
EXPLAINING EUROPEAN AVIAION^T

INTEGRATION

Paper presented at the 1999 ECSA conference in Pittsburgh

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Dear Sir/Madam,

This paper constitutes a plan for my thesis. I discuss how cases should be chosen in order to isolate explanations for the integration process within aviation. I also provide a presentation of hypotheses and cases. Central to my thesis is the hypothesis on the role of Britain. I am grateful for any comments.

Regards,

Robin Travis

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1. Introduction

In 1903 the Wright brothers managed the first engine-driven flight. Since then developments in aviation have revolutionised human society. There are a number of problems in aviation that demand international co-operation or co-ordination. The EU is a remarkable example of international co-operation, even slowly developing features commonly associated with sovereign states: monetary union, a high court and a common foreign policy. However, the core of the EU remains its common market. The treaty of Rome acknowledges the importance of transports by giving the development of a common transport policy a separate chapter in the treaty. Aviation was, however, implicitly put outside the general principles applicable to transport by Article 84 (1), which limited the scope of the Common transport policy to rail, road and inland waterways. On the other hand, Article 84 (2) reads:

“The Council may, acting unanimously, decide whether and to what extent and by what procedure appropriate provisions may be laid down for sea and air transport”

This is an awkward construction in which aviation is included in the treaty, at the same time as integration in aviation is postponed. European aviation policy was thus up until only very recently solely made on a domestic basis and its international aspects were handled through a system of bilateral agreements. Outside the EU, aviation is still regulated; fares, service provisions, market entry, ownership, airport management, every aspect are under government control and negotiated bilaterally.

Aiming at a single market, the treaty of Rome was in clear conflict with the prevailing regulatory approach to aviation. But because the main actors benefited from the prevailing system, incitements to put aviation in line with the treaty were weak. Member states feared increased competition would lead to losses, costs that would have to be

borne by strained government budgets.¹ Airlines are tools for regional policy making it tempting to obligate airlines to traffic unprofitable remote routes. Another important aspect of aviation is its implications for national security. Commercial aircraft can carry soldiers and airfields are easily converted for military purposes. Flag-carriers are symbols of national strength and autonomy. Any threat to the viability of the flag-carrier is a blow to national pride. Last, there were already existing forums for international co-operation in which governments could manage aviation without having to give up sovereignty. Flag carriers in turn enjoyed large profits under the umbrella of protection and resisted change. Member state preferences thus coincided with the interests of their respective flag-carriers. Consumers, on the other hand, which had to pay excessive fees for inefficiency were weakly organised.² Using the terminology of Wilson, member states decision-makers and negotiators were captured by airline interests.³ For these reasons an EU approach to aviation until mid-eighties seemed highly unlikely.

Yet, when it came, the integration process was remarkably fast. The relevant legislation was agreed to in merely half a decade from 1987-1992.⁴ In view of the old tradition of regulation and overwhelming resistance to liberalisation among member-state governments, the pace and scope of the liberalisation of the aviation market has been astounding. The integration process within aviation in 1987-1992 therefore merits explanation. My purpose is to determine how integration was possible given the strong resistance on behalf of most member states of the EU. My main question is why/how Great Britain and the Commission were successful in pushing for liberalisation. This leads to a number of other questions, mainly; what strategies did Great Britain and the Commission adopt? What made other member states change their minds about liberalisation? What is the role of Great Britain in aviation in general and today? I

¹ Allen, David, "Competition policy", in Wallace, Helen and Wallace William, eds, *Policy-Making in the European Union*, p. 37.

² Cost/benefit theory tells us that if a few are greatly favoured by a system whereas the many are disadvantaged only marginally, the few will have greater incitements to organise and exert influence.

³ Wilson, James Q, *Bureaucracy: what government agencies do and why they do it*, New York, Basic Books, 1989.

⁴ Its full implementation took until 1997 when Europe was declared to have "open skies".

attempt to try three hypotheses as explanations for the outcomes. The first of these focuses on the role of Great Britain, the second on the Commission and the third on the importance of an alliance between Great Britain and the Commission. In testing these hypotheses I will study indirect, background factors (why did integration take place? What was the rationale for integration?), and more importantly, direct explanatory factors (how did integration take place?).

Throughout the history of the EU there have been two main theoretical perspectives aspiring to explain why and how integration takes place, neo-functionalism which focuses on institutions and intergovernmentalism which stresses national interests.⁵ Neo-functionalists and intergovernmentalists mainly bicker over which actors are to be considered important in understanding integration, but very rarely specify how or why the same actors are influential in the actual policy processes.⁶ These rather blunt theoretical perspectives on integration do not in themselves provide a researcher with testable propositions. However, the main integration perspectives can be used as maps in the pursuit of possible explanatory variables. However, the indicated variables will be defined in order to allow testing. This discussion will be provided in the actual thesis.

When conducting a study pertaining to explain the outcome of an event, the process of choosing cases is of paramount importance. As mentioned earlier, there has been one major event in European aviation overshadowing everything else: the liberalisation process of 1987-1992. Two types of comparisons will be made in searching for explanations. First, comparisons over time are made on a common sense basis to illuminate changes that may be potentially important as explanations. For an independent variable to even be considered in an explanation for integration in aviation there will have to be changes in its value prior to 1987 in such a way that the same change logically can explain integration.

In the next stage, comparisons between cases featuring different values on the dependent variable will test whether these changes (variables) can carry explanatory

⁵ These perspectives are in many ways only international relations perspectives clad in new terminology, i.e. they originate from institutionalism and realism.

⁶ In other words they do not offer convincing accounts of casual mechanisms.

significance. This method acknowledges the fact that unless there is variation in the dependent variable, there is not much that can be said about what explains the outcome of a process of integration.⁷ The cases are thus structured into two main groups. The first group consists of those aspects of aviation that are integrated and governed by EU-legislation. The second group consists of cases in which there has been a failed attempt at creating governing EU-legislation⁸. Ideally, cases of unsuccessful integration should be similar to the cases in which integration has been successful, differing only in a few respects.

⁷ King, Gary, Keohane, Robert O., Sidney Verba, *Designing Social Inquiry, Scientific Inference in Qualitative Research*, Princeton University Press, Princeton, 1994.

⁸ I will also include cases in which there has been legislation, but no implementation, i.e. no governing. Unimplemented measures are in a sense not integrated since the field or issue in question is thus not governed by EU-legislation.

2. Hypotheses⁹

Andrew Moravcsik, the most prominent advocate of intergovernmentalism, conveniently sums up his argument in the beginning of his latest book:¹⁰

“The central argument of this book is that European integration can best be explained as a series of rational choices made by national leaders. These choices responded to constraints and opportunities stemming from the economic interests of powerful domestic constituents, the relative power of each state in the international system, and the role of international institutions in bolstering the credibility of interstate commitments.”¹¹

Consequently, according to Moravcsik liberalisation in aviation should have been the result of changes in preferences amongst the larger member states. However, in the mid-eighties, only the United Kingdom favoured liberalisation. Whereas the Netherlands had a pragmatic attitude, the other Member states adopted attitudes ranging from sceptic to firmly opposed.¹² My point is not to test intergovernmentalism as formulated by Moravcsik, which would be rather unfair since Moravcsik explicitly points out that his focus is on ground-breaking treaty revisions, but to stretch the logic of intergovernmental theory in order to see if it can be applied to aviation. According to the same logic, it should be difficult for a single large state to impose integration on all other member-states. Moravcsik's claim that states are the main actors in integration, presents a crucial question; can it be shown that the U.K. and the Netherlands were able to “impose” (or push through) integration on the reluctant others, and if so, why were they able to achieve such an outcome? What is the mechanism behind asserting that particular influence?

⁹ My thesis will feature three hypotheses: one on the role of Britain (which divides into three hypotheses), the second on the role of the Commission, and the third on the role of an alliance between the British, the Netherlands and the Commission.

¹⁰ Moravcsik, Andrew, *The Choice for Europe, From Messina to Maastricht – Social Purpose and State Power From Messina To Maastricht*, UCL Press, London, 1999.

¹¹ Moravcsik, p. 18.

Before beginning to answer the first question it needs to be shown that the British have been involved in all cases of successful integration. If there are numerous examples of successful integration within aviation without British advocacy, or even more important, despite British resistance at the time, then British action should not be regarded as a crucial variable for understanding integration. If, on the other hand, comparisons make it clear that the British are essential to understanding integration there remains the task of describing how and why the British were able to gain their considerable influence. In my thesis I will test three hypotheses on why the British had disproportionate bearing on aviation issues: first a general point. Great Britain is uniquely tied to the U.S and the rest of the world in aviation matters. This gives it a larger say than any other country in aviation matters. Of particular importance is Heathrow. The other two hypotheses are more specific. In the mid-eighties there was a window of opportunity which the British and the Dutch exploited efficiently. This window consisted of the legal gap after the *Nouvelles Frontiers* case in 1986. The fact that the Netherlands were in possession of the Council Presidency the first half of 1986 and the British at the latter made it possible for the British to make maximal use of their influence in aviation.

The third and last hypothesis on Britain's influence concerns the role of paradigm change. In Europe in the mid-eighties there was a shift away from state interventionism to liberalisation of economic life.¹³ Britain took the lead in this paradigm change both generally and specifically in aviation. Privatisation of BA served as a shining example to the reluctant others.

Whether these hypotheses will provide credible explanations for aviation integration in the late eighties and nineties remains to be seen. Neo-functionalists do not seem to think so and refer to aviation as a triumph for neo-functionalism. Alec Stone Sweet and Dolores O'Reilly conclude:

¹² Kassim, p.15 citing IATA World Air Transport Statistics, 1986.

¹³ In this context the privatised British Airways served as a shining example.

“Like Sandholtz, we found that a combination of transnational forces and supranational initiative overcame the commitment of governments to national control, which we take to support the transaction based theory of integration ...”¹⁴

This claim should be tested. At the very least we have grounds to investigate the role of the commission. My hypothesis is that integration in aviation can only be understood with reference to the pivotal place in European integration of the competition Articles 85 and 86. This is particularly true when it comes to explaining the specific outcome of integration in aviation (i.e., why are certain issues integrated whereas others are not). It also ties into the first hypothesis on Britain’s central role in aviation integration since Britain mainly favours liberalisation. If this hypothesis is true, when comparing cases, integration should only have come about in issues for which it is possible for the commission to refer to competition law. At the very least, integration should be easier in those cases. The competition tool since it maximises the commission’s powers, which was particularly important in the aviation integration process of 1987-1992 (due to the legal gap after the *Nouvelles Frontieres* case). In this situation

“Member States were confronted with two alternatives. Either they could accept the package, which offered a controlled move towards liberalisation and block exemption from the competition laws as an inducement to adopt this route forward, or else the Commission would force liberalisation upon the airlines through action in the Court.”¹⁵

Hard-line application of competition rules and face an American shock-therapy liberalisation of the aviation market threatened, a process which would definitely throw a number of European airlines into bankruptcy. In this situation, the commission could present a liberalisation process which involved the active participation of member states as an attractive alternative.

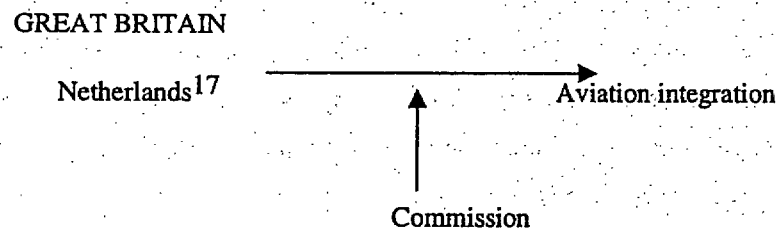
¹⁴ O’Reilly, Dolores and Sweet, Alec, Stone, “The liberalisation and European Reregulation of transport, in Sandholtz, Wayne and Sweet, Alec Stone, *European Integration and Supranational Governance*, Oxford University Press, 1998, p.184.

¹⁵ Dobson, Alan P, “Flying in the Face of Competition: Policies and Diplomacy of Airline Regulatory Reform in Britain, the USA and the European Community 1968-94”, Avebury Aviation, Ashgate Publishing Ltd, Aldershot, 1995.

An important strategy adopted was that of gradualism. By granting exceptions and making changes incrementally, the commission avoided fears of the chaos that the U.S airline industry underwent in connection to the liberalisation of its aviation market. Also, the commission granted long exemption periods in which airlines could prepare themselves for the implementation of the new aviation regime.¹⁶

My third and last hypothesis is virtually unaccounted for in the theoretical literature on integration and simply proposes a connection between the first and second hypothesis. In other words I suggest that Britain, the Netherlands and the Commission joined in a deliberate alliance for change. The alliance gave these actors the possibility to combine their efforts, thereby giving them influence exceeding the sum of the parts. Whether there is any truth to this argument can be found out by comparing it to the outcome of cases in which there has been no alliance.

It is now possible to draw a simple model of causality:



This model reads that British support or action is a necessary condition for integration in aviation. Increasing the likely-hood of integration is the action of the Commission. The U.S external influence and ECJ decisions are background variables and explain why Britain and the Commission were able to exert such a large influence in the particular period of 1987-1992.

¹⁶ Open skies were declared in 1997, five years after deciding on the final package.

¹⁷ I am currently very uncertain of the importance of the Dutch. This is something I will have clarify eventually.

3. Cases

3.1 Defining integration

Integration is the dependent variable in this thesis and thus the basis for selection of cases. Unfortunately the imprecision and multitude of its definitions are no less than depressing. A full discussion of the intellectual debate on the concept will be provided in the thesis, but for now it will do to state that a common definition of integration is that it consists of a shift of competence to legislate. This definition is too narrow to fully capture the concept of integration. When it comes to transport for example, the Council of Ministers has formally had the competence to decide on supranational rules in transport since the treaty of Rome. However, historically member states have wanted to preserve their national regulatory systems. The common transport policy was therefore long one of the biggest disappointments in the Common Market project.¹⁸ Thus, integration cannot be judicial competence alone, there has to be some kind of substance to integration. Intuitively integration involves a notion of agreeing on common rules. In a political context, this can be translated into "governing". The Longman Dictionary of Contemporary English's defines governing as follows: "if rules, principles etc govern the way a system or situation works, they control how it happens and what happens". Putting judicial competence and rules together produces two dimensions:

¹⁸ Schmitter, Philippe C, "Examining the Present Euro-Polity with the Help of Past Theories", in G. Marks, F.W Scharpf, P.C. Schmitter and W. Streek, *Governance in the European Union*, London (Sage), 1996, pp. 109-140, p.

		Rules	
		Yes	No
Supranational	Yes	4	3
Competence	No	2	1

Figure 1. The two dimensions of integration.

The bottom right square encompasses issues that are not integrated at all at the EU-level, e.g. tax policy. The bottom left square features rules without supranational status.

Examples include co-ordination, harmonisation or intergovernmental co-operation. The Common Foreign and Security policy fits into this square. The top right square is neatly illustrated by the Common Transport Policy prior to the mid-eighties. Formally, the EU had the legal competence to legislate, but member states did not want transports to be ruled at the supranational level. The top left square contains policies that are governed by supranational rules at the European level. The Common Agricultural Policy is the foremost example.

Where does aviation fit into this scheme? Although most aviation issues are situated in the top squares, aspects of aviation issues can be found in all of the featured squares.¹⁹ The main change prior to 1987-92 was the European Court ruling in *Ministère Public v. Lucas Asjes*, perhaps better known by its unofficial name, *Nouvelles Frontières*.²⁰ A travel agent was accused of selling tickets at prices which had not been approved by French authorities and which were lower than those of its competitors. *Nouvelles Frontières* was therefore a direct challenge to the fixing of prices under the Chicago

¹⁹ Infrastructure issues fit into the bottom right square, standards on training of pilots or other standards agreed on in e.g. IATA or other intergovernmental bodies are captured by the bottom left square.

²⁰ Cases 209 and 213/84, *Ministère Publique v. Lucas Asjes (Nouvelles Frontières)*, 1986, E.C.R.

Convention. The Court restated the conclusions from the French Sailors case²¹, but this time explicitly pointed out that the rules of competition applied to air transport: "Air transport remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty, including the competition rules".²² The court ruling in effect constituted a shift in competence to legislate. Although the competence to legislate is supranational, some governing of aviation still remains at the national or international level. Put simple, governing of aviation takes place in other forum and at other levels. The point of making this distinction between competence and rules is that different types of integration involve different dynamics (actors and processes). This is particularly true when it comes to comparing shifts in competence to legislate or changes in rule-making. Shifts in competence normally involves a treaty revision or a decision by the ECJ. Treaty revisions are the results of intergovernmental, top level negotiations and deal with the structure of the EU as a whole. ECJ decisions serve to interpret the competence given by the treaties according to judicial logic.²³ The dynamic of rule-making concerns the actual process of deciding on rules to govern the conduct of affairs in any particular area. This process of materialising competence involves actors and processes that are more related to the character of the issue itself. If we wish to understand integration in aviation, it would be unwise to look for explanations in the reasons behind the Maastricht treaty or ECJ interpretations in the *Cassis de Dijon* case. Rather it is more fruitful to regard those as necessary, but not sufficient, conditions for integration. In other words, the treaties and court decisions are background variables. Without treaty base there can be no common supranational rules, but treaty competence alone does not include actual integration.

²¹ In *Commission v. French Republic* the Court was asked to rule on whether Article 84(2) in effect placed sea and air transport outside the reach of the EC treaty's general rules on competition. The Court sided with the Commission and ruled that although air and sea transport were excluded from the special provisions laid down for transports, this did not mean that the other rules of the treaty were not applicable to air-transports. Case 167/73, *Commission v. French Republic (French Sailors)*, 1974, E.C.R. 359.

²² Cases 209 and 213/84, p. 1466.

²³ However, recent studies have illuminated the role the court plays in being a political force promoting integration. Weiler ascribes major importance to EC-law itself in understanding the evolution of the EU, Weiler, J.H.H, "Transformation of Europe", *The Yale Law Journal*, Vol. 100: 2403-83. For a discussion on the expansion of legislative competence see pp. 2437-2445.

Therefore, cases will only be chosen from the a situation in which there is competence, but in which governing varies.

Finally, the meaning of “governing” has to be specified. If integration is to have any *de facto* meaning, governing cannot only mean that legal competence to legislate has been used to establish rules, it should also entail that those rules have been implemented and that they are followed. If rules are ignored they cannot be said to govern. The same is true if the everyday functioning of a policy-area is determined according to rules and practices in contradiction to the EU-rules that should apply. If we take this aspect into consideration when determining whether integration is successful or not, we get two more dimensions:

		Supranational Rules	
		Yes	No
Implemented/ Followed	Yes	A	B
	No	C	D

Figure 2. The two dimensions of governing.

The point of making the above discussed distinctions is that they produce a dependent variable, integration, which at its highest value entails that there is supranational competence and governing rules that are implemented and followed. Anything else means less integration. In other words, the combination 4A is the highest ranking.²⁴ The

²⁴ The combinations 3B (competence but no rules) and 2A (no competence but rules that are followed) are difficult to rank. I would suggest that their ranking depends on the extent of competence and extent of the rules concerned. Is the sharing of information between foreign ministries under the CFSP less integration than the competence to decide on signalling systems for trains? The answer is far from evident. The cases discussed in this thesis all feature supranational competence thereby making this problem less acute. Shifts in competence are in other words not studied.

serves as the basis for the division of cases in two groups in this study; one group of cases is governed according to supranational rules (4A), the other cases are not governed by supranational rules (other combinations).

3.2 Successful integration – governing according to EU rules

In December 1987, the Transport Council adopted the first “package”²⁵ on air liberalisation. Up till then member states had done virtually nothing to create a common air transport policy.²⁶ Member states agreed that these measures were a first step towards the creation of a single market in air transport.²⁷ In rapid succession, the second and third packages were adopted in 1990 and 1992. The three packages all targeted three areas of liberalisation: the fixing of prices, access to routes and the application of competition legislation as a whole to aviation. The following short description of the events will focus on the aspects of regulation that were liberalised (as opposed to a chronological presentation).

3.2.1 Attacking the fixing of prices

In the Chicago system prices were fixed in negotiations and revenues earned on routes were shared between airlines. This meant that the revenues on e.g. the Paris-London route were shared equally between Air France and British airways regardless of who actually brought in the money.²⁸ Airlines applied to national authorities when setting air fares and the application had to be approved by both countries involved. Disagreeing countries had

²⁵ “Packages” has become part of the terminology in airline liberalisation denoting the three groups of regulations and directives.

²⁶ Apart from a rather insignificant directive on inter-regional services – Council Directive 416/83. Havel, Brian F, *In search of open skies, Law and policy for a new era in international aviation*, Kluwer Law international, The Hague, 1997, p. 302.

²⁷ Kassim, p. 23.

²⁸ Ross, John F.I., *Linking Europe*, Transport Policies and Politics in the European Union, Praeger Publishing, Westport, 1998, p. 122, Button, p. 44.

a right to veto the price for any reason (i.e. the fare being too low).²⁹ The 1987 directive³⁰ was modest in that it introduced a complicated system of "zones of flexibility" within which price competition was allowed, without the approval of national authorities.³¹

These zones were based on percentages on what was a "reference fare", in simple terms defined as the "normal" fare. The technical details are very complicated, but suffice it to say that Council directive was a slight relaxation of the previously very rigid and regulated process of fixing fares. This directive was annulled by Council Regulation 2342/90³², which extended the use of zones of flexibility and the formal need for government approval of fares.³³ Largely, the 1990 regulation meant that progress in pricing had to wait until the final phase of the process EU airline liberalisation in 1992. The 1992 regulation revoked the 1990 regulation finally initiated the full liberalisation of pricing. On the whole, the Council acknowledged the right of airlines to set their own fares. The need to file for approval of a fare was abolished having the effect of letting prices free.³⁴

3.2.2 Liberalising market access

Under the Chicago system, bilateral agreements divided market shares of routes according to a 50-50 ratio between carriers. In other words, the right to fly to a particular airport was negotiated by government representatives and once in place, the two national airlines concerned shared the number of passengers they had the capacity to take.³⁵ As we have seen before, they then split the revenues in half. As with prices, the iron grip of regulations on market access was broken by gradually introducing flexibility. Thus, the Council Decision allowed companies to compete within the continuum of fifty-five/forty-

²⁹ Button, p. 44.

³⁰ Council Directive 601/87, 1987 O.J. (L374). Note that a directive is less coercive than a regulation.

³¹ Havel, p. 301.

³² Council Regulation 2342/90, 1990, O.J. (L 217).

³³ Havel, p. 308.

³⁴ Council Regulation 2409/92, 1992, O.J. (L 240). Again, the technicalities involved are complicated and can wait until the final thesis.

³⁵ Capacity defined as available seats (which in itself limits the possible supply).

five percent of passengers, which in 1989 was allowed to increase to the ratio of sixty-fourty.³⁶ Competition for market shares was therefore still very limited, particularly since there a clause was included guaranteeing that competition should not be allowed to seriously harm a national carrier in which case the "competition span" would not be increased.³⁷ Also, national authorities retained the right to decide whether or not to let more than one carrier provide capacity on any route. Some initiatives were also taken in the area of cabotage. The decision concerned "fifth freedom right".³⁸ Fifth freedom is the right for an airline originating from country A to pick up passengers in country B and take them to country C. The effect of this provision was limited by the fact that a condition was that one of the airports could not be a "hub" airport.³⁹

The next major breakthrough came in 1990 when the Council of ministers in the preamble of regulation 2343/90 declared its commitment to full cabotage by June 30, 1992.⁴⁰ This was a very important change in attitude to one of the fundamental aspects of the Chicago system. The general right to fly to any European country was given, provided that the same right was granted reciprocally between airlines from different countries. British Airways would be granted the general right (as opposed to regulated or limited) to fly to Germany provided that Lufthansa would be allowed to fly to England. Again, however, the tactic chosen by the Commission was one of phasing out. Consequently, the number of passengers or flights allowed were at first limited. The right to fly to a third country was also extended (although limited to 50 percent of the capacity of the route).⁴¹ Capacity restrictions (previously 55-45) were increased so that up to market capture of up to sixty percent was approved.

³⁶ Article 3(1), Council Decision 602/87, 1987, O.J. 374.

³⁷ Havel, p.315.

³⁸ The rights granted are under the Chicago system are divided into nine "freedoms" of the air.

³⁹ A hub airport serves as a connection on route to other destinations, e.g. Heathrow or Arlanda.

⁴⁰ Council Regulation 2343/90, 1990, O.J (L 217).

⁴¹ Article 8(1), Council Regulation 2343/90.

The most far-reaching package in 1992⁴² aimed at completely abolishing the connection between access to air-transport markets and national sovereignty. The commission endeavoured to convince the Council to approve a resolution that would allow airlines to be able to “freely provide services between any two airports between or within the fifteen EU national territories.”⁴³ The design was too bold and the near total implementation of the last remains of cabotage was postponed until April 1, 1997. However, market access was considerably extended. Airlines no longer had to have a connection with their country of origin to be able to traffic two European airports in different countries. A Lufthansa jet was thereby granted the right to traffic London-Copenhagen without restriction on capacity – a truly dramatic change when compared to the regulated system in place just some years ago. The last restriction to full cabotage that concerned the right to traffic any two airports within the same country (Lufthansa jet from London to Edinburgh), was postponed to April 1, 1997. The reason for this postponement was the fear, particularly from Italy and Spain, that foreign carriers would move in on their most profitable routes.

3.2.3 Applying competition law

Council regulation 3975/87 applied Articles 85 and 86 to intra-European air transport.⁴⁴ This gave the commission its powerful Regulation 17/62 right to enforce competition if the commission would see it fit to do so.⁴⁵ Given, however, that aviation at the time was governed through a system of bilateral deals, a number of exemptions were granted under Article 85(3).⁴⁶ The Council gave the commission the job to work out exemptions in consideration of the special character of aviation and the time that would be necessary for airlines to adopt to the new competitive environment.⁴⁷ The

⁴² Ross, p.126.

⁴³ Havel, p. 320.

⁴⁴ Articles 85 and 86 are at the heart of EU-competition legislation.

⁴⁵ Council Regulation 17/62, 1962 O.J. Spec. Ed. (13). “Regulation 17 authorises the Commission to investigate and, if necessary, to order termination of infringements of Articles 85 and 86, and it has jurisdiction to levy substantial fines” Havel note 132, p. 255.

⁴⁶ Council Regulation 3976/87, O.J. (L 374).

⁴⁷ Article 2, Council Regulation 3976/87.

Commission used the fact that they were responsible for determining the nature of the exemptions to define them much more narrowly than had originally been intended by the Council.⁴⁸

By 1990 the Commission had grown concerned that airlines in the wake of liberalisation might adopt strategies not conforming to good business practices.⁴⁹ The preamble of the accommodating Regulation 1284/91 therefore reads:

“The Commission should be able to take prompt action in case where air carriers engage in practices which are contrary to the competition rules and which may threaten the viability of services operated by a competitor or even the existence of an airline company and thus cause irreversible damage to the competitive structure.”⁵⁰

Regulation 1284/91 added an Article 4 to regulation 3975/87. Article 4 gives the Commission the right to “take interim measures to ensure that these practices [threatening competition] are not implemented or cease to be implemented.”⁵¹ Thus, the Commissions’ powers to fight uncompetitive behaviour were substantially enhanced.

The third and final “package” in 1992, Regulation 2410/92, finally opened up the possibility for the Commission to clamp down on competition infringements also concerning airline transport within a member state.⁵²

Compared to the inflexible, regulated system that had been intact for the main part of the history of aviation, the rapid process of liberalisation of the aviation industry has been quite remarkable. Although the Single European Act and the completion of the inner market by 1992 meant a wave of liberalisation throughout large sectors of the economy, few areas can boast the same scale of deregulation. The simple reason is that transports, and aviation in particular, were among the most regulated areas of the European economies. Having characterised the changes between 1987 and 1992 as huge steps

⁴⁸ Havel, p. 331.

⁴⁹ Havel, p. 333.

⁵⁰ Council Regulation 1284/91, 1991, O.J. (L 122), preamble.

⁵¹ Council Regulation 1284/91, art 1(1).

⁵² Council Regulation 2410/92, 1992, O.J. (L 240). This was achieved by deleting the word “international” from the text of Regulation 3975/87.

forward, it is important to note that there is another side to the story as well. Brian Havel sums it up nicely:

“Our reading of the instruments of liberalization reveals the price of member state ambivalence in the face of a revolutionary transformation: a mosaic of assorted safeguard, exception, and emergency provisions that accentuates the role of the European Commission as the trustee of the new policy.”...

“Clearly, member states wished to preserve some procedural barricades – even if most can be erected only with Commission oversight – against competitive assaults on their flag carriers.”⁵³

What these “safeguards” are and how the Commission handles its trusteeship of keeping competition open is the topic for the next section.

*3.3. Unsuccessful integration – governing inconsistent with EU-rules*⁵⁴

This section contains cases of the second group. These cases are integrated in the legal sense of having EU-competence. These aspects of aviation are, however, not integrated in a *de facto* sense. Either the legal competence has not been utilised in a way that would mean effective EU-governance, or practices are not in line with the logic of the relevant treaty provisions. In essence they are cases that illustrate that member states have retained a certain degree of governing or control over aviation. The effect, and probable purpose, is to limit the impact of the integration process described in 3.2.

3.3.1 External relations

In a fully competitive single market, all participating companies should have equal access to markets. This was largely achieved within the EU as a result of the process of liberalisation described above. However, the external dimension remains in the hands of the Chicago system, i.e. market access is negotiated bilaterally and the Commissions has

⁵³ Havel, p. 336.

⁵⁴ Unfortunately I have not completed the study on the exemptions granted in the liberalisation packages. It will be included in the thesis, however.

no right to supervise air fares charged on routes between EU and non-EU states.⁵⁵ The result is twofold. First, European carriers do not have equal access to external markets. Access will depend on the importance of an airliner's home-market, which is a bargaining chip in reciprocal negotiations with other countries, notably the U.S. This mainly benefits the large countries. Second, third countries will have varying preferences as to which EU-airports they consider to be the best entries to the single market.⁵⁶ The effect is that airports like Frankfurt will attract a lot of U.S traffic if they grant the U.S carrier the right to fly on to, e.g. Vienna. There is also a spill-over effect in that U.S passengers arriving at Frankfurt may want to travel on to other European destinations, travels which, by the terms of the U.S-German agreement, can only be made with Lufthansa.

The external dimension is by no means unimportant in European aviation. Proportionally, Europe's role as a long haul intercontinental output is very significant, involving two-thirds of total airline travel between the major continents.⁵⁷ Commission efforts have therefore, unsuccessfully, aimed at convincing the Council to give them the procedures necessary for such a mandate.⁵⁸ The Commission has, however, endured in demanding external negotiating competence.

The Commission bases its claim for negotiation competence, apart from sheer logic⁵⁹, on Article 113 of the Rome treaty, the same article, which forms the basis of the EU's Common Commercial Policy.⁶⁰ The Council has, however, once again referred back to Article 84(2), which, the Council claims, assigns a special order for aviation.⁶¹

⁵⁵ Havel, p. 370.

⁵⁶ Havel, p. 371.

⁵⁷ Havel, p. 234, citing U.K. Civil Aviation Authority, (CAA) report, Airline Competition on European Long Haul Routes, CAP 639, Nov. 1994.

⁵⁸ The first of these efforts was made in 1981. This original commission proposal was refuted. Havel, p. 330, footnote 557. Other proposals were made, and rejected, in March 1992, p. 372.

⁵⁹ Ross, p. 39.

⁶⁰ The Commission also supports its claim on the Ahmed Saeed case, Case 66/86.

⁶¹ Havel, p. 375.

Member states feel that their right to bilaterally negotiate traffic rights advances their interests more than a supranationally negotiated settlement would.⁶² They also question the resources (competence, manpower, experience) of the Commission to effectively govern aviation.⁶³ The transport commissioner maintains the need for a common external policy in the common market and has threatened to take states with bilateral agreements to the European Court of Justice.⁶⁴ The seven member states concerned, Germany, Belgium, Finland, Sweden, Austria, Luxembourg and Denmark, remain rebellious.⁶⁵ Kinnock gave EU governments a last chance to abolish their deals with the U.S in early November, or they would have to face legal action.⁶⁶ Particularly annoying to Kinnock was the fact that American negotiators had managed to play out European negotiators against each other, thereby getting a better deal.⁶⁷

Despite the hard resistance, the Commission managed to get a compromise decision in June 1996. The Council sanctioned a division of competencies. The Commission is given the right to negotiate issues concerning harmonisation of regulations, ownership rules, slot allocation and other "soft" issues. The member states retain their right to negotiate traffic access with third countries. Although not a major victory for the Commission, the compromise deviates from the prevailing principle of strict bilateral negotiating competence on behalf of member states.⁶⁸ The Commission shows no signs of giving up despite the unwillingness of EU transport ministers:

⁶² Incentives for change may come from unexpected quarters in that a number of carriers are excluded from the U.S market as a result of the current system in which British carriers are major beneficiaries. Barnard, Bruce, "Gloss wears off bilateral US air deals", *European Voice*, Volume 4, Number 20, May 21, 1998.

⁶³ Kassim, p. 28.

⁶⁴ Johnstone, Chris, "Defiant stand over US air deals", *European Voice*, Volume 4, No. 10, March 12, 1998.

⁶⁵ Particularly annoying to Kinnock was the fact that three of the defiant states had just recently joined the EU – Sweden, Finland and Austria. Ross, p. 139.

⁶⁶ Johnstone, Chris, "Kinnock delivers final warning on bilateral "open skies" aviation deals, *European Voice*, Volume 4, No. 33, September 17, 1998.

⁶⁷ Ross, p. 139. Indeed, one of the Commission's main arguments for granting it external competence is that it would increase the say of the EU in negotiations.

⁶⁸ Havel, p. 13.

"The Commission will go through the ritual of asking Union transport ministers next month to broaden its current negotiation mandate with Washington from tame regulatory matters to key issues including traffic rights, capacity and market entry. Normally, Kinnock could expect a polite rebuff or a diplomatic request for more time or information or both."⁶⁹

One of the Commissions main claims is that a truly single market cannot exist since bilateral agreements regularly feature a nationality clause. This means that only airline must owned by nationals of the negotiating country will gain access to routes.⁷⁰

3.3.2 Freedom of establishment

Access to the aviation market is also hindered by rules concerning airline ownership rules. One of the central freedoms in the Single Market is the freedom of establishment, entailing the right to conduct commercial activities on a permanent basis in a member state of the European Union.⁷¹ Under the valid Chicago-regulations there is a system of guaranteed national ownership of airlines.⁷² The Chicago convention only grants right to a carrier owned by nationals of the country with which the bilateral deal is signed. This means that if ownership of an airline is unclear, an airline loses the right to fly to a particular nation.⁷³ This is also contrary to the principle of non-discrimination of nationality, an important principle found in the beginning of the EC treaty.⁷⁴ The Commission is therefore pushing to soften up ownership rules so as to make it sufficient that owners of airlines are EU residents. This would be more in line with provisions of the Treaty of Rome and the Single European Act, which guarantees the free movement of

⁶⁹ Barnard, Bruce, "Gloss wears off bilateral US air deals", *European Voice*, Volume 4, Number 20, May 21, 1998.

⁷⁰ COM (90) 17, 23/02/90 and COM (92) 434, 21/10/92.

⁷¹ Article 52, EC treaty.

⁷² Jones, Tim, "Union to target national airline ownership rules under scrutiny", *European Voice*, Volume 29, No. 30, 30 July 1998.

⁷³ Jones.

⁷⁴ Article 6, EC treaty, 3(G), Maastricht treaty.

capital in the EU. The issue of ownership is, like we have seen, tangled up with the question of who should negotiate agreements with countries outside the EU.⁷⁵

3.3.3 State aids

There is no doubt that flag-carriers evoke nationalist sentiments. It would be very disturbing for any European country to see its flag-carrier go bankrupt. For many carriers, state aid is the only way out of the red. But state aids are potentially distortive to competition within the Single Aviation Market. Coinciding with the process of liberalisation, aviation as an industry slumped, incurring heavy losses on European carriers.⁷⁶ The combination of bad results, state-owned carriers and an old tradition of covering deficits with state aids, created the danger of a "subsidy" race.⁷⁷ Indeed a number of controversial state aids have been granted airlines in financial trouble. The Commission has been "pragmatic"⁷⁸ in its response to state aid - it has the powers to take a firm stand against state aids, but has chosen to resort to a "one-time-only" policy.

Although article 92 of the EC treaty forbids state aids (public subsidies), the Treaty does not discriminate between public or state ownership. In other words, state ownership should not prevent from responsible ownership meaning capital injections when such are commercially motivated. The Commission has therefore been able to interpret cases in favour of governments on commercial grounds when it has been unfeasible for the Commission to do otherwise. The political costs of not clearing state aid, thereby forcing a state to let an airline go bankrupt, would simply be too high for the Commission. This was illustrated by the French state's aid to Air France which raised particular anger since many feel Air France violated the terms under which the aid was agreed.⁷⁹ The decision to clear the aid by the commission has indeed been challenged in the Court of First instance by BA, KLM, SAS and British Midland, backed by the British, Norwegian,

⁷⁵ Ownership rules also seem to put a lid on mergers, which according to economic logic of a tight market, should be taking place in Europe. Common licensing rules will be necessary in the long run to ensure free market access.

⁷⁶ Ross, p. 129.

⁷⁷ Kassim, p. 31, Ross, pp.128-129.

⁷⁸ Kassim, p.31.

⁷⁹ European Voice, July 25, 1996.

Swedish and Danish governments.⁸⁰ The court ruled against the commission in its clearing of the aid to Air France but the commission chose to maintain its decision in defiance of the court ruling. Air France could keep its aid. "Cancelling the aid is feasible neither in law nor in practice," said Neil Kinnock.⁸¹ The question is therefore if the Commission's one-time-only policy will hold in the long run.⁸²

The question of state-aids mirrors the old tension between an activist EU engaged in industrial policy and a *laissez-faire* EU. On the one hand, the Commission wants to promote competition in European aviation, on the other it wants to ensure the global competitiveness of European carriers.

3.3.4 Slots, ATM and groundhandling⁸³

In practice, competition in the aviation market is severely restricted by the system regulating starting and landing slots.⁸⁴ Competition is limited because of the inadequate number of possible slots for landing and taking-off.⁸⁵ This problem will not go away by itself - eighty percent of Europe's major international routes are seriously congested and 15 of Europe's major airports are expected to be full at the end of the decade.⁸⁶

The problem is twofold. First, overcrowding makes it impossible for new entrants to gain access to airports, thereby effectively blocking them out. Second, there is the more complicated political side to slots. Consulting firm Coopers and Lybrand found "the

⁸⁰ Johnstone, Chris, "Ryanair draws fresh hope from Court's findings on Air France", *European Voice*, July 2, 1998.

⁸¹ Iskandar, Simon, Skapinker Michael, "Air France: \$3.3bn state aid approved", *Financial Times*, Thursday July 23, 1998.

⁸² The Commission was forced to back down from this policy by member state on the grounds that article 93 does not contain any time-limit provisions. Havel, p. 381.

⁸³ I have yet to find sufficient material on ground-handling, but so far I have uncovered that competition in ground-handling is today non-existent. Airports and ground handling are still government monopolies charging airlines fees unjustified by costs, letting the surplus go into government budgets. Ground-handling will therefore be more extensively studied in the final thesis.

⁸⁴ Comité des Sages, *Expanding Horizons*, Luxembourg: OOPEC, 1994.

⁸⁵ Cameron, Doug, Lois Jones and Nick Moss, "Jet Jam", *The European*, January 26, 1998, pp. 8-13.

⁸⁶ Jones, Tim, "Congestion spurs 'slot' reform", *European Voice*, 21 December, 1995.

rights and duties associated with holding a slot to be unclear, arbitrary distinctions between incumbents and new entrants, and inefficient use of the existing allocation system.⁸⁷

As a case study in the current context slots most interesting if it can be shown that obstructing reform is a way for governments to indirectly benefit their flag-carrier. In other words if governments obstruct a European solution to the problem which would disadvantage their own carrier. The large, national carriers are interested in preserving the current system of "grandfathering" – slots held for one year can be held the next year. This clearly disadvantages newcomers. Further, there are signs of flag-carriers obstructing the functioning of Council Regulation 95/93 regarding allocation of slots. According to the regulation, available slots should be pooled and half of available given to new entrants. Slots allocation should be handled by an independent co-ordinator.⁸⁸ National authorities claim there are no available slots due to congestion, but everybody knows the flag-carriers are involved in selling slots under the table.⁸⁹ The question is if congestion is only used as an excuse to preserve the privileged position of the flag-carrier at the national airport.

Congestion is partly caused by an inefficient air traffic management system. The Commission has struggled to find a common approach to the lack of a coherent and co-ordinated air traffic management system (ATM). There are 49 different ATM centres in 31 of Europe's countries which builds in inefficiency and poor communication.⁹⁰ The strive of the commission is to ensure a more co-ordinated EU approach to air traffic control.⁹¹ Discussions in COREPER have mainly been inconclusive.⁹² Differences between member states can be observed with the "northern" member states being more in

⁸⁷ Cooper and Lybrand quoted in Jones, Tim, "Congestion spurs 'slot' reform", *European Voice*, Volume 1, No.14, 1995.

⁸⁸ Coopers and Lybrand claim the co-ordinator and the national flag carriers are not properly separated. Jones, Tim, "Congestion spurs 'slot' reform",

⁸⁹ Johnstone, Chris, "Airport slot sale plans grounded", *European Voice*, Volume 3, No.41, 1997.

⁹⁰ Cameron, Jones, Moss, p. 10.

⁹¹ *European Voice*, "Move to strengthen Eurocontrol", 13 June, 1996.

⁹² Ibid.,

favour of a centralised approach than the “southern” countries.⁹³ Part of the commission drive is to gain membership in Eurocontrol of which it is currently not a member. Some member states are reluctant to this claiming the commission might not have the expertise to be an effective member – ATM control has always been the responsibility of member-states.⁹⁴ Part of the problem is overlapping organisations. Eurocontrol includes 20 European countries, but not all of EU’s 15 member states. At the same time there is another working group “INSTAR” working together with the 33 member states of the European Civil Aviation Conference on improving ATM systems.

⁹³ Ibid.,

⁹⁴ Ibid.,

4. Conclusions and Implications for further theorising

The cases described above fit into figure 2 (page 16) in the following way:

		Supranational Rules	
		Yes	No
Implemented/ Followed (de facto)	Yes	Prices	ATM (?)
		Access	
		Competition	
	No	External relation	
		Freedom of establishment	
		State aids	
		Slots (?)	Groundhandling

Figure 3. Cases in dimensions of governing

This paper has made a brief outline of the theoretical framework which has been used when choosing cases. Specifying integration has enabled a division of cases in which competence, rules and implementation can be included. This paper has also presented three hypotheses on why integration took place in 1987-1992. The task for the thesis is to test the hypotheses on the cases. This is what I will be doing in the near future.

What can a study of this kind add to the EU-discourse? Obviously, there are only limited possibilities of generalising since aviation is a special case, and also, the dynamic of each policy-area varies. What this study of aviation can do for European studies in general is to high-light that integration theory should not only be about determining whether institutions or states are the main actors in understanding integration. Rather, this study illustrates that institutions and member states can join forces in order to reach common goals and that this is a potentially important force behind integration. Further, it takes on where Moravcik ends by examining what happens after the grand bargains. How

can single member states exploit the competency granted in the treaties? Furthermore, it shows that the competence to legislate can come from the ECJ, not only as a result of the rational choices of national leaders. In relation to neo-functionalism I hope my study will not merely confirm the importance of institutions, but also show the efficiency of various strategies employed to exert influence.

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