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AIRFREIGHT: REGULATORY ENVIRONMENT ENCOURAGES OR IMPOSES PRICE COORDINATION?

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The authors are grateful to the attendees of the Society of Legal Scholars Annual Conference 2012 at Bristol University for the fruitful discussion following the presentation of this work, and to Professor Alan Riley for his useful comments. Remaining errors are the authors' responsibility alone.

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ABSTRACT

In its Airfreight decision, the European Commission (Commission) fined eleven airlines approximately €799 million for their participation in a price-fixing cartel.[1] This decision is of particular interest because the Commission awarded all carriers a "reduction of 15% on account of the general regulatory environment in the sector[,] which can be seen as encouraging price co-ordination."[2]

Airlines alleged on appeal that, with regard to certain routes involving third country destinations, the regulatory environment did not simply encourage the prohibited behavior, but rather imposed this behavior on the airlines.[3] If this ground for appeal succeeds, it would mean that the alleged collusion with regard to those routes did not constitute an infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU) at all.[4]

This article first analyzes past reductions in fines under this category of mitigation and then discusses the "general regulatory environment" that may have led to the reduction in this case. Since the Commission and the European courts take a robust attitude in this area, the Commission's concession of a 15% reduction in fines is particularly noteworthy. The article concludes by considering the strength of the airlines' grounds for appeal based on evidence of the "general regulatory environment."

I. INTRODUCTION

The Commission's discretion when imposing fines for breaches of the European Union (EU) competition rules has been a topical and contentious issue in recent years; in the Airfreight decision, the Commission exercised its discretion to reduce the fine on all participants due to the "general regulatory environment."[5] This rationale seems to be a novel application of one of the

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1 Case COMP/39258, Commission Decision of Sept. 11, 2010 (unpublished). While a public version of the Airfreight case is not yet available, the Commission has published a detailed press release that enumerates the various infringements, the breakdown of fines as notified to each air cargo carrier, and the relevant adjustments as calculated with or without reference to leniency policies or the exercise of discretion. See Press Release, Eur. Union Comm'n, Antitrust: Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel (Nov. 9, 2010), available at http://europa.eu/rapid/press-release_IP-10-1487_en.htm [hereinafter Airfreight Press Release].

2 Airfreight Press Release, supra note 1.

3 Id.

4 See id.; Application of Articles 101 and 102 TFEU (Formerly Articles 81 and 82 of the EC Treaty), **Europa**, http://europa.eu/legislation_summaries/competition/firms/l26092_en.htm (last visited Oct. 28, 2013).

5 Airfreight Press Release, supra note 1.

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established grounds for mitigation when setting fines for infringement of the competition rules. On the one hand, this raises questions as to the Commission's breadth of discretion in setting fines because under this head of mitigation, the Commission has set its own benchmarks as to what degree of mitigation is appropriate, with little evidence of how it arrives at a particular figure and with the courts maintaining a deferential approach to review.[6] On the other hand, this mitigation adds a new dimension to the already occasional "special treatment" of some practices in the aviation sector by competition authorities.[7]

In the Airfreight case, the Commission also exercised its usual "powers" of leniency and recidivism uplift.[8] The whistle-blower, Lufthansa and subsidiary Swiss International Airlines, received full immunity under the Commission Leniency Programme,[9] whereas the fine for SAS, the Scandinavian carrier, was increased by 50% for its previous infringement in SAS/Maersk Air.[10]

At the same time, the Commission exercised its discretion to reduce the fines.[11] On the basis of the one-way nature of air cargo shipments, all carriers were given a 50% reduction to take account of sales on routes where the harm of the cartel fell outside the European Economic Area (EEA).[12] Additionally, the Commission granted all the carriers a reduction of 15% "on account of the general regulatory environment in the sector[,] which can be seen as encouraging price co-ordination."[13]

The operation of the cargo and passenger airline industries raises particular problems for the application of competition laws because a high degree of coordination between competing

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6 See, e.g., Case T-348/08, Aragonesas Industrias y Enegia, SUA v. Comm'n, 2011 E.C.R. 11-7583.

7 See Aviation, **Transport & Env't**, http://www.transportenvironment.org/what-we-do/aviation (last visited Sept. 20, 2013); David Gow, EU Proposes Crackdown on Airlines' Hidden Charges, **Guardian** (July 17, 2006), http://www.theguardian.com/business/2006/jul/18/travel.money.

8 See Leniency, **Eur. Comm'n**, http://ec.europa.eu/competition/cartels/leniency/leniency.html (last visited Oct. 28, 2013).

9 British Airways has appealed, inter alia, on the ground that it was given the lowest fine reduction under the Leniency Programme despite being the first to come forward. Airfreight Press Release, supra note 1.

10 Commission Decision (EC) No. 716/2001 of 18 July 2001, 2001 O.J. (L 265) 15, aff'd, Case T-241/01, Scandinavian Airlines Sys. AB v. Comm'n, 2005 E.C.R. 11-2917. It is interesting that the recidivist uplift was applied although the earlier infringement was for market sharing.

11 Airfreight Press Release, supra note 1.

12 Id.

13 Id.

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carriers is a requisite for the efficient functioning of the sector.[14] In the past, international agreements between third countries and EU Member States have been annulled on the grounds of (indirect) infringement of EU law.[15] At the same time, the Commission enacted a number of sector-specific block exemptions to the competition rules, which were in operation between 1993[16] and 2007,[17] permitting consultation and agreement between airlines on tariffs.

The factors in the regulatory environment that led the Commission to grant a 15% reduction are unknown because a public version[18] of the Airfreight decision is not yet available;[19] however,

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[14] See generally Commission Regulation 1617/93, 1993 O.J. (L 155) 18.

[15] The most notable instances were agreements concluded by Sweden, Finland, Belgium, Luxembourg, Austria, the Netherlands, Denmark, and the U.K. with third countries following the Second World War, which the Court of Justice of the European Union (CJEU) confirmed infringed upon EU law in two respects: (1) nationality clauses infringed the right of European airlines to nondiscriminatory market access to routes between all Member States and third countries; and (2) only the EU has the authority to agree to this type of commitment where agreements affect the exercise of EU competence. See Joined Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 & C-476/98, Comm'n v. U.K., 2002 E.C.R. I-9427; Council Regulation 847/2004, 2004 O.J. (L 157) 7, 8. Infringement procedures are ongoing against twelve Member States. See Press Release, European Union Comm'n, Air Transport: Commission Launches Infringement Procedures Against France, Germany, Austria, and Finland over Agreements with Russia on Siberian Overflights (Oct. 28, 2010), available at http://europa.eu/rapid/press-release_IP-10-1425_ga.htm; Press Release, European Union Comm'n, Air Transport: Commission Launches Infringement Procedures Against Seven Member States over Agreements with Russia on Siberian Overflights (Jan. 27, 2011), available at http://europa.eu/rapid/press-release_IP-11-74_en.htm?locale=en.

[16] Commission Regulation 1617/93, supra note 14.

[17] The Commission elected not to renew the block exemptions, which expired in June 2007 for routes between the EU and the United States or Australia, and in October 2007 for routes between the EU and other third countries. See Press Release, Eur. Comm'n, Competition: Commission Ends Block Exemption for IATA Passenger Tariff Conferences for Routes Between the EU and Non-EU Countries (June 29, 2007), available at http://europa.eu/rapid/press-release_IP-07-973_en.htm [hereinafter Press Release, Commission Ends Block Exemption]. The International Aviation Transportation Association (IATA) and individual carriers have been required since then to ensure that their agreements are compatible with the general EU competition rules. Id.

[18] Gaining access to the Commission's file is often a difficult undertaking. See, e.g., Case C-404/10 P–Commission v. Éditions Odile Jacob SAS, **InfoCuria**, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-404/10%20P (last visited Sept. 21, 2013); C-477/10 P–Commission v. Agrofert, A.S., **InfoCuria**, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-477/10%20P (last visited Sept. 21, 2013); Case C-360/09–Pfleiderer AG v. Bundeskartellamt, **InfoCuria**, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-360/09 (last visited Sept. 21, 2013).

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this article attempts to give an account of the "general regulatory environment" within which the sector operates before suggesting how it might encourage price coordination.

Particular air transport agreements between EU Member States and third countries, which appear to be the bases of some airlines' appeals, are examined in this article. A number of appeals allege that the prohibited behavior was not simply encouraged by the regulatory environment but was actually imposed on the airlines.[20] If this ground for appeal succeeds, it would not bring about the reduction of fines, but it would result in the annulment of the relevant part of Commission's decision—Articles 101 and 102 of the TFEU do not apply where "anti-competitive conduct is required of undertakings by national legislation," or where the national legal framework "eliminates any possibility of competitive activity on their part."[21]

This article first considers the "general regulatory environment" of the sector through an investigation of its sources before turning to consider how this could encourage price coordination. A semi-historical examination of the applicability and application of the EU competition rules to air transport reveals particular characteristics of the air transport sector that led to the issuance of sector-specific block exemptions permitting the sharing of information about price and other types of cooperation that are otherwise illegal under Article 101(1) of the TFEU.[22] While all the block exemptions are now repealed, in the Airfreight case, the "general regulatory environment" in which carriers operated mitigated the penalties imposed for what was a hard-core price-fixing cartel, described as "deplorable" by Vice President for Competition Joaquín Almunia.[23]

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[19] It is not uncommon that evidence produced pursuant to cartel investigations carried out by the Commission later becomes available via civil discovery in the United States. See Samuel R. Miller et al., U.S. Discovery of European Union and U.S. Leniency Applications and Other Confidential Investigatory Materials, 3 **CPI Antitrust J.**, Mar. 16, 2010, at 2. It may be argued that the risk that information held in the Commission's file on Airfreight would be used in future proceedings against the relevant air cargo carriers in jurisdictions outside the EU outweighs the benefits of declassifying such information. This article proceeds on the basis that it is unlikely that a comprehensive, final version of the Commission's decision will be made available to the public—at least until global cartel investigations, proceedings, and appeals have been concluded in the multiple jurisdictions where these actions continue.

[20] Joined Cases C-359 & C-379/95 P, Comm'n v. Ladbroke Racing, 1997 E.C.R. I-6265, 6305.

[21] Id.

[22] Consolidated Version of the Treaty on the Functioning of the European Union art. 101(1), May 9, 2008, 2008 O.J. (C 115) 47, 88 [hereinafter TFEU].

[23] Airfreight Press Release, supra note 1.

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II. THE DECISION

In November 2010, the Commission fined eleven air cargo carriers approximately €799 million for "operating a worldwide cartel which affected cargo services within the [EEA]."[24] The carriers fined were Air Canada, Air France-KLM, British Airways, Cathay Pacific, Cargolux, Japan Airlines, LAN Chile, Martinair, Qantas, SAS, and Singapore Airlines.[25] The cartel was in operation for six years, from December 1999 to February 14, 2006.[26] According to the Commission, the cartel was arranged through "numerous contacts between airlines, at both [the] bilateral and multilateral level," covering flights to, from, and within the EEA.[27]

In most cases, the air cargo carriers fined in Europe also received fines in other jurisdictions for the same offense and on similar facts. For instance, the U.S. Department of Justice (DOJ) fined a total of twenty-one airlines more than $1.7 billion in criminal fines and filed criminal charges against nineteen executives in an ongoing investigation into fixing cargo rates—a so-called "conspiracy to restrain trade" in the air cargo transportation services sector of the air transport industry.[28] To date, four executives have been sentenced under Section 1 of the Sherman Act to serve time in prison, while charges are pending against an additional three air cargo executives.[29] Two recent plea agreements in the U.S. investigation include Singapore Airlines Cargo PTE Ltd. and Cargolux; both have agreed to pay criminal fines of $48 million[30]

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[24] Id.

[25] Id.

[26] Id.

[27] Id.

[28] Alicia A. Caldwell, 21 Airlines Fined for Fixing Passengers, Cargo Fees, **Wash. Post** (Mar. 5, 2011, 3:18 PM), http://www.washingtonpost.com/wp-dyn/content/article/2011/03/05/AR2011030501365.html.

[29] See Sherman Act, 15 U.S.C. § 1 (2006) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."). A breach of U.S. antitrust law carries a maximum penalty of ten years in prison and a fine of $1 million for an individual, and carries a maximum fine of $10 million for corporations for offenses committed before June 22, 2004, or $100 million for offenses committed thereafter. Id. This "may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine." Press Release, Dep't of Justice, Polar Air Cargo LLC Agrees to Plead Guilty to Price Fixing on Air Cargo Shipments: Company Agrees to Pay $17.4 Million Criminal Fine (Sept. 2, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/262145.htm.

[30] Press Release, Dep't of Justice, Singapore Airlines Cargo PTE Ltd Agrees to Plead Guilty to Price Fixing on Air Cargo Shipments: Company Agrees to Pay $48 Million Criminal Fine (Nov. 30, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/264634.htm.

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and $119 million,[31] respectively. Singapore Airlines Cargo was also fined $3.3 million by the Competition Commission of South Africa for its involvement in the same worldwide cartel.[32]

In the Airfreight case, the Commission found that the air cargo carriers had contacted each other to ensure that all worldwide freight carriers would introduce a flat-rate fuel surcharge per kilo of cargo (price-fixing).[33] The carriers "extended their cooperation by introducing a security surcharge and refusing to pay a commission on [these] surcharges to their clients (freight forwarders)."[34] The Commission stated that "[b]y refusing to pay a commission, the airlines ensured that surcharges did not become subject to competition through the granting of discounts to customers."[35]

By agreeing between themselves to pass on the fuel and security surcharges in full and without any discount to the freight forwarders, the airline companies ensured that the freight forwarders could not exert competitive pressure on the airlines to reduce their prices.[36]

A. Setting the Fine

The legal basis of the Commission's "power" to impose fines on undertakings in breach of EU competition law is Article 23(2) of Regulation 1/2003,[37] which replaced Regulation 17/62.[38] While Article 23(2)(c) stipulates that "the fine shall not exceed 10% of [an undertaking's] total turnover in the preceding business year," and Article 23(3) stipulates that "[i]n fixing the amount of the fine,[39] regard shall be had both to the gravity and to the duration of the infringement,"

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31 Press Release, Dep't of Justice, Cargolux Airlines International Airlines Executives Plead Guilty for Fixing Surcharge Rates on Air Cargo Shipments: Airline Executives to Serve Prison Time (Dec. 8, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/278133.htm.

32 Harry Suhartono, Singapore Airlines Pays $3.3 Million Fine to S. Africa, **Reuters** (Mar. 26, 2012), http://www.reuters.com/article/2012/03/27/us-singaporeairlines-southafrica-idUSBRE82Q01E20120327.

33 Airfreight Press Release, supra note 1.

34 Id.

35 Id.

36 According to the Commission, there were four price-fixing cartels between (1) Europe and the rest of the world; (2) Europe and the United States; (3) Europe and China; and (4) Europe and Hong Kong. See Press Release, European Union Comm'n, Antitrust: Commission Imposes €169 Million Fine on Freight Forwarders for Operating Four Price Fixing Cartels (Mar. 28, 2012), available at http://europa.eu/rapid/press-release_IP-12-314_en.htm. The Commission additionally fined fourteen international freight forwarding companies €169 million for their collusion on prices on these important international trade lines. Id.

37 Council Regulation 1/2003, art. 23(2), 2003 O.J. (L 1) 17.

38 Council Regulation 17/62, art. 15, 1959–1962 O.J. Spec. Ed. 87, 91–92.

39 Council Regulation 1/2003, supra note 37, art. 23.

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within that limitation the Court of Justice of the European Union (CJEU) has confirmed that the Commission enjoys a very broad discretion with respect to the setting of fines in particular cases.[40] Regulation 1/2003 makes clear that fining decisions may be imposed both for intentional and negligent infringements.[41]

Though the Commission did not originally set out criteria for the imposition of fines, the level at which fines were set in earlier years was significantly lower than today.[42] There were also far fewer decisions on cartel infringement; approximately one cartel was uncovered each year between 1959 and 1998.[43] At the same time, the Commission's wide discretion in imposing fines was upheld by the CJEU: "the Commission may at any time adjust the level of fines to the needs of [EU competition] policy."[44]

The level of fines imposed for breaches of Articles 101 and 102 of the TFEU rose steeply from the mid-1980s onward.[45] In 1998, the Commission, prodded by the concern of the Court of First Instance (CFI; now the General Court), decided that its fining criteria should be more transparent[46] and adopted the 1998 Guidelines on the Setting of Fines (1998 Guidelines).[47] Under the 1998 Guidelines, the basic fine amount was calculated according to gravity and duration by first classifying the infringement as "minor," "serious," or "very serious," depending on a number of factors.[48] A multiplier was applied for duration: 10% per annum or 50% added for cartels subsisting for five or more years.[49] Then, a number of "aggravating" or "mitigating" factors were applied, resulting in a lower or higher fine.[50]

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40 Joined Cases 100-103/80, Musique Diffusion Française SA v. Comm'n, 1983 E.C.R. 1825, 1926; Guidelines on the Method of Setting Fines Imposed Pursuant to Art. 23(2)(a) of Regulation 1/2003, ¶ 2, 2006 O.J. (C 210) 2 [hereinafter 2006 Guidelines].

41 2006 Guidelines, supra note 40, ¶ 1.

42 Alan Riley, The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?, 31(5) **E.C.L.R.** 191, 192 (2010).

43 Id.

44 Musique Diffusion Française SA, 1983 E.C.R. at 1906.

45 Riley, supra note 41, at 192–93.

46 Case T-148/89, Tréfilunion v. Commission (Welded Steel Mesh), 1995 E.C.R. II-1063, 1119, ¶ 142 ("[T]he Court considers that . . . it is desirable for undertakings—in order to be able to define their position in full knowledge of the facts—to be able to determine in detail, in accordance with any system which the Commission might consider appropriate, the method of calculation of the fine imposed upon them, without being obliged, in order to do so, to bring court proceedings against the Commission decision.").

47 Guidelines on the Method of Setting Fines Imposed Pursuant to Article 15(2) of Regulation No. 17 and Article 65(5) of the ECSC Treaty, 1998 O.J. (C 9) 3–4 [hereinafter 1998 Guidelines].

48 Id.

49 Id.

50 Id.

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This methodology was refined in the Guidelines on the Method of Setting Fines Imposed Pursuant to Art. 23(2)(a) of Regulation 1/2003 (2006 Guidelines).[51] In the process of setting the fine, the Commission first determines a basic amount for the fine.[52] This is based on a percentage of the value of the undertaking's sales of affected goods or services within the EEA[53]—a value that is "determined before [value added tax (VAT)] and other taxes directly related to the sales"—and is usually calculated with reference to the "last full business year of its participation in the infringement."[54] The percentage applied in any case is generally up to 30% of the value of sales, and the actual percentage used is determined by the gravity of the infringement; the gravity of the infringement is assessed by taking into consideration factors such as the combined market share of all the undertakings concerned, the geographic scope of the infringement, and the nature of the infringement.[55] Hard-core cartels, such as agreements for horizontal price-fixing, market-sharing, and output-limitation,[56] are set at the higher end of the scale.[57] An innovation introduced by the 2006 Guidelines was the possibility that, for worldwide cartels, the undertaking's share of the total value of sales, including sales outside the EEA, could be taken into account, and then that percentage share could be applied to the value of the EEA sales when determining the fine for each participant.[58]

The amount arrived at once the percentage of the value of affected sales has been calculated is then multiplied by the number of years the infringement continued.[59] This represents a significant increase from the 10% per annum rate of the earlier regime.[60] An "entry" deterrent of between 15% and 25% of the value of sales as defined above is then added to the basic amount "to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements."[61] This is applied irrespective of duration.[62]

Once the basic amount has been calculated in this way, aggravating or mitigating factors may increase or decrease the fine levied.[63] A highly significant aggravating factor is recidivism;[64]

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51 2006 Guidelines, supra note 40, ¶ 3.
52 Id. ¶ 10.
53 Id. ¶ 13.
54 Id. ¶¶ 13, 17 (The fine notice will normally refer to "the sales made by the undertaking during the last full business year of its participation in the infringement.").
55 Id. ¶¶ 19, 21–22.
56 Id. ¶ 23.
57 Id. ¶¶ 22–23.
58 Id. ¶ 18.
59 Id. ¶ 24.
60 See id.; 1998 Guidelines, supra note 47, at 3.
61 2006 Guidelines, supra note 40, ¶ 25.
62 Id.
63 Id. ¶¶ 27–29.

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repeat offenders may be fined an additional 100% for each subsequent "similar" infringement (up from the 50% maximum under the 1998 Guidelines), reflecting the view of the CFI in Michelin that "[r]ecidivism is a circumstance which justifies a significant increase in the basic amount of the fine. Recidivism constitutes proof that the sanction previously imposed was not sufficiently deterrent."[65]

In an analysis of thirteen decision made under the 2006 Guidelines, compared with a large sample of decisions between 1999 and 2009 under the 1998 Guidelines, Professor John M. Connor concludes that there was a 141% increase in the average amount of fines.[66] He concludes that this was partly due to an increase in average affected sales, but also due to the tougher regime introduced by the new guidelines.[67]

It has been calculated that fines for hard-core cartel offenses were twenty-nine times higher by the end of 2008 than in 1990.[68] The steep rise in the level of fines imposed for breaches of Article 101 of the TFEU in the past two decades is shown in the following chart[69]:

[INSERT GRAPH HERE]

The total amount imposed in fines for cartels from 2008 to 2012 was approximately €9.16 billion, with Saint Gobain (car glass) coming in with the highest fine for a single undertaking for a cartel infringement at €880 million.[70] The Airfreight fine of approximately €799.45 million is the fourth highest total for one cartel.[71]

The Commission has, as shown above, provided a framework for the calculation of fines in the 2006 Guidelines.[72] The question of whether the legal basis of the fines complies with Article 7 of the European Convention on Human Rights[73] (ECHR) continues to be raised.[74] The recidivism uplift, for example, was increased from a maximum of 50% in the 1998 Guidelines to 100% in

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64 Id. ¶ 28.

65 Case T-203/01, Michelin v. Comm'n, 2003 E.C.R. II-4071, 4179, ¶ 293.

66 John M. Connor, Has the European Commission Become More Severe in Punishing Cartels? Effects of the 2006 Guidelines, 32(1) **E.C.L.R.** 27, 29 (2011).

67 Id.

68 John M. Connor & Douglas J. Miller, The Predictability of Global Cartel Fines, 2 **Concurrences: Rev. of Competition L.** (2010), available at http://ssrn.com/abstract=1610284 (last visited Oct. 22, 2013).

69 Cartel Statistics, **Eur. Union Comm'n**, http://ec.europa.eu/competition/cartels/statistics/statistics.pdf (last visited Sept. 20, 2013).

70 Id.

71 Id.

72 2006 Guidelines, supra note 40, ¶ 3.

73 European Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, Nov. 4, 1950, 2013 U.N.T.S. 222.

74 See, e.g., In re Intel Corp., No. 9341, 2010 WL 1634901, at 86 (F.T.C. Apr. 12, 2010).

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the 2006 Guidelines for each additional infringement.[75] This was decided not on the basis of EU legislation, as there is no explicit reference to a recidivism penalty in Regulation 1/2003,[76] but by the Commission itself without debate in any other EU institution.[77] Professor Alan Riley, among many other commentators, raises the question as to "whether containing such sanctions in an administrative document that can be changed at will by the executive without legislation complies with [Article] 7" of the ECHR.[78]

This argument not been upheld by the European courts so far.[79] However, the General Court has held that the 2006 Guidelines are "rules of practice from which the administration may not depart in an individual case without giving reasons."[80] Furthermore, by adopting and publishing these rules of conduct, the Commission has imposed "a limit on the exercise of its discretion"; departing from them could breach the general principles of law, such as the right to equal treatment and the protection of legitimate expectations.[81] Such rules of conduct "may produce legal effects."[82]

While the application of the uplift for recidivism has a defined maximum value in the 2006 Guidelines,[83] there is no indication of what percentage increase or decrease might be applied for the other aggravating and mitigating factors listed in the 2006 Guidelines, the evaluation of which is apparently for the Commission to determine on a case-by-case basis.[84]

The other aggravating factors listed that may increase the fine include: refusal to cooperate with or obstruction of the Commission in carrying out its investigations; having the "role of leader in, or instigator of, the infringement"; attempting "to coerce other undertakings to participate"; and taking "any retaliatory measures . . . against other undertakings with a view to enforc[e] the practices constituting the infringement."[85]

On the other hand, a number of mitigating circumstances may lower the fine.[86] One example is when an undertaking provides evidence that its involvement in the infringement was

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75 Cento Veljanouski, Deterrence, Recidivism, and European Cartel Fines, 7(4) **J. Competition L. & Econ.** 871, 889 (2011).

76 See generally Council Regulation 1/2003, supra note 37.

77 2006 Guidelines, supra note 40, ¶¶ 1, 28.

78 Riley, supra note 42, at 204 n.83.

79 Joined Cases T-69/04, Schunk GmbH v. Commission, 2008 E.C.R. II-2567, ¶ 33.

80 Joined Cases C-189/02 P, 202/02 P, C-205–208/02 P & C-213/02 P, Dansk Rorindustri v. Comm'n, 2005 E.C.R. I-542S, ¶¶ 209, 211.

81 Id. ¶ 211.

82 Id.

83 2006 Guidelines, supra note 40, ¶ 28.

84 Id. ¶¶ 28–29.

85 Id. ¶ 28.

86 Id. ¶ 29.

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substantially limited, or that the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or legislation—this is the focus of the discussion in this article.[87]

It should be borne in mind that there are additional factors referred to in the 2006 Guidelines that may affect the fine, such as the inability of the firm to pay in a specific social and economic context,[88] and the application of the "Leniency Programme."[89] Both of these factors were applied in the Airfreight case.[90]

The high fines imposed in the Airfreight case had a particularly significant impact because the decision was delivered at a time when airline companies were under extreme economic and competitive pressure. Controversially, the Commission dropped charges against eleven other carriers named in the original Statement of Objections.[91]

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87 Id. Other factors are

> where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels); where the undertaking provides evidence that the infringement has been committed as a result of negligence; where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market . . . [; and] where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so.

Id.

88 Id. ¶ 35.

89 Id. ¶ 34. In 1996, the Commission adopted a "Leniency Notice" that set out the Commission's policy giving immunity or reduced fines to companies that came forward with information about cartels. Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, 1996 O.J. (C 207) 4, 4. The Notice was revised in 2002 and again in 2006. Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3, 3; Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006 O.J. (C 298) 17, 22 [hereinafter 2006 Leniency Notice]. The 2006 Leniency Notice gives complete immunity from fines to the first member of a cartel to provide the Commission with sufficient "information and evidence" to enable it to launch targeted inspections (dawn raids) on other cartel members. 2006 Leniency Notice, supra, at 17–18. A cartel member may also qualify for full immunity by providing sufficient information and evidence to establish an infringement related to the alleged cartel, but this is only possible if no undertaking has qualified for immunity by the first route. Id. at 18. Other undertakings may qualify for a reduction in fines by providing evidence that contributes "significant added value" to the investigation. Id. at 20.

90 See Airfreight Press Release, supra note 1.

91 Id.

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B. Final Reduction: The General Regulatory Environment

This section of the article focuses on the uniqueness of the 15% reduction granted to all the participants in the Airfreight cartel because of the "general regulatory environment" that possibly encouraged price coordination.[92]

As described above, the 2006 Guidelines provide that the Commission may reduce the basic amount of the fine where specified mitigating circumstances exist. One circumstance is "where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation."[93] This ground of mitigation was not included in the 1998 Guidelines, but a fine reduction was given in a number of cases prior to 2006 because the condemned behavior was encouraged or authorized by national authorities.[94]

This possibility of mitigation of penalties was first raised in the early case of Suiker Unie v. Commission, where the CJEU recognized that the "organization of the market in sugar . . . only left a residual field available for competition," and that this contributed to the fact that the sugar producers behaved in an anti-competitive manner.[95] The CJEU clarified that although the structure of the market could not lead to the condoning or acceptance of anti-competitive practices, it did mean "that the [behavior] of the parties concerned cannot be regarded with the usual severity."[96] For this reason, inter alia, the fines were reduced.[97]

The Commission applied such mitigation in the French Beef decision in August 2003.[98] In French Beef, the parties argued that the intervention of the French authorities (in encouraging the conclusion of the prohibited agreement) meant that Article 81 of the Treaty Establishing the European Community (TEC) (Article 101 of the TFEU) was inapplicable. This argument was rejected.[99] However, the Commission agreed "that the French State, through its Minister for Agriculture, was indeed implicated in the conclusion of the agreement . . . [and] strongly encouraged the conclusion of an agreement whose content was necessarily going to be in violation of the competition rules."[100] The Commission therefore awarded mitigation (a reduction of 30% of their fine) to the two affected trade associations, which refused to sign the agreement before "the forceful intervention of the French Minister for Agriculture in [favor] of the

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92 Id.

93 2006 Guidelines, supra note 40, ¶ 29.

94 See Commission Decision, French Beef, 2003 O.J. (L 209) 12, 39 [hereinafter French Beef Decision].

95 Case 40/73, Suiker Unie v. Comm'n, 1975 E.C.R. 1663, ¶ 619.

96 Id. ¶ 620.

97 See id. ¶ 624.

98 See French Beef Decision, supra note 94, at 40.

99 Id. at 36.

100 Id.

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conclusion of such an agreement."[101]

In Consorzio Industrie Fiammiferi (CIF), a judgment[102] delivered just before French Beef in September 2003, the CJEU clarified the distinction between the situation where the "conduct [was] required . . . by national legislation"[103] (so that the undertakings were required to act in the way that they did, in which case Articles 101 or 102 of the TFEU would not be applicable[104]) and the situation where "the conduct was merely facilitated or encouraged by the national legislation" (which would result in a reduction of the fines imposed).[105] This ground of mitigation was included in the 2006 Guidelines[106] and is also set out in the Commission Guidelines on the Applicability of Article 101 of the TFEU to Horizontal Co-operation Agreements.[107]

The Commission's award of a 10% reduction in fines has recently been upheld in Deutsche Telekom AG[108] and Wanadoo España v. Telefónica,[109] two cases decided under Article 102 of the TFEU, concerning the abuse of unfair pricing through margin squeeze. In light of the 15% reduction in the Airfreight case,[110] it is interesting to consider the Deutsche Telekom AG case, in which the Commission's allocation of a 10% reduction in the fine because of the national regulatory framework was upheld on appeal to the CJEU.[111] Deutsche Telekom was found to be in breach of Article 102 of the TFEU and fined €12.6 million for imposing unfair prices in the form of a margin squeeze.[112]

Deutsche Telekom AG demonstrates the stringency with which the Commission, upheld by

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101 Id. at 39.

102 See Case C-198/01, Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato, 2003 E.C.R. I-8055.

103 Id. ¶ 58.

104 Id. This point is discussed in further detail below.

105 Id.

106 2006 Guidelines, supra note 40, ¶ 29.

107 Commission Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 O.J. (C 11) 1, 8 [hereinafter Commission Guidelines on the Applicability of TFEU Article 101 to Horizontal Co-operation Agreements].

108 Case C-280/08 P, Deutsche Telekom AG v. Comm'n, 2010 E.C.R. I-9555, ¶ 264.

109 Case T-336/07, Telefónica and Telefónica de España v. Comm'n, 2012 EUR-Lex CELEX 62007T30336 (Mar. 29, 2012) (unpublished).

110 Airfreight Press Release, supra note 1.

111 Case C-280/08 P, Deutsche Telekom AG v. Comm'n, 2010 E.C.R. I-9555, ¶ 264.

112 Id. ¶¶ 5–6. Margin squeeze can occur where a vertically integrated undertaking controls access to infrastructure (upstream market) that is indispensable for access to the downstream market in which it also competes and where the dominant undertaking charges its competitors for access. Id. ¶ 4.

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the CJEU, imposes the continued responsibility of undertakings to assess their own behavior with regard to the competition law provisions, despite the position taken by national authorities. Deutsche Telekom is the former monopoly provider of telecom services in Germany.[113] Since August 1996, the German telecommunications market has been liberalized, and since June 1997, Deutsche Telekom has been required to provide competitors with fully unbundled access to the local loop at a "wholesale" price fixed by the national regulatory authority, the Regulierungsbehörde für Telekommunikation und Post (RegTP).[114] Those competitors were then able to compete with Deutsche Telekom in the provision of retail services to consumers through analogue lines, and were able to offer internet access though narrowband and broadband connections.[115] The ensuing margin squeeze was between the wholesale prices charged by Deutsche Telekom to its competitors for access to the unbundled local loop and the prices it charged consumers for retail network access services.[116]

Despite the facts that the wholesale price was set by the national regulator, that retail prices were subject to authorization or review by the same regulator, and that the national regulator investigated allegations of margin squeeze because of complaints by competitors on six occasions and rejected them, Deutsche Telekom was awarded only a 10% reduction in its fine due to the national regulatory framework.[117]

Niamh Dunne argues that the problem in this case was an error in the national regulation[118]: "Ultimately, this case involved the sub-optimal use of competition law to correct a problem caused by inadequate regulation, in circumstances where the regulation itself was essentially immune from review."[119]

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113 Id. ¶ 2.

114 Id.

115 Id. Retail network access is provided through either traditional analogue connection or digital narrowband connection (an integrated services digital network, or ISDN). Id. Access to these is via Deutsche Telekom's existing copper pair network (narrowband connections). Id. Deutsche Telekom also offers end-users a broadband connection (an asymmetrical digital subscriber line, or ADSL), which requires upgrading the existing narrowband connections. Id.

116 Id. ¶ 3. The term "'local loop' signifies the physical circuit connecting the network termination point at a subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network." Id. ¶ 2.

117 Id. ¶¶ 264, 279.

118 Niamh Dunne, Margin Squeeze: From Broken Regulation to Legal Uncertainty, 70 **Cambridge L.J.** 34, 36 (2011).

119 Id. at 34–37. It should be noted, however, that the Commission raised the argument in the appeal before the CJEU that the excessive wholesale price was attributable to Deutsche Telekom itself. See Deutshe Telekom AG, 2010 E.C.R. I-9555, ¶¶ 35–40. The regulator had set the wholesale prices with reference to Deutsche Telekom's submitted costs and Deutsche Telekom failed to inform it that those costs had decreased; however, the point was not adjudicated because

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The breadth of the Commission's discretion in setting fines for breach of the competition provisions has been subject to much debate and criticism. When applying this ground of mitigation, the unspecific wording of Article 29 of the 2006 Guidelines has enabled the Commission to set its own benchmark for what level of reduction in the fine is appropriate for "encouragement" by the national regulatory regime.[120]

What is interesting is the very limited impact that national regulation had on the fine in Deutsche Telekom AG.[121] By comparison, in the Airfreight case, the reduction for "the general regulatory environment" was 15%.

Aside from Suiker Unie,[122] the cases referred to above all concern specific actions, administrative decisions, or legislation by national regulatory authorities. By contrast, in the Airfreight cartel, the 15% reduction was granted to all the carriers "on account of the general regulatory environment in the sector[,] which can be seen as encouraging price coordination."[123] While in the absence of a published decision the precise characteristics of the "general regulatory environment" cannot be definitively established, this does seem to be a novel use of this ground of mitigation because it is applied to a global regulatory environment rather than to specific, identified actions by national authorities or particular instances of national regulation, as in earlier cases.[124] It is interesting that this mitigation was extended to all carriers irrespective of routes and therefore independent of the specific national regulation regulating particular routes.[125]

III. REGULATING AIR TRANSPORT

As demand for air transport services increases, new airlines enter the market and existing airlines offer new routes or frequencies. Where this demand involves international travel, airlines typically depend on their respective governments to negotiate reciprocal, bilateral traffic rights vis-à-vis air service agreements (ASAs).[126] It follows that dialogue between airlines and regulators is essential to effective operation of the industry.

The air transport sector comprises two key business segments: passengers and cargo. Virtually all airlines have at least small-scale freight operations while some airlines perform strictly cargo

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it had not been raised in the original appeal to the General Court. See id.

[120] 2006 Guidelines, supra note 40, ¶ 29.

[121] Deutsche Telekom AG, 2010 E.C.R. I-9555, ¶ 279.

[122] Case 40/73, Suiker Unie v. Comm'n, 1975 E.C.R. 1663.

[123] Airfreight Press Release, supra note 1.

[124] Id.

[125] Id.

[126] See, e.g., Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

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operations.[127] Passenger airline services typically involve two parties: the passenger and the airline, and perhaps the passenger's travel agent. Shipping by air, on the other hand, requires at least three parties: the sender, the carrier, and the consignee. Plus, in many instances, freight forwarders, consolidators (or "bulk-break agents"), and customs authorities may be involved.[128]

It should be noted that the Chicago Convention introduced nine "freedoms of the air" in 1944,[129] the first five of which were subsequently adopted as express terms in most bilateral ASAs. The first ever ASA was the former Bermuda I Agreement between the United States and the United Kingdom (U.K.) in 1946, which, together with the subsequent Bermuda II Agreement, set out which airlines could access which airports and with what frequency.[130]

A. Air Service Agreements

The Organisation for Economic Cooperation and Development (OECD) published its Regulated Conduct Defence in February 2011,[131] which discusses the Commission's Airfreight decision in the context of bilateral ASAs "between the EU and third countries [that] . . . still contain restrictive clauses requiring designated carriers to agree on fares before filing them with Aviation Authorities."[132]

This would seem to be in breach of the clear duty imposed on national aeronautical authorities by the CJEU in 1986 in the Flugreisen case to "refrain from taking any measure which might be construed as encouraging airlines to conclude tariff agreements contrary to the Treaty."[133]

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127 Massimo Geloso Grosso & Ben Shepherd, Liberalising Air Transport Services in APEC 12 (Groupe D'Economie Mondiale, Working Paper, 2009), available at www.ecipe.org/media/publication_pdfs/GelosoGrosso_Shepherd_Liberalising_aircargo_services_in_APEC102009.pdf.

128 See id. at 7.

129 Chicago Convention, supra note 126, arts. 10–13.

130 Agreement Between the Government of the United Kingdom and the Government of the United States of America Relating to Air Services Between Their Respective Territories, U.S.–U.K., Feb. 11, 1946, 60 Stat. 1499 [hereinafter Bermuda I ASA]. Signed in 1946, the Bermuda I ASA is an example of a "traditional" bilateral air service arrangement following the Chicago Convention between post-war aeronautical powers such as the United States and the U.K. In 1977, the Bermuda II ASA amended the terms of the previous agreement and outlined, for instance, which airlines were permitted to fly to London's Heathrow and Gatwick airports from designated U.S. cities. Consolidated Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.–U.K., July 23, 1977, 28 U.S.T. 5367 [hereinafter Bermuda II ASA].

131 **Policy Round Tables: Regulated Conduct Defence**, **DAF/COMP(2011)3**, **OECD** 2, 3 (2011), available at http://www.oecd.org/regreform/sectors/48606639.pdf.

132 Id. at 199.

133 Case C-66/86, Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs E.V., 1989

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For the most part, the air transport sector remains regulated by a "complex web" of restrictive bilateral and reciprocal ASAs.[134] Airlines called on governments in 2008 to reduce impediments to trade, specifically calling for greater liberalization of cargo ASAs.[135]

There is a general trend toward liberalization of ASAs with new bilateral and multilateral ASAs agreed on "open skies" terms—allowing unrestricted service between the two or more state signatories—particularly with regard to passenger services.[136] Notwithstanding that there are an estimated 3,000 ASAs currently in force, and that analyzing these ASAs presents a challenge, a number of empirical studies have been conducted[137] that assess the extent of liberalization using the Cargo Air Liberalization Index (CALI).[138] From these studies, it is apparent that the regulatory framework is liberalizing at the international level, albeit gradually.[139]

Most U.S.-negotiated open skies agreements contain specific provisions that apply to all-cargo operations (freighters), but not belly cargo (mixed passenger–cargo services); the all-cargo provisions are typically more liberal than those for passenger services.[140] Cargo tends to be regulated differently from passenger services, as the former is by definition unidirectional because the majority of consignments travel only one-way.[141] In global air transport, this leads to a situation where airline operations are comprised of passenger and cargo divisions of "unbalanced" cargo yet "balanced" passengers.[142]

The ASAs negotiated in the past between Member States and third countries tended to be more restrictive than the new wave of open skies and multilateral agreements negotiated by the EU.[143] Certain bilateral ASAs between EU Member States and third countries established the "regulatory" process for setting tariffs, and these were less "liberalized" than the new EU-

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E.C.R. 803, 852, 4 C.M.L.R. 102, ¶¶ 48–49 (1990).

134 **Pascal Achard**, **The Regulation of International Air Cargo Services**, **SciencesPo** (2009), available at http://www.gem.sciences-po.fr/content/research_topics/trade/RITS/Achard_Regulation_of_International_Air_Cargo_Services062009.pdf.

135 See Istanbul Declaration, **Int'l Aviation Transp. Ass'n** (Mar. 2, 2008), www.iata.org/events/agm/2008/Pages/istanbul-declaration.aspx.

136 Grosso & Shepherd, supra note 127, at 3.

137 **Achard**, supra note 134, at 17.

138 Id.

139 Grosso & Shepherd, supra note 127, at 3.

140 **Achard**, supra note 134, at 21.

141 Anming Zhang & Yimin Zhang, A Model of Air Cargo Liberalisation: Passenger vs. All-Cargo Carriers, 38 **Transp. Res. Part E Logistics & Transp. Rev.**, 175, 7 (2002).

142 **Achard**, supra note 134, at 14–16.

143 Id. at 18–19.

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mandated ones.[144] This is relevant to note in connection with the assumption, which Pascal Achard has proven empirically, that more liberal ASAs are linked to higher trade flows.[145]

B. European Air Transport

Air transport is mentioned only once in the TFEU, in Article 100, which provides that:

(1) The provisions of this Title shall apply to transport by rail, road and inland waterway.

(2) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.[146]

The legal framework of the EU as it relates to air transport is two-fold: the sector is now subject to the general rules on competition (under Articles 101 and 102 of the TFEU)[147] just as all other sectors, but air transport policy is determined by the European Parliament and Council.[148]

The four main objectives of the EU's air transport regulatory framework are: "facilitating the airlines' financing ability"; "ensuring the respect of the internal market rules"; "creating conditions for fair and equitable competition"; and "extending the liberalization policy to third-country routes."[149]

European air transport policy has matured over the past decade and a half, during which time the EU air transport market has been liberalized incrementally vis-à-vis three internal market "liberalization packages"; the final package came in 1993, though arguably the market was not fully liberalized until 2004.[150] In any case, the packages influenced more overt national markets,

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144 Id. at 19.
145 Id. at 41.
146 TFEU, supra note 22, art. 100 (emphasis added).
147 Id. arts. 101–02.
148 Id. art. 100.
149 **Steven Truxal**, **Competition and Regulation in the Airline Industry: Puppets in Chaos** 82 (2013). This includes the on-going problem of state aid being offered to flag carriers by the respective Member States.
150 See Market Integration Theory, **Eur. Comm'n**, http://ec.europa.eu/transport/modes/air/internal_market/integration_en.htm (last visited Sept. 16, 2013). It is reasonably argued that the liberalization of the internal EU market for air transport was not completed until the CJEU "open skies" judgments in 2002 and indeed not fully liberalized until the transfer of exclusive (external) competence for EU external air transport in 2004. See id.

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and created the single European air transport market and the "Single European Sky."[151] Until 1993, there was much debate on the appropriate application of the competition rules to the industry, but the best argument for the delay was that the sector was not yet sufficiently liberalized, and therefore, the EU competition rules would have had little or no real effect.

However, a highly significant case in 1985, Nouvelles Frontières,[152] confirmed that the competition rules did indeed apply to the air transport sector. At the same time, it established that prior to the adoption of legislation under Article 87 of the TEC, national courts could not apply Articles 85(1) and 85(2) of the TEC to hold an anticompetitive agreement void, unlike the situation in other areas where the national courts could directly apply Articles 81(1) and 81(2) of the TEC.[153]

During the liberalization of the EU air transport sector, the Commission devised a number of legal measures to apply EU competition law to the sector in a gradual and effective manner. The liberalization process encouraged an incremental relinquishing of Member State controls in the sector and vested future oversight centrally in the EU. This process is perhaps best demostrated by the area of market access and traffic rights.

"Council Decision 87/602 under the first phase of the liberalization process and Council Regulation 2343/90 were 'measures designed to introduce greater freedom of access to air transport markets to bring about a single market for air transport, albeit gradually.'"[154] These regulations "assign[ed] substantive rights and obligations to individual Member States and the [EU with respect to EU] air transport, in particular . . . free market access to all intra[-EU] air

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[151] See Single European Sky, **Eur. Comm'n**, http://ec.europa.eu/transport/modes/air/single_european_sky/ (last visited Sept. 16, 2013). This denotes a single European commercial airspace under the management of Eurocontrol, the body empowered by the EU to control air traffic for the entire Union. See id.; see also Council Decision 2004/636/EC, 2004 O.J. (L 304) 204.

[152] Joined Cases 209–213/84, Ministère Public v. Lucas Asjes, 1986 E.C.R. 1425.

[153] See Consolidated Version of the Treaty Establishing the European Community arts. 81–82, Dec. 24, 2002, 2002 O.J. (C 325) 33, 64–65 [hereinafter TEC]. National courts could only apply the competition provisions if (1) there had been a prior ruling of infringement by the "competent authority" of a Member State, acting under the interim provision of Article 88 of the TEC, that there had been a breach of Article 81 of the TEC, or (2) where the Commission, acting under Article 89(2) of the TEC, on application by a Member State or on its own initiative, had investigated and found an infringement. Id. arts. 88–89. If the infringement was not brought to an end, the Commission could record the infringement in a "reasoned Decision" and authorize the Member State to take measures. Id. The Commission had no power itself to take action against an undertaking to compel it to bring an infringement to an end. Id.

[154] **Truxal**, supra note 149, at 83.

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routes."[155]

As part of the third and final phase of the liberalization, a number of regulations aimed to: ensure equal market access and traffic rights for all designated EU carriers; provide an appropriate procedure and relevant criteria for the licensing of EU carriers; ensure air fares and cargo rates are deregulated; develop a code of conduct for computer reservations systems (CRSs); and establish procedural rules for the application of the competition rules on state aid in the air transport sector.[156]

Following the Nouvelles Frontière case and the three liberalization packages, Council Regulation 3975/87[157] established the procedure for applying the rules on competition to undertakings in the air transport sector.[158] The Flugreisen[159] case came to the CJEU soon after the enactment of Regulation 3975/87—which allowed the Commission to take action in the air transport sector under Articles 85(1) and (2) of the TEC, thereby establishing the procedure for applying for an individual exemption—and Regulation 3976/87—a block exemption covering certain categories of agreements and concerted sector practices, such as consultations.[160] "Consultations on tariffs or fares are [a] common, worldwide practice in the airline industry."[161]

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155 Id. Council Regulation 2408/92 "subsequently amended these provisions under the third wave of the [EU]'s market liberalization process." Id. at 83 n.109.

156 See Council Regulation 323/1999, 1999 O.J. (L 40) 1; Council Regulation 2409/92, 1992 O.J. (L 240) 15, 15–16; Council Regulation 2408/92, 1992 O.J. (L 240) 8, 8–9; Council Regulation 2407/92, 1992 O.J. (L 240) 1, 1–2; Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State Aids in the Aviation Sector, 1994 O.J. (C 350) 5, 8.

157 Council Regulation 3975/87, 1987 O.J. (L 374) 1, 2. This created the "general regulation" (Council Regulation 17/62) for the implementation of EU competition law to the air transport sector. Id.; see Council Regulation 17/62, supra note 38. Article 1 empowered the Commission to apply the rules directly to intra-Community routes. Council Regulation 3975/97, supra. Council Regulations 1284/91 and 2410/92 amended Regulation 3975/87. See Council Regulation 2410/92, 1992 O.J. (L 240) 18; Council Regulation 1284/91, 1991 O.J. (L 122) 2.

158 This procedure was amended by Council Regulation 2410/92 and subsequently repealed and replaced by Council Regulation 411/2004. See Council Regulation 411/2004, 2004 O.J. (L 68) 1, 2; Council Regulation 2410/92, supra note 157.

159 Case C-66/86, Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs E.V., 1989 E.C.R. 803, 852, 4 C.M.L.R. 102, ¶ 48 (1990).

160 See Council Regulation 3976/87, 1987 O.J. (L 374) 9, 10.

161 The CJEU "recognized the need to distinguish between price-fixing and 'consultation' on tariffs" but admitted that this is not an easy distinction to draw. **Truxal**, supra note 149, at 76. Consultation on tariffs was exempted from Article 101(1) under Regulation 2671/88. See id. Consultation must be intended solely to prepare joint tariff proposals, which are not binding on the participants, who must remain free to put forward different tariff proposals to the relevant

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"These consultations are held on a bilateral or multilateral conference basis."[162]

The CJEU held that the enactment of Regulation 3976/87 meant that Articles 81(1) and 81(2) of the TEC could be applied by the national courts directly, as it was now possible for the courts to apply Article 85(3) at the same time.[163] An anti-competitive agreement would therefore be automatically void without a finding by the competent authorities under Articles 88 or 89.[164] However, this was only true with regard to flights between EU airports.[165] Breaches of the competition laws with respect to domestic flights and flights between Member States and third countries could not be enforced by national courts but rather only vis-à-vis transitional rules under Articles 88 and 89.[166]

This situation was remedied by the enactment of Regulation 411/2004, which repealed Regulation 3975/87 and extended the Commission's powers of investigation and enforcement with respect to flights between Member States and third countries.[167] In other words, by 2004, the competition laws were finally applicable to the entire air transport sector on the same basis as other industries.

Two further reforms aimed at standardization of the regulations applicable to different routes were the adoption of Common Position 7/2004, which sets out the appropriate procedure for the future negotiation and implementation of multilateral ASAs between Member States and third countries,[168] and Regulation 847/2004, which provides for the compatible standardization of pre-existing bilateral ASAs between Member States and non-EU countries.[169]

In relation to the EU's external aviation policy, the Council welcomed comprehensive agreements: "[T]he inseparable twin aims of comprehensive open aviation area agreements should be, on the one hand, market opening creating new economic opportunities and investment possibilities, and, on the other hand, a process of regulatory convergence that ensures a

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aeronautical authorities and then to apply those alternative tariffs; additionally, participation in consultations must be open to all air carriers with an interest in the relevant routes. See id.

162 "The major international conference for scheduling and fares is held biannually in June and November under the framework and oversight of IATA." Id.

163 Flugreisen, 1989 E.C.R. at 845, 4 C.M.L.R. ¶ 20.

164 See TEC, supra note 153, arts. 88–89.

165 Flugreisen, 1989 E.C.R. at 845, 4 C.M.L.R. ¶ 21.

166 See id.; TEC, supra note 153, arts. 88–89.

167 Council Regulation 411/2004, supra note 158, at 1–2 (repealing Regulation 3975/87 and amending Regulations 3976/87 and 1/2003, in connection with air transport between the Community and third countries).

168 Council Common Position (EC) No. 7/2004 of 5 Dec. 2003, 2004 O.J. (C 54 E) 33; see also Council Regulation 868/2004, 2004 O.J. (L 162) 1.

169 See Council Regulation 847/2004, supra note 15, at 8.

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satisfactory level playing field with fair and equitable competition conditions."[170]

The Council also urged the Commission to "bring the current negotiations with the United States to a successful and mutually satisfactory conclusion as early as possible"; the result of these negotiations was the EU–U.S. "Open Skies" Agreement, which came into force in March 2008.[171]

C. Block Exemptions

Particularly noteworthy is the special treatment of the airline industry in the context of block exemptions issued in the 1980s and 1990s that exempted agreements on pooling revenue, limiting of capacities, and tariffs[172]—clear infringements of Article 101(1) of the TFEU. Commission Regulation 1617/93, which renewed Regulation 2671/88, exempted from Article 101(1) "certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services," and slot allocation at airports with the aim of facilitating "interlining," subject to certain a priori conditions.[173]

Initially, cargo tariff consultations "benefited [from] a block exemption under Commission Regulation 1617/93, which effectively enabled European airlines to agree on tariffs for the carriage of freight."[174] In 1996, however, the Commission removed cargo operations from the scope of the block exemption.[175] Exemptions with respect to passenger airline operations continued but were amended five times between 1993 and 2002.[176]

The Commission reviewed and renewed a series of revised block exemptions for passenger airlines via the Internatational Air Transport Association (IATA) in October 2006 under Block Exemption Regulation (EC) No. 1459/2006, resulting in a reduction of the scope of the

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[170] Council Conclusions on Developing the Agenda for the Community's External Aviation Policy, at 4, COM (2005) 79 final (Mar. 11, 2005).

[171] Id. at 5.

[172] See Press Release, Eur. Comm'n, Commission Takes Preliminary View that IATA Cargo Tariff Consultations Infringe Competition Rules (May 15, 2001), available at http://europa.eu/rapid/press-release_IP-01-694_en.htm [hereinafter Press Release, Commission Takes Preliminary View].

[173] Commission Regulation 1617/93, supra note 14, at 18–19; see **Truxal**, supra note 149, at 92.

[174] Press Release, Commission Takes Preliminary View, supra note 172.

[175] Commission Regulation 1523/96, 1996 O.J. (L 190) 11, 12.

[176] See Commission Regulation 1105/2002, 2002 O.J. (L 167) 6; Commission Regulation 1324/2001, 2001 O.J. (L 177) 56; Commission Regulation 1083/1999, 1999 O.J. (L 131) 24; Commission Regulation 1523/96, supra note 175; Commission Regulation 1617/93, supra note 14.

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exemptions.[177] Finally, the Commission decided not to renew (1) the block exemptions expiring in June 2007 for routes between the EU, United States, and Australia, and (2) the block exemptions expiring in October 2007 for routes between the EU and other third countries on the grounds that the benefits to consumers were outweighed by the anti-competitive effects.[178] As a result, the IATA and individual carriers have been required since 2007 to ensure that their agreements are fully compliant with EU competition rules.[179]

D. Airline and Cargo Alliances

An airline alliance, which in essence is a cooperative agreement between two or more airlines, is typically established as a means to extend and optimize flight networks, reduce costs, and offer greater benefits to consumers.[180] The level of cooperation between partners to an airline alliance varies from sharing frequent flyer programs or airport lounges, to minimum standards for crew uniforms, seat comfort, and in-flight services, to a "stock investment by one airline in its partner."[181] Many alliances "began as codeshare agreements aimed at extending existing flight networks and have subsequently developed into regional or global alliances."[182] Alliances involving so-called codeshare agreements may have the potential for both pro-competitive and anti-competitive effects.[183] "On the [pro-competitive] side, they can create new service, improve existing service, lower costs, and increase efficiency, all to the benefit of consumers. On the [anti-competitive] side, they can result in market allocation, capacity limitations, higher fares, or foreclosure of rivals from markets, all to the injury of consumers."[184]

Perhaps the most significant development "in recent years has been the emergence of a grouping of major carriers in the form of deeper and more complex alliances extending to all aspects of the airline business."[185] The three largest global airline alliances are Star Alliance, One World, and Sky Team.[186]

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177 Commission Regulation 1459/2006, 2006 O.J. (L 272) 3, 3–5.

178 See id. at 4–5.

179 Press Release, Commission Ends Block Exemption, supra note 17.

180 See **Truxal**, supra note 149, at 136.

181 International Aviation Alliances: Market Turmoil and the Future of Airline Competition: Hearing Before the Subcomm. on Antitrust, Competition & Bus. Rights of the S. Comm. on the Judiciary, 107th Cong. 6 (2001) (statement of R. Hewitt Pate, Deputy Assistant Att'y Gen., Antitrust Div.) [hereinafter Pate Hearing].

182 **Truxal**, supra note 149, at 137.

183 A "codeshare" occurs when one airline operates a service but allows another to offer that service for purchase under its flight designator code. Pate Hearing, supra note 181, at 5.

184 Id. at 6.

185 **Truxal**, supra note 149, at 137.

186 Id.

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Lufthansa Cargo and its passenger side, Lufthansa German Airlines, belong to Star Alliance, capturing the alliance's additional members as potential partners for joint cargo operations.[187] This means that whatever agreements the passenger airline enters into may incorporate its cargo business as well, whether the agreement is a codeshare with another passenger (integrated) airline or a block space agreement with an all-cargo carrier, such as DHL.

The capacities of global air cargo alliances are remarkable, particularly since freight is time-sensitive rather than based on loyalty or preference, as with passenger flights. Sky Team Cargo, with its members Aero Mexico, Air France, Alitalia, Czech Airlines, Delta Air Logistics, and Korean Air, carried 2.093 million tons of international freight combined in 2002.[188]

The Commission has investigated a number of joint ventures undertaken by members of alliances. More recently, in January 2012, the Commission launched an investigation into whether a transatlantic joint venture between Air France-KLM, Alitalia, and Delta—members of the Sky Team alliance—infringes Article 101 of the TFEU.[189] Another investigation into transatlantic cooperation between Air Canada, Lufthansa, Continental Airlines, and United Airlines—members of the Star Alliance—was started in 2009 and is still ongoing.[190]

E. Special Treatment

The air transport sector is inherently information sharing. Examples include network and fare conferences, which in the past had antitrust immunity;[191] the publication of fares, which often leads to so-called "fare wars"; and a trend toward cooperative arrangements between airlines in the form of strategic alliances.[192] It can also be argued that the existing coordination between

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[187] About Lufthansa, **Star Alliance**, http://www.staralliance.com/en/about/airlines/lufthansa_airlines/ (last visited Sept. 13, 2013).

[188] Aaron Karp, Airlines Pairing Off, 94 **Air Cargo World** 20, 25 (2004) (citing IATA figures).

[189] See Press Release, Eur. Comm'n, Antitrust: Commission Opens a Probe into Transatlantic Joint Venture Between Air France-KLM, Alitalia and Delta and Closes Proceedings Against Eight Members of Sky Team Airline Alliance (Jan. 27, 2012), available at http://europa.eu/rapid/press-release_IP-12-79_en.htm.

[190] See Press Release, Eur. Comm'n, Antitrust: Commission Opens Formal Proceedings Against Certain Members of Star and Oneworld Airline Alliances (Apr. 20, 2009), available at http://europa.eu/rapid/press-release_MEMO-09-168_en.htm.

[191] See Press Release, Eur. Comm'n, Competition: Commission Revises Block Exemption for IATA Passenger Tariff Conferences (Oct. 2, 2006), available at http://europa.eu/rapid/press-release_IP-06-1294_en.htm.

[192] See Joe Sharkey, Forget the Airlines' Name; It's All About Alliances, **N.Y. Times** (Dec. 5, 2010), http://www.nytimes.com/2011/12/06/business/global/forget-the-airlines-name-its-all-about-alliances.html.

airlines through interline agreements[193] demonstrates that the mechanics of the practical operation of the global air network requires cooperation.

It seems therefore that the current regulatory environment has required the industry to introduce changes to its structure so as to ensure a level of workable competition on par with that which is expected in other industries. One must be mindful that the air transport sector possesses unique characteristics, and although it is not the aim of this article to elaborate on that point, it is interesting to consider the phenomenon of strategic, increasingly intimate worldwide alliances forming within this regulatory space.[194]

IV. THE APPEALS

The following section offers an analysis of the regulatory framework within which the sector currently operates, focusing on those aspects that might be considered to "encourage" price coordination.

Four of the appeals lodged against the Commission's decision have raised, inter alia, the state action defense in relation to certain flights between EU Member States and third countries, arguing that state regulation precluded application of the competition rules and therefore there was no breach of Article 101 of the TFEU; those appeals have been brought by Deutsche Lufthansa,[195] Cathay Pacific,[196] British Airways,[197] and Singapore Airlines and Singapore Airlines Cargo PTE.[198]

A. State Action

A possible defense to a finding of infringement of the competition rules is the "state action" defense—if anticompetitive conduct is required of undertakings by national legislation or if national legislation creates a regulatory framework which eliminates any possibility of

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193 "Interlining is an agreement between two carriers, under which each carrier may accept the other's tickets in exchange for transport." **Truxal**, supra note 149, at 121. Passengers therefore have the opportunity to travel with one airline's tickets on flights operated by many other carriers worldwide. See id. The interline agreement may thus be seen as an industrial construct; "the arrangement is fundamental to the operation of the industry from both a corporate and competition perspective." Id.

194 See id.

195 Case T-46/11, Deutsche Lufthansa v. Comm'n, 2011 O.J. (C 80) 31.

196 Case T-38/11, Cathay Pac. Airways v. Comm'n, 2011 O.J. (C 72) 32.

197 Case T-48/11, British Airways v. Comm'n, 2011 O.J. (C 80) 32.

198 Case T-43/11, Singapore Airlines and Singapore Airlines Cargo PTE v. Comm'n, 2011 O.J. (C 89) 21.

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competitive activity, the competition rules will not apply.[199]

This defense was first raised successfully in Suiker Unie, where it was held that Italian regulation of the sugar market left no scope for competition and the Commission's finding of an infringement of Article 101 was thus annulled.[200] The defense has been raised on many occasions since then, generally without success.[201]

The law was clarified in CIF, where the question arose whether a national competition authority (NCA) that has found a breach of the competition rules by national legislation is authorized or indeed obliged to disapply the offending provisions.[202] The CJEU, citing Fratelli Costanzo, held that the obligation to disapply national law that conflicts with EU law applies not only to national courts but also to all organs of the state, including administrative bodies.[203]

In CIF, the CJEU held that undertakings that have infringed upon EU competition rules as a result of complying with national legislation would not be "accountable" for that infringement for the period when the national legislation is in force.[204] This was due to the EU general principle of "legal certainty."[205] The CJEU held that the national law constitutes a "justification which shields the undertakings concerned from all the consequences of an infringement of Articles 81 EC and 82 EC."[206] However, this protection will no longer apply once the NCA has made a decision that the national law is contrary to the competition rules and has disapplied it.

The most recent formulation of the defense comes from Deutsche Telekom.[207] Where "anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part," Articles 101 and 102 of the TFEU do not apply because "the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings."[208]

The CJEU makes clear, however, that Articles 101 and 102 of the TFEU will apply if the

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199 See, e.g., Case 40/73, Suiker Unie v. Comm'n, 1975 E.C.R. 1663.

200 Id. ¶¶ 36–73.

201 See, e.g., Commission Decision 85/206, Aluminum Imports from Eastern Europe, 1985 O.J. (L 92) 1.

202 Case C-198/01, Consorzio Industrie Fiammiferi (CIF) v. Autorità Garanie della Concorrenza e del Mercato, 2003 E.C.R. I-8055.

203 Id.; see also Case C-66/86, Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs E.V., 1989 E.C.R. 803, 852, 4 C.M.L.R. 102, ¶ 49 (1990).

204 Consorzio Industrie Frammifui (CIF), 2003 E.C.R. I-8055, ¶ 51.

205 Id. ¶ 53.

206 Id. ¶ 54.

207 See also Commission Guidelines on the Applicability of TFEU Article 101 to Horizontal Co-operation Agreements, supra note 107, ¶ 22.

208 Case C-280/08 P, Deutsche Telekom AG v. Comm'n, 2010 E.C.R. I-9555, ¶ 80.

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national legislation leaves scope for the possibility of competition; it points out that the defense has "been accepted only to a limited extent by the Court of Justice," meaning that it has been narrowly interpreted.[209]

The judgment continues, stating that if national law merely encourages or makes it easier for undertakings to engage in anti-competitive conduct, the competition rules will be applied, and the undertakings will be found to be in breach.[210] However, as we have seen, such encouragement or facilitation of a breach of the rules by the national authorities may lead to mitigation of the severity of the fines imposed, at the Commission's discretion.

It seems that the failure of the national authorities to explicitly annul or disapply bilateral ASAs requiring agreement on tariffs between airlines may be significant in the consideration of this defense, as will be explored below.

In the absence of a published decision in the Airfreight case, the final part of this article considers how ASAs between EU Member States and third counties provided a regulatory framework governing airfreight transport that has raised the possibility of this defense. If successfully pleaded, this defense would result in the annulment of relevant parts of the infringement decision itself. This discussion involves an examination of a selection of ASAs, with a focus on those between the U.K. and third-country jurisdictions that regulated the airspace in which the air carriers in the case operated.

Cathay Pacific argues that "[t]he vast majority of events reported in the decision against the applicant . . . do not amount to an infringement as they relate to the exchange of publicly available information [or] are part of a mandated collective regulatory approval process."[211] This airline also challenges the Commission's finding that

> the applicant was not required to participate in the collective application process in seeking the approval of surcharges by the Civil Aviation Department (CAD) of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (PRC). . . . [C]arriers were required to agree on the details of the collective applications, including the amount of the surcharge for which approval was sought and were bound to charge the surcharges fixed by the CAD.[212]

It further appeals the Commission's rejection of "the state compulsion defen[s]e" with regard to "the applicant's conduct in Hong Kong (and India, Sri Lanka, Japan, the Philippines and Singapore)."[213]

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[209] Id. ¶ 81.
[210] Id. ¶ 82.
[211] Case T-38/11, Cathay Pac. Airways v. Comm'n, 2011 O.J. (C 72) 32, ¶ 1.
[212] Id. at 33, ¶ 2.
[213] Id. at 33, ¶ 3. It also appealed on the ground that "the Commission erred in law in its

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Singapore Airlines appeals on the ground that the Commission failed to take into account the fact that in a number of foreign jurisdictions, the allegedly illegal "conduct was actively supervised and effectively required by government agencies."[214] Also, Lufthansa appeals on the ground that "government intervention in a number of relevant jurisdictions precludes the application of Article 101 [TFEU]."[215]

Four other airlines have challenged the 15% reduction of fines on the ground that 15% was "manifestly insufficient,"[216] or that it was insufficient on the grounds of breach of "the principles of proportionality,"[217] or of both proportionality and equal treatment.[218]

B. ASAs Reviewed—U.K. and Third Countries

In this section, we identify and review documentary evidence of the terms of ASAs between the U.K. and seven non-EU countries (Japan, Thailand, India, Brazil, Singapore, Hong Kong, and South Korea).[219] In all instances, the U.K. and the respective third country have agreed to an ASA. Subsequently, in most cases, the two national authorities have amended the ASA, signed a

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treatment of the regulatory regime in Hong Kong in comparison with the relevant equivalent regulatory regime in Dubai. It should have excluded Cathay Pacific and Hong Kong on a similar basis as it excluded Dubai from the scope of the infringement." Id. at 33, ¶ 5.

[214] Case T-43/11, Singapore Airlines and Singapore Airlines Cargo PTE v. Comm'n, 2011 O.J. (C 89) 21, 21–22, ¶ 3.

[215] Case T-46/11, Deutsche Lufthansa v. Comm'n, 2011 O.J. (C 80) 31, ¶ 4.

[216] See Case T-62/11, Air France-KLM v. Comm'n, 2011 O.J. (C 95) 8, 9, ¶ 12.

[217] See Case T-67/11, Martinair Holland v. Comm'n, 2011 O.J. (C 95) 9, 10, ¶ 2; Case T-36/11, Japan Airlines v. Comm'n, 2011 O.J. (C 80) 25, 26, ¶ 3.

[218] See Case T-28/11, Koninklijke Luchtvaart Maatschappij (KLM) v. Comm'n, 2011 O.J. (C 72) 30, 31, ¶ 4.

[219] These countries were selected on the basis of their mention in one or more of the airlines' appeals of the Commission decision. Agreement for Air Services, U.K.–Japan, Dec. 29, 1952, 175 U.N.T.S. 130 [hereinafter U.K.–Japan ASA]; Agreement for Air Services Between and Beyond Their Respective Territories, U.K.–Thai., Nov. 10, 1950, 96 U.N.T.S. 94 [hereinafter U.K.–Thailand ASA]; Agreement Relating to Air Services, U.K.–India, Dec. 1, 1951, 12 U.N.T.S. 40 [hereinafter U.K.–India 1951 ASA]; Air Transport Agreement, U.K.–Brazil, Oct. 31, 1946, 11 U.N.T.S. 116 [hereinafter U.K.–Brazil ASA]; Agreement for Air Services Between and Beyond Their Respective Territories, U.K.–Sing., Jan. 12, 1971, 788 U.N.T.S. 146 [hereinafter U.K.–Singapore ASA]; Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Air Services, U.K.–H.K., July 25, 1997, 2050 U.N.T.S. 211 [hereinafter U.K.–Hong Kong ASA]; Agreement for Air Services Between and Beyond Their Respective Administrative Territories, U.K.–S. Kor., Mar. 5, 1984, 1416 U.N.T.S. 160 [hereinafter U.K.–South Korea ASA].

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memorandum of understanding (MOU) amending the ASA, or communicated new terms by official letter.

The current status of relations in air services between the U.K. and the countries listed above is mixed. First, since 1950, designated airlines operating routes between the U.K. and Thailand have been required to set fares through the IATA unless otherwise agreed by airlines.[220] Second, designated airlines were required to reach agreement regarding tariffs on flights between the U.K. and Japan via IATA (between 1952 and 2000) and between the U.K. and Singapore via IATA (between 1971 and 2001).[221] Similarly, though without mention of the IATA, the 1951 ASA between the U.K. and India required airlines to agree to or at least consult each other regarding tariffs from 1951 until 2004.[222] Finally, designated airlines were to consult each other regarding tariffs on services between the U.K. and South Korea from 1984 to 2001 "whenever possible."[223]

A closer look at the documentary evidence reveals a number of turning points in the history of the ASAs above. It is possible that the amendments were made in response to an awareness that a requirement for agreement between airlines on tariffs could be in breach of competition rules, although we have no documentary evidence to substantiate this. As early as 2000, and continuing through 2004, there was a discernible increase in dialogue between the states, ranging from initial communication to consensus, finally resulting in agreement to amend the language of the ASAs. One turning point occurred in 2000 when the U.K. and Japan signed an MOU, which made clear that "designated airlines . . . will not be required to consult each other on proposed tariffs,"[224] changing the previous requirement of agreement on tariffs either "through the rate-fixing machinery"[225] of the IATA or by mutual agreement.

In 2001, the consultation requirement was lifted for designated airlines on routes between the U.K. and South Korea,[226] and between the U.K. and Singapore.[227] In the case of the U.K. and

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[220] See U.K.–Thailand ASA, supra note 219. It has been argued that the IATA is itself an example of tight cartelization and effectively serves as a platform for the international fuel surcharge cartel. **Rigas Doganis**, **Flying off Course: The Economics of International Airlines**, 38–39 (2d ed. 2012).

[221] See U.K.–Japan ASA, supra note 219; U.K.–Singapore ASA, supra note 219.

[222] See U.K.–India 1951 ASA, supra note 219.

[223] See U.K.–South Korea ASA, supra note 219.

[224] Memorandum of Understanding, U.K.–Japan, art. 3, Sept. 22, 2000 (on file with author).

[225] U.K.–Japan ASA, supra note 219, ¶ 2.

[226] Memorandum of Understanding Amending the Air Services Agreement Done at Seoul on 5 March 1984, U.K.–S. Kor., June 29, 2001 (on file with author) (replacing Article 8 of the 1984 ASA between the U.K. and South Korea).

[227] Memorandum of Understanding, U.K.–Sing., Oct. 25–26, 2001 (on file with author) (replacing Article 9 of the 1971 ASA between the U.K. and Singapore).

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India, the lifting of this requirement came only in 2005, from which point forward prior consultation on tariffs was and is no longer required.[228] Furthermore, national authorities agreed to ensure that tariffs reflect market conditions and agreed to reciprocally approve the other national authority's tariffs.[229]

The ASA between the U.K. and Hong Kong (1999) does not require prior consultation by airlines, whereas the U.K. and Brazil ASA (1999) does not even require filing of tariffs.[230]

C. ASA Reviewed—EU and United Arab Emirates

The multilateral ASA between the EU and the United Arab Emirates (UAE), by way of example as a hub of paramount importance for EU–Far East air traffic, aims to consolidate ASAs that were agreed upon earlier between each of the Member States and the UAE.[231] It also reinforces in its preamble that under EU law, agreements that may affect trade between Member States and prevent, restrict, or distort competition cannot be entered into.[232] Article 6(1) of the UAE–EU Agreement makes clear that nothing in earlier bilateral agreements between Member States and the UAE shall

- (i) favour the adoption of agreements between undertakings, decisions by associations of undertakings or concerted practices that prevent or distort competition;
- (ii) reinforce the effects of any such agreement, decision or concerted practice; or
- (iii) delegate to private economic operators the responsibility for taking measures that prevent, distort or restrict competition.[233]

If the effect of an earlier agreement between the UAE and a particular Member State contains provisions that are incompatible with the points outlined above, they shall not apply from the date of the UAE–EU Agreement going forward.[234] This template is to be applied comprehensively to all such instances of incompatibility where an amended or new agreement

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228 Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India Concerning Air Services art. 15, ¶ 2, U.K.–India, Sept. 8, 2005 [hereinafter U.K.–India 2005 ASA] (amending the position laid down in Article 6 of the 1951 ASA between the U.K. and India, which required that: tariffs shall always be agreed or at least consulted upon; airlines shall regard rates adopted by IATA; and all tariffs are ultimately subject to the approval of national authorities).

229 Id. art. 15, ¶¶ 1, 3.

230 U.K.–Hong Kong ASA, supra note 219, art. 6, ¶ 3; U.K.–Brazil ASA, supra note 219, ¶ 2.

231 Agreement Between the European Community and the United Arab Emirates on Certain Aspects of Air Services, EU–U.A.E., 2008 O.J. (L 28) 21 [hereinafter EU–U.A.E. ASA].

232 Id. at 21.

233 Id. art. 6, ¶ 1.

234 Id. art. 6, ¶¶ 1–2.

has been reached.[235] The above reflects very clearly the language and intent of the EU competition rules and clarifies any doubt as to private firms' (carriers') own responsibility to ensure that agreements and behavior comply with Articles 101 and 102 of the TFEU.

There are no similar fully multilateral agreements on the books, however, between the EU and Japan, Thailand, India, Brazil, Singapore, Hong Kong, or South Korea. In an International Civil Aviation Organization (ICAO) 2004 working paper, a progress report claims that the "[EU] Member States have now concluded new agreements or revised existing bilateral agreements with over thirty other ICAO States to permit the designation of European Community carriers on routes to [and] from their territories."[236] The 2002 CJEU open skies judgments[237] prompted the removal of nationality clauses in ASAs to ensure nondiscrimination between carriers with the Community designation.[238]

Nonetheless, evidence shows that nationality restrictions in preexisting bilateral ASAs with EU Member States were fully removed sometime later: Singapore's in 2006,[239] India's in 2008,[240]

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[235] Id. art. 6, ¶ 2; see also id. art. 9, ¶ 3.

[236] Ownership and Control: Recognizing New Developments 4 (Int'l Civil Aviation Org., Working Paper A35-WP/96, 2004), available at http://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf.6.WP.94.2.en.pdf.

[237] See generally Joined Cases C-466/98, Comm'n v. U.K., 2002 E.C.R. I-9427; Case C-467/98, Comm'n v. Den., 2002 E.C.R. I-9519; Case C-468/98, Comm'n v. Swed., 2002 E.C.R. I-9575; Case C-469/98, Comm'n v. Fin., 2002 E.C.R. I-9627; Case C-471/98, Comm'n v. Belg., 2002 E.C.R. I-9681; Case C-472/98, Comm'n v. Lux., 2002 E.C.R. I-09741; Case C-475/98, Comm'n v. Austria, 2002 E.C.R. I-9797; Case C-466/98, Comm'n v. Ger., 2002 E.C.R. I-9855. There was "split competence" for air transport prior to 2002 insofar as the Community regulated the internal market while Member States were free to enter into ASAs with third countries. Since the "open skies" ruling, the EU has exercised exclusive external competence for air transport. Although outside the scope of this article, the application of the CJEU's two doctrines on implied external powers (based on Opinion 1/76 (pursuant to Article 228(1) of the TEEC) and the ERTA doctrine ("European Road Transport Agreement")) is also of interest. See Opinion 1/76 of the Court of Justice, Draft Agreement Establishing a European Laying-Up Fund for Waterway Vessels, 1977 E.C.R. 741; Case 22/70, Comm'n v. Council, 1971 E.C.R. 264; see also L. Heffernan & C. McAuliffe, External Relations in the Air Transport Sector: The Court of Justice and the Open Skies Agreements, 28 **E.L. Rev.**, no. 5, 2003, at 601.

[238] Following this ruling, the European Council agreed upon a standard clause on designation, which is to be used in future negotiations; the clause provides for the designation of a carrier established in any Member State as a "Community air carrier" rather than a discriminatory designation, e.g., "U.K. air carrier." Commission Decision on Approving the Standard Clauses for Inclusion in Bilateral Air Service Agreements Between Member States and Third Countries Jointly Laid Down by the Commission and the Member States, Annex, 2005 O.J. (C 943) 3.

[239] See International Aviation: Singapore, **Eur. Comm'n**, http://ec.europa.eu/transport/modes/air/international_aviation/country_index/singapore_en.htm

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South Korea's in 2008,[241] and Japan's in 2009.[242] Negotiations between the EU and Brazil are ongoing[243] following a horizontal agreement on certain aspects of air services in 2009.[244]

D. ASAs as Defense?

The following section reflects on the feasibility of arguing that the ASAs identified above between EU Member States and third countries provided a regulatory framework governing airfreight transport, which was the basis for the 15% reduction in fines.

Elsewhere in this article, two potential layers in the general regulatory environment, as referred to in the available details of the Airfreight decision, are identified: the ASA and the competition rules. Some ASAs require designated airlines to consult "locally" and agree on tariffs—that is, independent of the IATA—before the tariffs can be approved. Other ASAs require airlines to do this via the IATA mechanism.

As discussed above, a general block exemption existed to facilitate interlining in passenger and cargo services from 1988 to 1996, specifically for "certain categories of agreements, decisions, and concerted practices" concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services, and slot allocation at airports.[245] Cargo operations were removed from the scope of the block exemption in 1997 (with some parts already suspended in 1996),[246] although a conditional block exemption continued for IATA passenger tariffs until 2007.[247]

Owing to the changing nature of the regulatory regime for airlines in the period from 1988 to

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(last updated Feb. 26, 2013).

240 See International Aviation: India, **Eur. Comm'n**, http://ec.europa.eu/transport/modes/air/international_aviation/country_index/india_en.htm (last updated Feb. 26, 2013).

241 See International Aviation: Korea (Republic of), **Eur. Comm'n**, http://ec.europa.eu/transport/modes/air/international_aviation/country_index/south_korea_en.htm (last updated Feb. 26, 2013).

242 Press Release, Eur. Comm'n, Breakthrough in EU-Japan Aviation Relations (Jan. 16, 2009), available at http://europa.eu/rapid/press-release_IP-09-64_en.htm.

243 See International Aviation: Brazil, **Eur. Comm'n**, http://ec.europa.eu/transport/modes/air/international_aviation/country_index/brazil_en.htm (last updated July 17, 2013).

244 See Proposal for a Council Decision on the Signature of the Agreement on Certain Aspects of Air Services Between the European Community and the Federative Republic of Brazil, COM (2009) 411 final (Aug. 3, 2009).

245 Council Regulation 3976/87, supra note 160, art. 2, ¶ 2.

246 Press Release, Commission Takes Preliminary View, supra note 172.

247 Press Release, Commission Ends Block Exemption, supra note 17.

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2007, which encompasses the period of infringement for the decision (1999 to 2006), what is of great significance is *when* the terms of the ASAs and subsequent MOUs were effective. In other words, an ASA which requires airlines to consult others regarding cargo tariffs after 1997 would place an airline in an uncomfortable position between two layers of regulation: the ASA and the competition rules.

Already in 2001, the Commission took the preliminary view that the IATA consultations on cargo tariffs breached EU competition rules.[248] In response, the IATA agreed to no longer set intra-EEA tariffs from 2002 onwards.[249] Apparently, the IATA continued to facilitate cargo tariffs on non-EEA routes.[250]

It is also clear that carriers continued to discuss and agree upon tariffs independently from the IATA. Since there was no exemption after 1997, the practice of agreeing upon tariffs—whether multilaterally, and arguably "transparently," via the IATA, or "locally" by mutual agreement between carriers—prima facie appears to have breached the EU competition rules. At the same time, certain ASAs required airlines to consult each other for some or all of the period from 1997 to 2004.[251]

The third and final layer in the "regulatory environment" for airlines is the regulatory lag vis-à-vis liberalization of the European sector and resulting transfer of competency on external aviation policy to the Commission. With the European Single Sky (single aviation market), the Commission assumed exclusive competency in 2004 to enter into and enforce all future ASAs between the EU and third countries, as well as to investigate existing agreements.[252] Prior to this, Member States drafted, negotiated, and enforced ASAs for their sovereign airspace.[253] In the wake of the CJEU's open skies judgments, the Council granted the Commission a mandate to open negotiations with third countries over the replacement of certain provisions of existing ASAs and exclusive (external) competence vis-à-vis authority to negotiate new comprehensive ASAs.[254]

A potential further difficulty has arisen in the years since 2004, insofar as the Commission simultaneously applied the competition rules to the airline sector and yet, though this next

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248 Press Release, Commission Takes Preliminary View, supra note 172.

249 Press Release, Eur. Comm'n, IATA Agrees to End the Joint Setting of Cargo Rates Within the EEA (Oct. 19, 2001), available at http://europa.eu/rapid/press-release_IP-01-1433_en.htm.

250 See id.

251 See, e.g., U.K.–India 1951 ASA, supra note 219.

252 See Council Regulation 549/2004, 2004 O.J. (L 96) 2.

253 See **Achard**, supra note 134, at 17.

254 See Council Decision 11323/03, 2003, partially declassified version available at http://register.consilium.europa.eu/pdf/en/03/st11/st11323-ex01.en03.pdf (restricted document known as the "Horizontal Mandate").

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statement is debatable, appears to have neglected to exercise its exclusive competence to review and renegotiate those comprehensive ASAs with third countries, which compelled airlines to collaborate on tariffs.

E. Conclusions

Below are general conclusions on what is or what should be considered the "general regulatory environment" in which EU airlines operate. Over the period of infringement, four possible (and by no means mutually exclusive) eventualities are apparent:

1) Airlines were compelled by the ASAs to consult each other and form common cargo tariffs despite the fact that the practice breached competition rules, giving rise both to the 15% reduction in fines and the state action defense.
2) Airlines hold ultimate responsibility (self-regulation) for ensuring their activities are compatible with the EU competition rules. In short, airlines must not prevent, distort, or restrict competition.
3) The Commission's position was unclear insofar as having only drawn attention to the importance of not restricting air cargo competition on intra-EEA routes in 2001; the Commission failed to clarify the application of the competition rules to non-EEA routes.[255] This led to a confusing state of policy.
4) The Commission undertook to ensure the insertion of the "Community" (now EU) airline designation into existing bilateral ASAs between Member States and third countries (e.g. Singapore, India, South Korea, and Japan), but it has not yet renegotiated multilateral ASAs with all third countries. The EU common external aviation policy started in 2003.[256] The Commission has since proposed to launch "targeted negotiations seeking to achieve global agreements in the major regions of the world, with the aim of . . . ensuring fair competition."[257] Thus, the Commission has a systematic program for undertaking negotiations for the conclusion of ASAs between the EU and third countries that will then replace the existing bilateral ASAs between Member States and those countries. In the meantime, however, existing bilateral ASAs remain in force. Compounded by considerable variations in these ASAs, it is argued that this environment exposed, and possibly continues to expose, airlines to a

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[255] Press Release, Commission Takes Preliminary View, supra note 172.

[256] External Aviation Policy – Horizontal Agreements, **Eur. Comm'n**, http://ec.europa.eu/transport/modes/air/international_aviation/external_aviation_policy/horizontal_agreements_en.htm (last updated Feb. 20, 2013).

[257] Council Conclusions on Developing the Agenda for the Community's External Aviation Policy, supra note 170, at 11.

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"patchwork of air service agreements" between the EU and third countries.[258]

Regulation 847/2004 provides that "[a]ll existing bilateral agreements between Member States and third countries that contain provisions contrary to Community law should be amended or replaced by new agreements that are wholly compatible with Community law."[259] What is unclear is where responsibility ultimately falls for identifying incompatibilities and initiating change.[260] The Regulation goes on to say: "Without prejudice to the Treaty, and in particular Article 300 thereof, Member States may wish to make amendments to existing agreements and make provision to manage their implementation until such time as an agreement concluded by the Community enters into force."[261]

It appears from the above statements that while contrary provisions "should be amended or replaced," the Commission has exclusive external competence, and therefore there is no requirement for Member States to amend incompatible features of existing bilateral ASAs.[262] Indeed, until the EU targets a particular third country for negotiation of a new multilateral agreement, Member States "may wish to make amendments" to existing ASAs, but merely on behalf of, and strictly upon notification to, the Commission.[263] What results is regulatory lag in the European air transport sector.

In other words, until the EU prioritizes a third country and secures a new comprehensive multilateral,[264] lacunae such as those that could encourage price coordination will continue to

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[258] See **Martin Bartlik**, **The Impact of EU Law on the Regulation of International Air Transportation** 114 (2007).

[259] Council Regulation 847/2004, supra note 15, at 7, 9.

[260] Id. According to Article 4(3) of the TFEU, although the EU has competence to carry out activities in research, technological development, and space, Member States are not prevented from exercising their competence. TFEU, supra note 22, art. 4. Article 4(2) of the TFEU provides that the EU and Member States shall share competence in areas such as transport. Id. It is important to note that the European Parliament and the Council may promulgate legislative provisions for air transport under Article 100(2) of the TFEU. Id. art. 100. Thus, exercise of EU competence requires a specific mandate. See id. arts. 4, 100.

[261] Regulation 847/2004, supra note 15, at 9.

[262] Id. (emphasis added).

[263] Id.

[264] Proposals for a Council Decision regarding the signature on behalf of the EU of provisional agreements with third countries is also an (interim) possibility, particularly "where compliance with the law of the [EU] should be ensured through amending or complementing existing provisions in bilateral air services agreements between Member States and third countries." See Proposal for a Council Decision on the Signature, on Behalf of the European Union, and Provisional Application of the Agreement on Certain Aspects of Air Services Between the European Union and the Macao Special Administrative Region of the People's Republic of China, at 2, COM (2012) 28 final (Feb. 2, 2012).

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contribute to a general regulatory environment deserving of either a discount on fines or even an annulment of the infringement decision.

V. AFTERTHOUGHTS

This article has given an overview of the legal framework within which the fine was imposed and the 15% reduction for the "general regulatory environment" was applied in the Commission's decision in the Airfreight case. It has been observed that in the airline industry (where, for most of the EU's history, collaboration and cooperation between airlines when setting tariffs was exempted from competition law), cooperation between airlines is often considered inherent because of the need for interlining. The most significant feature affecting the application of the mitigation is the operation of various ASAs, and their effect has been considered by using the example of the U.K.–third country ASAs in operation at the time of the infringements.

It is hoped that a final version of the Commission's decision will be made public. It is the authors' further hope that the published version will clarify what "the general regulatory environment" in the context of this infringement means. While access to the Commission's confidential file might remain difficult, what one can be sure of at this point, owing to the grounds for appeal, is that the ASAs between Member States and third countries are a significant element. The authors have sought in this article to interpret the possible grounds of mitigation in the "general regulatory environment." It may be that the ASAs are the only ground for the mitigation. But it is also possible that though the airlines are appealing how the requirements imposed by these ASAs are considered by the Commission (both when determining that there has been an infringement and when setting the fine), other factors in the regulatory environment, such as cargo alliances, are relevant, too. In any case, if the ASAs are the only ground for the application of the mitigation, it is interesting that it has been applied to all airlines, irrespective of which flight routes they operated and therefore irrespective of the extent to which their operations fell within the various ASAs.

While the consensus view is that the Commission often exercises great discretion in issuing fines for breaches of the EU competition rules, in the Airfreight decision the Commission's reduction of the fine for all participants with respect to "the general regulatory environment" appears to be quite novel. This is particularly interesting because the discretion was exercised with respect to the aviation sector, which has "enjoyed" the rather special treatment competition authorities have given it, especially in the past. According to the Commission, the regulatory environment can be seen as encouraging price coordination; whether it goes so far as to impose it, as some airlines argue, is a question yet unanswered.