual rights and obligations. This reflects a basic principle of treaty law and is derived from the *pacta tertiis* rule in article 34 of the VCLT. This will certainly not in itself give airlines from non-member states access to cabotage within EC states. However, it will on the other hand strengthen the negotiating position of those states wishing to obtain cabotage right for their airlines. In addition, EC member states will be internationally responsible in relation to states which are party to only the Chicago Convention.[278] The EC states can of course also be subject to the mechanisms of dispute settlement under chapter XVII of the Convention.

5.2.1.3 Relations between EC Member States

In order to offer a solution in this part it is necessary to start with article 41 of the VCLT, and the result will of course be the same as in the previous case: the modification is illegal according to article 41. Again, this opens up for the possibility of applying article 30 of the VCLT. As between EC member states, the situation is covered by article 30(4a) since all EC member states are parties to both treaties. The rule stated in this article includes a cross-reference to article 30(3) which gives priority to the *inter se* treaty concluded by the states that are parties to both treaties. This is in accordance with the fundamental *lex posterior* rule within treaty law. The member states are internationally responsible in relation to states which are party to the Chicago Convention only.[279] They can, furthermore, be subject to the mechanisms of dispute settlement under chapter XVII of the Chicago Convention. Accordingly, the result is that the EC air transport regulation should be applied as between member states.

However, according to the ILC, this solution is based on the assumption that a distinction is possible between the two sets of legal relations, i.e. those between the parties to both treaties, and those between a party to one treaty and a party to both treaties.[280] In other words, multilateral treaties may consist of either a web of 'mutually reciprocal obligations', or a web of 'interdependent obligations'.[281] The latter treaty-type

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[278] VCLT, article 30(4b) and (5), last sentence.

[279] *Ibid.*

[280] *Reports of the ILC*, *supra* note 274, at pp. 215-217.

[281] J.B. Mus, *supra* note 270, at pp. 223-224.

has been distinguished as a treaty that contains so called 'absolute obligations' in the form of either 'interdependent obligations' or 'integral obligations'.[282] The two types of multilateral treaties described here may be easier understood when examining the consequences of a breach: a) non-compliance with the first treaty-type only injures the directly affected party and not all the other parties to the treaty, and can relieve the injured party from its obligations towards the non-complying state;[283] b) non-compliance with the latter treaty-type automatically injures all the other member states to the treaty, and will not relieve the other parties from its obligations under the treaty in the case of breach by one of the member states. [284] Consequently, the crucial question is whether or not it is possible in our case to divide the Chicago Convention into sets of legal relations equal to a series of independent bilateral agreements without loosing its meaning.[285] This issue will not be discussed in detail in this thesis, but it is possible that the Chicago Convention should be regarded as a 'truly' multilateral treaty instead, creating obligations towards all Convention states. In this case, the latter treaty will unavoidably be seen as a breach of the first. This would create a very difficult and rather schizophrenic situation for the EC states, creating unavoidable breaches of treaties.[286]

Turning now to EC Law, it is clear that article 307 of the EC Treaty is important in this respect. According to the ECJ in the *Burgoa Case*[287], the rights protected by this article are the rights of third states. It does not protect the rights in relation to other EC member states and consequently it is not possible to invoke the older treaty towards other member states.[288] Thus, the new treaty should be applied as between member states, with the reservation made above for the possibility that the Chicago Convention be seen as a 'truly' multilateral treaty.

5.2.2 Violation of Primary EC Regulation on the Right to Establishment

In this section we invert the discussion to cover the issue of how to solve the situation where a violation of the EC Treaty has arisen. As previously discovered, it is possible that the provisions on ownership and control in bilateral air transport agreements between EC member states and third states constitute a violation of the right to establishment in the EC Treaty. This situation merits a discussion on how the conflict situation should be solved with regard to the rights of third states. For reasons of clarity, it is necessary to divide the bilateral treaties in two groups: The first group includes old bilateral treaties – or pre-accession treaties – concluded by member states. The second group contains new bilateral treaties – or post-succession treaties.

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[282] See G. Fizmaurice in *Reports of the ILC,* YBILC (1958), Vol. II, at p. 43.

[283] The typical example of this kind of treaty is a convention of diplomatic relations. *Ibid.*

[284] The standard example of such a 'truly' multilateral treaty is the 1950 European Convention for the protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (1950). *Ibid.*

[285] See G. Lysén, Publicia EU, No 49 - *Externa Relationer* (1996), at p. 49:27.

[286] This conflict situation has been discussed under the title "unresolvable treaty conflicts" by J.B. Mus, *supra* note 270, at p. 227.

[287] *Attorney-General v. Burgoa*, Case 812/79 [1980] ECR 2787.

[288] G. Lysén, *supra* note 285, at p. 49:27.

5.2.2.1 Article 307 and Pre-Accession Bilateral Agreements

EC Law – including subsequently adopted secondary legislation – will yield in favor for the old bilateral treaty according to article 307. However, the scope of the second part of article 307 must also be considered. It creates an obligation for the member state to try to remove any incompatibilities. The question is how far the member states must go to fulfill this requirement. For example, if re-negotiation attempts were made repeatedly but proved unsuccessful, the question would arise whether the member state would be obliged to renounce the agreement in question. It has in fact been suggested by the Advocate General C.O. Lenz that all appropriate steps referred to in article 307 include all steps permissible under international law – not only the opening of renegotiations with a view to amending air transport agreements – but also denunciation of the agreement if the non-member state is not prepared to amend the agreement.[289] It is, however, submitted that it would be unlikely that the ECJ would adopt such an extreme solution. The expression "all appropriate steps", seems to leave a scope for the view that there is a reasonable limit to the steps required by the state. This seems, furthermore, also to be in accordance with the previously mentioned *Burgoa Case*.[290]

Another question in this context is whether or not article 307 applies to amendments to pre-accession bilateral agreements agreed after accession to the EC Treaty. This question is relevant since the structure of most bilateral air transport agreements prescribe amendments rather than termination followed by renegotiation.[291] The case law is very sparse on this matter. There is, however, an English decision on the subject, where the Judge suggested that amendments were probably to be treated in the same way as post-accession agreements.[292] Furthermore, the European Commission argued in the same way in a case before the ECJ.[293] Finally, Advocate General C.O. Lenz has suggested a similar solution twice before the ECJ in an air transport context.[294] Unfortunately, the ECJ failed to make any conclusion or comment on this issue in any of these cases. The situation is therefore quite uncertain, but it has recently been proposed that "it would be logical for post-accession amendments not to be protected by article 307(1) and to be treated in the same way as post-accession agreements".[295] It is submitted that this conclusion is correct.

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[289] *Nouvelle Frontiers Case*, *supra* note 47, at p. 1453

[290] *Supra* note 287, at p. 2802-2803, and Advocate General Capotorti's opinion in the case at pp. 2810-2811.

[291] See e.g. the 1996 Agreement on amending the 1944 Agreement between the Government of the United states of America and the Government of Sweden Relating to Air Transport Services, with Annex, SÖ 1996:24 (1996).

[292] *R v. Governor of Holloway Prison, ex. p. Kember,* 2 CMLR 125 (1980), at. pp. 142-143.

[293] *Re British Telecommunications: Italy v. EC Commission*, Case 41/83 [1985] ECR 873, at pp. 889-890.

[294] *Nouvelles Frontiers Case*, *supra* note 47, and *Ahmed Saeed Case, supra* note 49.

[295] J. Balfour, *supra* note 151, at p. 279.

5.2.2.2 Article 307 and Post-Accession Bilateral Agreements

While the EC Treaty makes no explicit reference to the question of post-accession treaties, it is submitted that it would be an infringement of their duties under Community law for member states to enter into agreements with third countries containing provisions violating Community law after accession to the EC Treaty. This follows from the context of article 307 and the loyalty obligation expressed in article 10. It has been suggested that the situation should be analogous to that under article 307, provided the subject matter of the agreement is not, under Community law, within the exclusive competence of the Community.[296] However, there are some uncertainties here. First of all, article 307 is of course not literally applicable to agreements entered into after the 1st of January 1958, or in the case of states acceding subsequently, after the accession to the Community. This means that any application of the article would have to be by way of analogy. Secondly, the principle suggested here would only apply if the post-accession agreement actually would contain provisions that are materially contrary to Community law, otherwise there are of course no infringements of Community Law to discuss. In this respect it is important to keep in mind that the position of EC Law is practically negligible when it comes to external aviation relations.[297] The EC has so far no exclusive competence to negotiate bilateral agreements with third state, and, as previously described, the competition rules in the EC Treaty remain essentially inapplicable outside the Community.[298] The result would thus basically be that the incompatibility of new external bilateral air transport agreements with Community law could only occur with respect to the very limited regime in article 82 of the EC treaty which is until now the only rule that is applicable to external aviation relations. In other words, only dominant positions in aviation markets between the Community and third countries, as a result of bilateral air agreements with third countries, could infringe Community law. This leaves most post-accession bilateral air transport agreements out of danger from being considered incompatible with Community law for the time being.

If, however, it can be established in the future that the EC has exclusive competence to negotiate bilateral air transport agreements, and that a new bilateral treaty has been concluded between a member state and a third state despite this fact, the member state would clearly have exceeded its competence and violated the EC treaty. In this scenario, the validity of the bilateral treaty will be decided according to general international law.[299] This means that unless the member state can invoke any of the provisions under section 2 of the VCLT, laying down the general rules on invalidity of treaties, the treaty will stay in force. The result will be that the member state will face an impossible position since the treaty cannot be validly invoked towards the EC. Looking at the situation the other way around, the member state can not invoke Community law against the non-member state as binding grounds for abrogating the agreement. Consequently, the member state will have to face the risk of international responsibility towards the third state.[300] This is, however, not the situation with regard to the present situation on external aviation relations. Another question in this context is whether a post-accession

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[296] T.C. Hartley, *The Foundations of European Community Law*, 4th ed. (1998), at p. 179.

[297] See *supra* section 1.1.3 and chapter 3.

[298] *Supra* section 3.5.

[299] G. Lysén, *supra* note 285, at pp. 49:29.

[300] *Ibid.*

agreement should always be regarded as such. Most existing bilateral air transport agreements are only replacements of prior agreements, nearly all of which had been concluded prior to accession to the EC Treaty.[301] The provisions in such existing agreements, which could be contrary to Community law, were most probably also contained in the prior agreement in an identical shape. It has therefore been argued that those particular provisions were agreed on before the entry into force of the Treaty, and therefore would fall within article 307 as pre-accessions agreements and be treated as such.[302] It is however submitted that such a solution would not be acceptable to the Community legal order.

5.3 CONCLUDING REMARKS

5.3.1 General

The primary purpose with this dissertation has been to examine whether certain aspects of EC air transport regulation violate the traditional legal system under the Chicago Convention. An additional purpose has been to consider some issues of violation concerning bilateral air transport agreements between EC member states and non-member states. The reasons behind this study should be obvious by now. All EC member states are members of the Chicago Convention and are as such bound to the legal principles enshrined in the Convention. By setting up a regional system of air transport regulation between only a handful of the Chicago member states, it becomes necessary to examine whether this regional cooperation is compatible with the older system. By testing the compatibility of the two systems, the present study has revealed at least one direct violation of the Chicago Convention together with another possible violation and yet another pending violation. The other important aspect of the interrelationship between the two systems is that EC member states also have obligations towards other EC member states through their membership in the Community. The effect is that EC member states must observe both their responsibilities under EC Law and the system of air transport regulation under the Chicago Convention. By analyzing this situation, it has been shown that the continuation and renewal of bilateral air transport agreements with third states may result in violations of these obligations towards other EC member states. Finally, in the last chapter, the possible solutions and consequences of the above mentioned violations have been discussed. It has been shown which treaty will prevail, first in relation to other Chicago Convention states, and second in relation to other EC member states. It has also been shown that the EC member states are internationally responsible towards states which are party to only the Chicago Convention, because of the violations. With regard to the issue of the continuation and renewal of bilateral air transport agreements with third states, it has been shown that pre-accession agreements will take precedence over subsequently adopted EC regulation. EC member states must, however, fulfill their obligation to try to remove the incompatibility in the old bilateral agreement. Finally it has been shown that most post-accession bilateral air transport agreements are compatible with Community law at the present stage of development of EC air transport regulation.

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[301] B. Cheng, *supra* note 5, at p. 239; I.H.Ph. Diederiks-Verschoor, *supra* note 7, at pp. 52-54.

[302] J. Balfour, *supra* note 260, at p. 6.

5.3.2 Future Perspective

A few words should be said about the future perspective for EC air transport regulation. The EC system of air transport regulation is undoubtedly an attractive solution to many of the problems inherent in the traditional system. In the short-term perspective, this regionalism will probably be the preferred way to further liberalize air transport in the world. However, at the same time it must be remembered that EC air transport regulations is an integral part of the global system of air transport. The modification of the regional European regulatory framework will not remain without repercussions on that global system and *vice versa*. In other words, the European Union must not loose sight of the legal obligations binding its member states. What must be remembered is that the traditional system of air transport regulation will continue to exist essentially unchanged beneath EC air transport regulation until another and more liberal solution can be achieved worldwide.[303] In the meantime, the legal consequences of possible violations of the traditional system must be taken into consideration, and the possibility that EC member states may be subject to the principles of state responsibility because of the violations must be recognized.

[303] It has been pointed out several times in this thesis that fundamental changes to the Chicago Convention are not likely to take place in the near future. See e.g. section 4.3.4.

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