

# Freedom of establishment within the European aviation sector

by

Esther Neumann

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## Introduction

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The basis of modern aviation law is formed by the 1944 Convention of Chicago. The aim of the international Chicago Conference is to set up an international aviation system after the Second World War. The Convention contains the constitution of the ICAO (International Civil Aviation Organization), binding the 189 participating countries to minimum provisions in order to ensure that the safety of aviation is guaranteed.

Traditionally a distinction is made between domestic and foreign (international) air traffic. National legislation is applicable to domestic air traffic. Given the fact that the systematic international air traffic above or to the territory of another state is dependent upon the consent of that state, countries are obliged to mutually conclude air service agreements which make international air traffic possible. International air traffic was historically provided for in bilateral agreements. These agreements supplement, may not violate and often refer to the Chicago Convention. For many years they determined the economic growth of air traffic. In their currently most liberal form such bilateral agreements are called 'Open Skies Agreements'. They leave capacity and frequency allocation, as well as tariff coordination, to the commercial judgement of the designated airlines.

The EC has an ever-increasing say in the further development of these treaties, for the time being in close cooperation with the Member States. The European Commission has been instrumental in creating an internal European market, which is the subject of the Communication from the Commission to the Council and the European Parliament of 1 December 1999. Consequently, measures are necessary to ensure that air transport regulation is consistent with the Community principle of smooth running of the internal market.

# 1 General tenets relating to establishment (EC legislation)

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The European integration process, for which the EC Treaty lays the foundation, aims at fusing the domestic markets and government policies in these markets to an economic unit. This market will be shaped by the four freedoms and by rules that are set up in order to combat business and government distortion of competition<sup>1</sup>. The more economic integration gains ground, the more Member States' policy areas need to be mutually consistent in order to safeguard an optimal functioning of the common market. The core of the four freedoms lies in the prohibition of discrimination on grounds of nationality<sup>2</sup>.

In the last few decades, the call for EC legislation concerning air traffic and concerning the policy that should be pursued with regard to an open airspace above Europe has grown louder and louder. Application of EC legislation on air carriers whose principal place of business is in one Member State and that want to establish in another Member State is also an issue here. The Articles 43 through 48 of the EC Treaty provide for the right of establishment in the European framework. However, problems arise as a result of Member States sticking to various different guiding principles when it comes to establishing the nationality of air carriers. Nationality is determined by the question who is in control of the air carrier.

## 1.1 Articles 43 and 48 of the EC Treaty

Article 43 grants all EC nationals the right of freedom of establishment. It primarily concerns nationals of a Member State leaving that state and intending to establish in another Member State. In principle, the first Member State is not allowed to place restrictions on companies that leave<sup>3</sup>. Furthermore, the Member State in which the company wants to establish is prohibited from hampering or complicating the company's access to it. This means that the physical movement of nationals of one Member State to the territory of another Member State must not be hampered<sup>4</sup>.

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<sup>1</sup> R. Barents, L.J. Brinkhorst, *Grondlijnen van Europees Recht*, 10th edition. Tjeenk Willink, Deventer, 2001, p. 294.

<sup>2</sup> R. Barents, L.J. Brinkhorst, p. 329.

<sup>3</sup> C-81/97 Daily Mail.

<sup>4</sup> R. Barents, L.J. Brinkhorst, p. 336.

Pursuant to Article 48, companies and other legal entities are subject to the free movement of persons and, consequently, they may invoke the right of freedom of establishment. However, this company or other legal entity must be constituted under the laws of one of the Member States and have its official seat, central administration or principal place of business within the Community to be able to derive rights from Article 48. If these requirements are met, the company or other legal entity will be treated in the same way as natural persons who are nationals of Member States. These provisions ensure that Community nationals and the companies that have been placed on the same footing receive the same treatment as own nationals in the host Member State.

The drafters of the EC Treaty did not pay attention to the position of legal entities in the Member States' private international law. EC Law did (and does) not in so many words indicate the law that applies to a legal entity, an undertaking or a company. This can be explained by the fact that, in the early days of the European Community, the original six Member States were, more or less, supporters of the 'company seat principle' (Sitztheorie)<sup>5</sup>. However, as the European Community expanded, there were more and more countries joining the European market that were supporters of a different principle, namely the 'incorporation principle'. The 'company seat principle' and the 'incorporation principle' serve to determine whether companies are bound to one Member State's legal system, comparable to the nationality of natural persons. An air carrier's nationality indicates which country's company law is applicable. Today, the Member States apply both principles side by side. The Court makes sure that applying the two different principles does not result in the right of freedom of establishment being complicated or restricted. The aforementioned principles also serve to establish a connection between a Member State and the air carrier, in order to determine the nationality of the aircraft and, consequently, the applicable law. An aircraft also needs a nationality because of the safety problem: it indicates who can be held liable for possible loss and/or damage.

### **1.1.1 Company seat principle**

According to this principle a company's legal capacity should be determined based on the law of the country where its real seat is established. This real seat can be determined on the basis of the company's actual centre of administration or its head office. The company's seat

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<sup>5</sup> J. Wouters, Private International Law and Companies' freedom of Establishment, European Business Organization Law Review 2, 2001, TMC Asser Press, p. 104.

is deemed to be in the place where the company's business activities are centered, where its directors carry out the main part of their work and from where the company is run<sup>6</sup>. This principle also holds true when a company that was incorporated in a legally valid way in one country moves its real seat to a country that applies the 'company seat principle'.

Germany maintains this principle in its strictest form, which in practice implies the following:

- If a legal entity has its centre of administration on the territory of a country that applies the company seat principle and it is granted legal personality by virtue of foreign law, the country that applies the company seat principle does not acknowledge this legal personality, because it was not granted in accordance with its national law<sup>7</sup>
- If the centre of administration of a foreign company moves to a country that applies the company seat principle, this country's national law requires the company to re-apply for recognition as a legal entity in order to obtain legal personality in the country that applies the company seat principle. This also holds true if the country of origin continues to recognise the company as a legal entity after its relocation. The reasons for granting legal personality here are not the same as in the example above. All directors are jointly and severally liable.<sup>8</sup>
- A company's relocation from a country applying the company seat principle to another country leads to a *conflict mobile*, as a result of which the company will be governed by a new legal system regarding its personal status, unless *renvoi* (return) takes place. The company seat principle does not imply dissolution or liquidation of the relocating company. Its rules have been further specified in national law.

A country generally justifies the company seat principle in order to keep a say in the airline company's activities<sup>9</sup>. The principle protects the company from being influenced by foreign law and ensures that only the law of the country that applies the company seat principle is applicable. This country has a monitoring role and is in a position to deal with the company's actions directly. Since the law of the country applying the company seat principle is the only applicable one, the company's creditors are afforded the highest possible protection. This principle does not lead to problems until a company moves its seat abroad.

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<sup>6</sup> J. Wouters, p.103-107.

<sup>7</sup> J. Wouters, p. 107.

<sup>8</sup> J. Wouters, p. 107.

<sup>9</sup> J. Wouters, p. 107.

### 1.1.2 Incorporation principle

According to this principle a company's legal capacity is determined in accordance with the law of the State in which the company was incorporated (*Gründungstheorie*). Here, the residence of its centre of administration is not relevant at all for the company's legal personality. This principle makes relocation much easier, because the company remains subject to one single legal system. This is important because of the ever-increasing growth of international trade and the legal certainty the principle creates, which accounts for its popularity in the business world. Yet, the freedom of parties to select the applicable legal system involves a risk. Countries will tend to relax their national legislation drastically in order to attract companies, and companies will establish in the Member State with the most lenient company law and operate in the other Member States from there. This will create competition between countries as far as attracting companies is concerned and result in overly lenient, inferior, company-friendly legislation: the so-called 'Delaware effect'<sup>10</sup>. **"RACE TO THE BOTTOM"**

### 1.2 Which principle prevails? (EC COJ judgments)

So far the Court has not made an explicit choice of one of the two principles. Only in concrete cases does it comment on the compatibility of application of these principles with the Community right of freedom of establishment.<sup>11</sup> **"BOTH PRINCIPLES APPLICABLE"**

#### 1.2.1 C-81/87 Daily Mail

The Court concludes that the conditions for the transfer of a company's central management and control to another Member State are subject to the national legislation of the country in which the company concerned is incorporated. Consequently, a Member State may place restrictions on the transfer of the real seat of a company incorporated under its law to another Member State. It may also place restrictions on the company retaining legal personality under the law of the State in which the company is incorporated<sup>12</sup>.

This judgment shows that harmonisation of the Member States' company law should be regarded as a prerequisite for the freedom of establishment. **Since harmonisation has not**

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<sup>10</sup> J. Wouters, p. 109.

<sup>11</sup> J. Wouters, p. 109.

<sup>12</sup> C- 81/97 Daily Mail § 23.

**taken place to date, a company cannot evade the national rules by invoking the right of establishment.**

### **1.2.2 C-212/97 Centros BV**

According to the Court the right of establishment is, in itself, not abused if a national of a Member State wishing to set up a company decides to incorporate it in a Member State whose rules of company law are less restrictive and to set up branches in other Member States, as the right to incorporate a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, within a common market, of the freedom of establishment guaranteed by the Treaty <sup>13</sup>.

### **1.2.3 C-208/00 Überseering BV**

This judgment shows that when a company that is incorporated in accordance with the legislation of a Member State and has its official seat in that country, exercises its freedom of establishment in another country, the latter country cannot interfere in it<sup>14</sup>. That country must acknowledge the powers that the company derives from the legal system in which it was formed.

In no single Judgment so far has the Court expressed its preference towards or disapproval of maintaining one particular principle. It does, however, indicate that discrimination in the application of the principles is not allowed. Otherwise, it confines itself to assessing the compatibility of Member States' behaviour with EC legislation. As regards air traffic and transport policy, the EC has issued Regulations that have resulted in air traffic liberalisation. It should be realised that traditionally the air traffic section was strongly protected and subsidised by the Member States, and that opening up the aviation market and allowing competition creates quite a few complications.

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<sup>13</sup> C-217/97 Centros § 27.

<sup>14</sup> C-208/00 Überseering § 95.

## 2 Towards an internal European market

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When a company carries out its economic activities in a Member State, we speak of establishment. The Court defines establishment as the exercise of an economic activity for an indefinite period of time in a Member State by means of a fixed establishment<sup>15</sup>, which may also concern a subsidiary, branch or agency<sup>16</sup>. A company may also have several centres of activity, in other words: it may be established in several Member States<sup>17</sup>.

### 2.1 Establishment of air carriers in Europe

The gradual creation of an internal European aviation market, brought about by allowing competition to develop, took place in three steps. With the third liberalisation package of July 1992, Regulations 2407/92, 2408/92 en 2409/92 completely liberalised air traffic within Europe. For the rest, this sector is governed by a separate, highly complicated competition regime<sup>18</sup>. Regulation 2407/92, together with Regulations 2408/92 (concerning access for Community air carriers to intra-Community air routes) and 2409/92 (concerning fares and rates for air services) constitutes the legal basis for creating a common aviation market. With respect to the balance between these EC regulations and the Member State's national legislation, it should be pointed out that EC Regulations are binding in their entirety and directly applicable in all Member States (Article 249, para 2 EC Treaty). The Courts of Appeal and the official bodies in all Member States are obliged to apply the Regulations and disregard conflicting national legislation.

The main objective of the third liberalisation package was to bring the subjective market access conditions for all European countries up to the same level and to apply them without any form of discrimination. For instance, where the setting up of an air carrier before the introduction of the package was dependent on provisions in the national laws of the Member States, since the entry into force of Regulations 2407/92 and 2408/92 permission is granted

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<sup>15</sup> C-55/94 Gebhard, R. Barents and L.J. Brinkhorst p.335.

<sup>16</sup> Article 43, paragraph 2.

<sup>17</sup> R. Barents and L.J. Brinkhorst p. 336.

<sup>18</sup> P.J. Slot, Het Europese luchtvervoerbeleid: eindelijk los van de grond?, Sociaal-economische wetgeving 1995, p. 683.

according to a system that is valid for all Member States<sup>19</sup>. If the carrier effectively wishes to be a participant in air traffic, it needs to have an operating licence at its disposal (2407/92) and it has to be granted access to intra-Community air routes (2408/92). Only then is it allowed to be a participant in the intra-Community air traffic.

### **2.1.1 Granting of operating licences to air carriers (Regulation 2407/92)**

This Regulation applies to Community-based undertakings that wish to carry out air traffic activities. According to Article 2, under b, of Regulation 2407/92, an air carrier is an air transport undertaking with a valid operating licence. An air transport undertaking is not required to have a specific legal form. For that reason, it may be run by any natural person, any legal person, whether profit-making or not, or any official body, whether having its own legal personality or not<sup>20</sup>.

According to its preamble the main aims of the Regulation are to:

- define non-discriminatory requirements in relation to the location and control of an undertaking applying for a licence;
- ensure that an air carrier is at all times operating at sound economic and high safety levels;
- ensure that air carriers are sufficiently insured in respect of liability risks;
- ensure that, within the internal market, air carriers can use aircraft owned anywhere in the Community;
- ensure that procedures for the granting of licences to air carriers are transparent and non-discriminatory.

In principle, the Member State in which the principal place of business or the official seat of an undertaking is located is responsible for granting an operating licence. This licence is granted to the undertaking, permitting it to carry out carriage by air of passengers, mail and/or cargo, as stated in the operating licence, for remuneration (Article 2, under c). According to Article 3, paragraph 3, no undertaking established in the Community is permitted to carry out air transport unless it has been granted the appropriate operating licence. Such a licence can be regarded as a minimum licence, as it does not confer in itself any rights of access to specific routes or markets<sup>21</sup>. If the undertaking meets the requirements

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<sup>19</sup> C. Calliess, M. Ruffert, Kommentar zu EU-Vertrag und EG- Vertrag, Luchterhand 2e Auflage 2002 p. 997.

<sup>20</sup> W. Schwenk, Handbuch des Luftverkehrsrechts, 2<sup>e</sup> Druck, Carl Heymanns Verlag Köln, 1996, p. 427.

<sup>21</sup> Regulation 2407/92, Article 3(2).

in the Regulation, it is entitled to an operating licence. The main material requirements for granting a licence to an undertaking are that:

- its principal place of business or, if any, its official seat, are located in a Member State (Article 4, para 1, under a);
- its main occupation is air transport (Article 4, para 1, under b);
- it is owned and continues to be owned directly or through majority ownership by Member States and/or nationals of Member States. “EIGENTÜMERVORBEHALT” Such States or such nationals must at all times effectively control the undertaking (Article 4, para 2);
- it has at least one aircraft at its disposal, through ownership or any form of lease agreement (Article 8, para 1);
- the aircraft used by an air carrier is registered in its national register or within the Community. A separate arrangement exists for leased aircraft (Article 8, paragraphs 2 and 3);
- the air carrier is insured against liability (Article 7);
- the air carrier operates at a sound economic level and can prove that it can meet its actual and potential obligations (Article 5);
- there is proof that the persons who will continuously and effectively manage the operations of the undertaking are of good repute (Article 6). The licencing authority must grant its prior approval to an air carrier if this carrier uses an aircraft from another undertaking or provides it to another undertaking (Article 10);
- it possesses a valid Aircraft Operating Certificate (AOC) (Article 9 para 1).

If an undertaking meets all these requirements, it is legally entitled to be granted an operating licence<sup>22</sup>. The licence is granted by the competent body in the Member State in which the air carrier has its official seat. It is irrelevant whether the undertaking is owned by the Member State or by nationals of that Member State. The only thing that must be ascertained is that the undertaking is owned, directly or through majority ownership by Member States and/or nationals of Member States. It is important that such Member States or nationals can at all times effectively control the undertaking<sup>23</sup>. A Member State must also grant an operating licence to an undertaking that is not owned by that State, but whose official seat or principal place of business is located in that Member State<sup>24</sup>. This does not apply to undertakings established outside the EC, in order to prevent air carriers established

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<sup>22</sup> W. Schwenk, p. 447.

<sup>23</sup> Regulation 2497/92 Article 4, para 2.

<sup>24</sup> W. Schwenk, p. 558.

in third countries from establishing in the EC and serving the entire European market from there. The right of freedom of establishment for air traffic within the EC applies only to those air carriers that are owned by a Member State irrespective of which state<sup>25</sup>. This also follows from the provisions of the EC Treaty regarding freedom of establishment (Articles 42 and 48).

The Regulation follows the model provided in Article 71 of the EC Treaty concerning European access rules for non-resident carriers.

If a Member State refuses to grant an operating licence, the undertaking concerned may lodge an appeal with the Commission, who deals with the interpretation and implementation of the Regulations (Article 13, para 3).

### **2.1.2 Access for Community air carriers to intra-Community air routes (Regulation 2408/92)**

This Regulation also lifts the objective barriers between Member States with regard to actual access to air routes. It provides rules in order to steer competition on the European market in the right direction, with the aim to prevent discrimination. These rules must ensure identical assessment and evaluation of market access for the same types of air services. Regulation 2408/92 concerns access to routes within the Community for scheduled and non-scheduled air services (Article 1, para 1). Subject to this Regulation, the Member States concerned may give permission to Community air carriers to exercise traffic rights on routes within the Community (Article 3, para 1). 'Traffic right' means the right of an air carrier to carry passengers, cargo and/or mail on an air service between two Community airports (Article 2 para. f).

By granting access to intra-Community air routes a Member State acknowledges the limitations to its sovereignty over its own airspace with respect to European air carriers. Consequently, it is no longer a Member State that decides which air carrier is granted access and which is not. National access criteria have been replaced by Regulations ensuing from the EC Treaty. For air transport planning purposes, the Member States are only granted the right to regulate without discrimination on grounds of nationality or identity of the air carrier, the distribution of traffic between the airports within the same airport system<sup>26</sup>. The exercise of traffic rights is subject to published Community, national, regional or local

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<sup>25</sup> C. Calliess, M. Ruffert, p. 998.

<sup>26</sup> Regulation 2408/92, Preamble and Article 8.

operational rules relating to safety, the protection of the environment and the allocation of slots (Article 8, para 2). The exercise of traffic rights must also be consistent with operational rules relating to safety, protection of the environment and conditions concerning airport access and has to be treated without discrimination<sup>27</sup>. When serious congestion and/or environmental problems exist (Article 9, para 1), the Member State responsible may impose conditions on and limit or refuse the exercise of traffic rights, in particular when other modes of transport can provide satisfactory levels of service. This leaves Member States a certain amount of policy freedom, e.g. to promote rail traffic. All capacity limitations have also been lifted as a result of making intra-Community air routes freely accessible<sup>28</sup>.

This Regulation only concerns access of Community air carriers to intra-Community air routes. It does not govern routes from a European Member State to a third country; these routes are governed by bilateral air treaties between the countries concerned. Granting of operating licences for these routes is no longer subject to European legislation, but applications are assessed on the basis of bilateral treaties concluded by Member States with a third country.

## **2.2 Nationality in the aviation sector**

Generally speaking, national transport sector regulations concerning ships and aircraft are very important, because they guarantee that the outside of the craft shows its country of origin and the law that governs the craft. In shipping, flags are used to indicate the craft's nationality. Nationality criteria also apply to aviation, where they ensure safety and confidence. It is of the utmost political importance to a Member State that it should be able to define an aircraft's nationality, because this means that it can find out who owns the aircraft and who exercises control over it<sup>29</sup>.

The international law applicable to air transport, contained in the Chicago Convention, does not provide rules or requirements relating to nationality on the basis of which the nationality of an air carrier can be determined. Consequently, national laws and bilateral treaties have to

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<sup>27</sup> Regulation 2408/92 Preamble.

<sup>28</sup> Regulation 2408/92, Article 10.

<sup>29</sup> R. Münz, *The Future of Ownership and Control Clauses, the German point of view, Project 2001 Plus, Consequences of Air Transport Globalization*, 2003 p. 39.

provide the nationality criteria<sup>30</sup>. The countries ultimately developed a formula in these bilateral treaties that enable them to determine whether nationality should be granted and that can be interpreted at the countries' own discretion. Nationality will be granted to an air carrier if a country, a party to the bilateral treaty concerned, has 'substantial ownership and effective control'<sup>31</sup>. The purpose of granting nationality in a bilateral treaty is twofold. On the one hand, when entering into the treaty, parties wish to restrict access to the air traffic market to their own aircrafts and, consequently, exclude third country aircrafts. On the other hand, the 'effective control' rule intends to safeguard compliance with the applicable laws and regulations, in particular where the aircrafts' safety and security are concerned<sup>32</sup>. However, it is hard to define the term 'substantial ownership'. According to Article 4 (2) of EC Regulation 2407/92, 'substantial' may be interpreted as one half plus one. 'Ownership' does not directly relate to the question who is the owner of the airline, but refers to ownership of shares and exercise of voting rights<sup>33</sup>. It is even more difficult to interpret the term 'effective control'. It is given content by vague political terms, as national aviation authorities have and wish to retain extensive discretionary powers<sup>34</sup>. Nationality, therefore, is granted on different grounds.

### **2.3 'Open Skies' judgments of the European Court of Justice of 5 November 2002, C476/98**

A judgment rendered by the European Court of Justice (ECJ) dated 5 November 2002 shows that bilateral agreements may be on strained terms with pursuing a internal European market. The Commission brought proceedings against eight countries because of the bilateral agreements that they concluded with the United States, in which ownership of and control over the air carrier had been limited. The Court ruled in all eight proceedings<sup>35</sup>.

According to the Commission the agreements violated, inter alia, the right of establishment as laid down in the EC Treaty.

The Court found 'that the eight agreements in question contain elements which deprive Community air carriers of their rights under the European Treaty, the nationality clause in the agreements being a clear violation of the right of establishment enshrined in Article 43.

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<sup>30</sup> P. Mendes de Leon, . The Future of Ownership and Control Clauses in Bilateral Air Transport Agreements: Current Proposals and Legal Objections, Project 2001 Plus, Consequences of Air Transport Globalization, 2003, p. 21.

<sup>31</sup> P. Mendes de Leon, pp. 20-21.

<sup>32</sup> R. Münz, p. 37.

<sup>33</sup> P. Mendes de Leon, p. 22-23.

<sup>34</sup> P. Mendes de Leon, p. 25.

<sup>35</sup> The judgment against Germany is explained below in more detail.

Therefore, although the Court could not have invalidated the agreements under international law, they constitute an infringement of Community law for which Member States are responsible towards the beneficiaries of the right of establishment<sup>36</sup>.

The clause prevents companies from other Member States from doing business in Germany, which disturbs the common market<sup>37</sup>. The clause on 'national ownership and effective control' over the air carriers, e.g., offers the USA the opportunity to withdraw, suspend or limit the operating licence of an air carrier that is not for a substantial part owned or effectively controlled by Germany<sup>38</sup>. It is beyond doubt that the air carriers that are established in Germany but are not in German hands can be duped by this<sup>39</sup>. The USA is not obliged to grant licences to air carriers whose ownership and control are in German hands. Consequently, Community aircrafts except for the German aircrafts are discriminated against, since they do not enjoy the advantage of being treated in the same way as own nationals in the host Member State, i.e. the Federal Republic of Germany<sup>40</sup>. As a result of this judgment, not only the clause in the bilateral agreement between Germany and the USA must be brought in line with EC Law, but the same applies to all countries that apply a similar clause in their bilateral agreements.

In its judgment the ECJ found that all air carriers established in a Member State within the meaning of Article 43 EC Treaty fall under this provision, even if the only activity is transport services to third countries<sup>41</sup>. It is the first time that the Court found Article 43 to be applicable to airlines even if the relevant air carrier flies to a non-EC country<sup>42</sup>. In its judgment the Court does not indicate what should be done with the Open Skies Agreements in question. Their status remains unclear.

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<sup>36</sup> Com/2002/0649, Communication from the Commission on the consequences of the Court judgements of 5 November 2002 for European air transport policy, paragraph 34.

<sup>37</sup> C-476/98, paragraphs 138 and 141.

<sup>38</sup> C-476/98, paragraph 151.

<sup>39</sup> C-476/98, paragraph 151.

<sup>40</sup> C-476/98, paragraph 153.

<sup>41</sup> C-476/98, paragraph 146.

<sup>42</sup> J. Balfour, After the EC Decision Re Open Skies, the TCAA as Successor of the open Skies Agreements?, Project 2001 Plus, Consequences of Air Transport Globalization, 2003 p 67.

### **2.3.1 Consequences of the judgment regarding freedom of establishment**

This judgment negates the nationality provisions in the bilateral agreement. Lufthansa and the American companies no longer have the monopoly on the Germany – America routes. The new definition of the concept ‘establishment’ creates opportunity for third parties to compete in this transport market.

The European Court judgment does not preclude bilateral treaties. However, a new criterion with respect to nationality must be observed. The Member States resort to the terminology also used in the EC Directive 2407/92, Article 4(1)(a) and Article 83 bis of the Chicago Convention. The terminology used is “principal place of business” for which there is no precise definition. This vague, inexact wording allows room for individual political interpretation. In practice this term is primarily defined by the national company laws of the Member States. This is precisely where, future problems could arise given that the Member States maintain different underlying principles in their national company laws.

Some countries use the “company seat principle” as connecting factor between the nationality of a company and the state itself. The company acquires its nationality from the country where the central headquarters, the Board has its seat. In other words, the granting of nationality denotes which country is deemed to be the air carrier’s principal place of business. Other countries uphold the “incorporation principle” as connecting factor between the company and the state for the granting of nationality. A company has the nationality of the country where it is incorporated. The substantiation of the criterion “place of business” according to this national underlying principle merely denotes where the company is incorporated without devoting any attention to the principal place of business of the company as such.

With respect to upholding these two principles, the ECJ has rendered several judgments concerning the right of establishment. The underlying principle formulated herein must also be taken into account on interpretation of this criterion. Given that there is little or no harmonisation of national company law, we must wait and see how the European Court interprets this new criterion in the aviation sector.

### **2.3.2 The 5<sup>e</sup> ICAO World Air Transport Conference 2003, criteria “principal place of business”**

The Conference adopted a recommendation on liberalising air carrier ownership that endorsed the notions of “principal place of business” and “effective regulatory control” as

alternatives to “substantial ownership and effective control” generally used in air service agreements<sup>43</sup>.

The following criteria have been laid down concerning interpretation of the term “principal place of business”:

- The air carrier must be established and incorporated in accordance with the regulations of a specific state;
- The air carrier must carry out a substantial part of its operations and have its capital investment in facilities situated within the territory of the specific Member State;
- The air carrier pays income tax in that state;
- The air carrier registers its aircraft in that state; and
- The air carrier has a significant number of national employees in managerial, technical and operational positions.<sup>44</sup>

Once all these criteria have been met, there is a “principal place of business” and accordingly nationality is granted. The link between international interpretation of the criterion and interpretation under the domestic laws of the Member States, however, remains vague and indistinct.

Given that the Court considered the old criteria for the granting of nationality to air carriers to be a distortion of competition, the ECJ’s view on this new criterion remains to be seen. Countries must uphold this criterion in their bilateral treaties in an attempt to preclude distortion of the European right of freedom of establishment. The Conference also encouraged States to be flexible in responding to the use by other States of non-traditional criteria, having full regard to the need for safety and security<sup>45</sup>.

## **2.4 The objectives of the European Commission**

The Court ruled in its judgment that the Commission and the Member States were jointly competent with respect to Open Skies Agreements. Close co-operation ensues from the requirement that the Community must speak with one voice. The Commission gave shape to this by proposing a new Directive 847/2004. The objective of this Directive is the co-ordination of negotiations with third countries on the conclusion of agreements regarding air

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<sup>43</sup> Working paper International civil aviation organization, A35-WP/64, EC/13, 08/07/04, p. 2.

<sup>44</sup> P. Mendes de Leon, blz 27.

<sup>45</sup> Working paper International civil aviation organization, A35-WP/64, EC/13, 08/07/04, p. 2.

services, guaranteeing a harmonised approach on implementation and application of these agreements and regulating the compatibility of such agreements with Community Law. Given that the Member States cannot realize these objectives nationally, a Directive at European level is necessary.

The Directive allows Member States to open negotiations with third countries, to conclude agreements regarding air services and to amend current agreements<sup>46</sup>.

Member States must give the Commission prior notice of this. If this concerns matters that fall under the joint authority of the Community, the Member States must include standard provisions. Finally, they must inform the Commission on the outcome of the negotiations<sup>47</sup>. If Member States wish to involve air carriers in the negotiations, all carriers with an establishment on the territory of the relevant Member State will be treated equally<sup>48</sup>. Member States may not conclude new agreements that are more restrictive than the old agreements<sup>49</sup>.

The ECJ found that nationality clauses in air service agreements concluded by Member States of the European Union infringed European law by limiting the freedom of establishment of Community air carriers. The definition of the nationality in the Air Transport Law, with a view to connecting the State and the applicable corporation law, still induces continuous discussion and uncertainty at national, European and international level.

The Commission proposed a draft EU standard designation clause (effective May 2004) for inclusion in revised Air Service Agreements intended to separate the notions of ownership and effective regulatory control. Under this clause, airlines designated by a non-EU State must be:

- “established in the territory” of the third country and licensed in accordance with the applicable law; and
- the third country shall have and maintain “effective regulatory control” of the airline.

This wording is more liberal than the formulation in referring to “establishment” rather than “principal place of business”<sup>50</sup>.

The Court ruling resulted in placing EU Member States under an individual obligation to amend their appr. 3.500 Air Service Agreements by replacing “national ownership” clauses

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<sup>46</sup> Directive 847/2004, article 1.

<sup>47</sup> Directive 847/2004, article 4.

<sup>48</sup> Directive 847/2004, article 2.

<sup>49</sup> Directive 847/2004, article 3.

<sup>50</sup> Working paper International civil aviation organization, A35-WP/64, EC/13, 08/07/04, p. 4.

with a “community ownership” clause<sup>51</sup>. Directly after the judgement of the Court, the Commission requested all Member States to denounce their Open Skies Agreements in order to ensure compliance with the ECJ judgements<sup>52</sup>.

Three and a half years after the Court’s ruling, Member States have not followed up this request arguing that denunciation:

- is not mandated by the ECJ;
- produces a legal void for the operation of the international air services;
- places them, and the Community, in an awkward position for future negotiations with third states<sup>53</sup>.

During the discussion, after the judgment of the European Court, the International Air Transport Association (IATA) stated that any widespread renegotiation of bilateral service agreements would prove a complicated process. This difficulty might be overcome by unilateral declaration, or pluri-lateral (bloc-to-bloc) arrangements. An agreement between the EU and the United States offers such an opportunity<sup>54</sup>.

Following the ruling of the Court, the European Commission was given specific mandates regarding external aviation relations. These are a Horizontal Mandate to negotiate with all other third countries on a restricted basis to amend the nationality clauses in Air Service Agreements that limit the freedom of establishment of Community companies, and another to negotiate a single comprehensive agreement for an Open Aviation Area (OAA) with the United States in place of existing bilateral agreements<sup>55</sup>.

Bilateral negotiations at Community level by the Commission, permits the insertion of the necessary standard clause in the whole range of agreements concluded between the Member States and a given third country. By virtue of requiring just one single round of negotiations, an agreement of this kind has the advantage of enabling a third country to cut down on a

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<sup>51</sup> Working paper International civil aviation organization, A35-WP/64, EC/13, 08/07/04, p. 3.

<sup>52</sup> See: European Commission requests the denunciation of the bilateral Open Sky agreements, Brussels, 20 November 2002, IP/02/1713

<sup>53</sup> P.M.J. Mendes de Leon, Liberalising international aviation with the ECJ Open Skies Judgement re Open Skies and the Community clause, p.3.

<sup>54</sup> Working paper International civil aviation organization, A35-WP/64, EC/13, 08/07/04, p. 3.

<sup>55</sup> Working paper International civil aviation organization, A35-WP/64, EC/13, 08/07/04, p. 3.

series of individual negotiations with the Member States with which it is linked<sup>56</sup>. IT INCREASES MARKET POWER OF THE EU (OR BROUGHT IT ON EQUAL FOOT WITH THE US)

On 11 March 2005 the Commission stated in an communication [COM(2005)79] that the EU can take steps towards reforming civil aviation and opening up markets to fair competition, by developing an external aviation policy. The Commission points out that the case law testifies to the Community's powers in the field of international air services, whereas traditionally these services had always been governed by bilateral agreements between states<sup>57</sup>.

In order to adopt an external aviation policy, between EU Member States and third countries, the Commission wants to achieve two complementary objects:

creating a Common Aviation Area by 2010 which will comprise the European Community and all its partners located along its southern and eastern borders, which a view to achieving a high degree of economic and regulatory integration of aviation markets in this area. The various parties would share the same market operation rules, not only from an economic point of view but also with regard to air traffic, security and air safety<sup>58</sup>.

Launching, in the short term, targeted negotiations on global agreements in the major regions of the world, with the aim of strengthening the prospects for promoting European industry and ensuring fair competition in the most dynamic world markets, while at the same time helping to reform international civil aviation<sup>59</sup>.

## **2.5 Co-operation between Member States and the Commission?**

The aim of the European Treaty, namely the realisation of a European market with free competition, also covers, as already clearly illustrated, the European airspace. However, the Commission, on formulation of its objectives, now seems to lay a claim to the international authority that Member States have with respect to third countries. In addition to the realisation of a European aviation market with free competition, it seems as though the

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<sup>56</sup> [COM(2005)79] Communication from the Commission of 11 March 2005, developing the agenda for the Community's external aviation policy.

<sup>57</sup> COM(2005)79 Communication of the Commission of 11 March 2005.

<sup>58</sup> COM(2005)79 Communication of the Commission of 11 March 2005.

<sup>59</sup> COM(2005)79 Communication of the Commission of 11 March 2005.

Commission wishes to create a “common market”. Opposing European policy and the Commission’s overall objective are the policies of the Member States, which are aimed at maintaining domestic air carriers.

The ownership and control of a domestic air carrier is vitally important to most countries. Apart from the prestige issue, a “domestic carrier” ensures the realisation of air traffic / air transport both at domestic and international level<sup>60</sup>.

Countries wish to retain the economic benefit obtained through this. This explains why there are so many air carriers in Europe. All national airspace within Europe has been abolished and there is now a European airspace. Theoretically speaking the European aviation market has been liberalised<sup>61</sup>. Fair competition on the European aviation market with respect to third countries is only possible if the nationality of the air carrier plays no role at all<sup>62</sup>.

Only then are the domestic aviation politics of a Member State not aimed at obtaining the greatest possible gain for its own air carrier but community interests are taken into account. Currently, however, a Member State still offers a helping hand if its “domestic carrier” finds itself in problems<sup>63</sup>. In the sphere of international air traffic, Member States still think nationally and continue to put their own economic interests first. This also involves offering state aid in order to ensure the continuation of the domestic air carrier thereby guaranteeing its participation in international air traffic. In addition to measures such as bilateral Open Skies Agreements and national aviation politics, domestic air carriers receive state aid<sup>64</sup>. Historical examples clearly show that intervention by the state often does not have the desired result as illustrated by Sabena and Swissair<sup>65</sup>. The justification of all these support measures is that each state has the fundamental right of access to the international airspace<sup>66</sup>.

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<sup>60</sup> T. Soames, G. Goeteyn, P.D. Camesasca, p. 119.

<sup>61</sup> Lufthansa Politikbrief Informationsdienst für Entscheider in Politik, Medien und Wirtschaft, Staatseingriff ist keine Lösung, September 2004, p. 4.

<sup>62</sup> H. Wassenbergh, The Decision of the ECJ of 5 November 2002 in the “Open Skies” Agreements Cases, *Journal of Air and Space Law* volume XXVIII/1 (February 2003), p. 25.

<sup>63</sup> Lufthansa Politikbrief Informationsdienst, September 2004, p. 4.

<sup>64</sup> H. Wassenbergh, *Journal of Air and Space Law* volume XXVIII/1 (February 2003), p. 25.

<sup>65</sup> Lufthansa Politikbrief Informationsdienst, September 2004, p. 4.

<sup>66</sup> H. Wassenbergh, *Journal of Air and Space Law* volume XXVIII/1 (February 2003), p. 28 and the agreement by the Parties to the Chicago Convention on “equality of opportunity” for them to establish international air transport services: Preamble of the Chicago Convention of 1944.

## 2.6 European aviation market, international dimension

Since the realisation of the internal European market, European air carriers may exercise all eight air freedoms. In practice this means that KLM, for example, making use of its seventh and eighth freedom right may, on the European market, fly freely between Hamburg and Madrid or between Milan and Rome<sup>67</sup>.

However, the Open Skies Agreements exclude exercising the seventh and eighth freedom (cabotage) between Europe and third countries. Countries are, for example, normally not permitted to offer transport services other than those to and from their own country. An exception is formed by the above mentioned Open Skies agreements, granting carriers to operate so called fifth freedom rights between points located in other Open Skies countries. For instance, KLM may fly from Amsterdam via Paris to New York, picking up traffic in Paris. Furthermore, air carriers may not fly between two points inside the territory of the other party. In addition as a result of the nationality clause, only the air carriers designated by the parties under the agreement may fly and aforementioned air carriers must also be owned and controlled by one of the parties. Because of this restriction, it is essential with respect to the Member States that allocation of traffic rights to the own (national) air carriers is monitored because domestic and regional interests are at stake. Precisely because Member States allow their domestic interests to take precedence over the realisation of an international market for civil aviation, defined by free competition, means that bilateral agreements are cherished and that the organisation of the international airspace is far from optimal and efficient. By upholding the nationality clause in the Open Skies Agreements, the Member States are assured that the benefits intended by the agreement are indeed enjoyed by the designated domestic air carrier.

Under the Open Skies Agreement with the United States, European air carriers may only fly from their domestic airports to the United States, save if they make use of the just mentioned Fifth Freedom rights<sup>68</sup>.

The perpetuation of the nationality clause undermines the internal European aviation market. Lufthansa (hereinafter "LH") may, for example, only fly from Germany to the

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<sup>67</sup> A list of freedom rights is included in the appendix, part A, of this thesis.

<sup>68</sup> House of Lords session 2002-03, 17<sup>th</sup> report, Select Committee on the European Union, "Open Skies" or Open Markets? The effect of the European court of Justice (ECJ) Judgements on Aviation Relations Between the European Union (EU) and the United States of America (USA), printed on 8 April 2003, p. 11.

United States, and furthermore may not fly between two points in the United States itself. KLM may not fly between Amsterdam and New York under the Open Skies Agreement between the Netherlands and the United States. ???????? Only the American air carriers profit from this situation. As the United States has concluded Open Skies Agreements with almost all countries, American aircraft may fly to almost all European destinations from all points in the United States<sup>69</sup>. The European air carriers are, in turn, restricted because they may only fly between airports in their own country and all destinations in the United States. Following the judgment of the ECJ, LH can easily have an establishment in The Netherlands. When established in The Netherlands, LH could fly to the United States under the Open Skies Agreement concluded between The Netherlands and the United States (on a so called seventh freedom basis which is not permitted under the current Open Skies agreements).

In spite of what the name “Open Skies” suggests, there is no question of a completely free market under such agreements<sup>70</sup>. For the time being the international aviation market is characterised by restrictions that make free competition impossible.

It is clear that because of the nationality clauses in the Open Skies Agreement, the development of the internal European aviation market cannot get underway. The right of freedom of establishment on the European market is blocked in two different ways. Firstly, LH may not freely decide to move its principal place of business to the Netherlands. Other than is the case with regular businesses where deregistration from the Chamber of Commerce Register in Germany and registration in the Netherlands can quite simply take place, air carriers are almost inseparably attached to their country of incorporation. This is, inter alia, the result of the nationality clause but more so because for decades the national Member States have safeguarded transport rights worldwide for the European carriers. In this respect governments acted as representatives of the interests of their “domestic” air carrier<sup>71</sup>.

Total establishment, in other words, moving the principal place of LH’s business to the Netherlands would mean both the loss for LH of the German nationality and the loss of the right to operate the air routes between Germany and the United States under the Open Skies

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<sup>69</sup> G. Williams, *Airline Competition Deregulation’s Mixed Legacy*, Ashgate Publishing Limited 2002, p. 165.

<sup>70</sup> G. Williams, p. 159.

<sup>71</sup> U. Schulte-Strathaus, *Die Europäische Lufthart in der Zeit nach den “Open Skies” – Urteilen des Europäischen Gerichtshofes*, *Zeitschrift für Luft und Weltraumrecht*, nr. 52, Jahrgang 2003, p. 316.

Agreement because LH does not have the right to operate international air services from points outside German territory.

Secondly, LH may decide to have an establishment in the Netherlands from where it can offer services. In that case LH may retain its German nationality but pursuant to EC law is entitled to open an establishment in the Netherlands. LH can then offer all services on the European market from within the Netherlands. As illustrated, by virtue of the nationality clause this does not apply to international air traffic.

In both situations it must be concluded that it is not advantageous for LH to consider an establishment in the Netherlands or any other Member State. Apart from the question whether it is juridically possible, there are practical problems in both situations outlined (such as, inter alia, the employment of staff in the new Member State, organisation of ground-handling, obtaining landing rights etc.).

Each merger and acquisition involving community air carrier and international networks have been made impossible<sup>72</sup> Mergers are possible, such as is illustrated by KLM and Air France but they come with restrictions. KLM retains its Dutch character and this is necessary to fly from the Netherlands to the United States.

## **2.7 Competition**

Whilst all European air carriers within the European airspace may make unrestricted use of the eight air freedom rights, this is not possible with respect to the international aviation market<sup>73</sup>.

If the Member States are made to relinquish the nationality clause, this could open up significant legal opportunities for all parties involved with the Open Skies Agreements. European Law only binds European countries and is not applicable outside the EU. Third countries cannot be compelled to consent to amendment to the nationality clause in the existing Open Skies Agreements. When European Member States start renegotiations with third states, the other states will wish to take into account commercial interests established over time, before accepting any change. This could weaken the negotiating position of the

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<sup>72</sup> COM/2002/0649 § 35, 36

<sup>73</sup> G.Williams, p.159

Member States vis-à-vis the third states. The objective of the nationality clause is to furthermore make quite clear which domestic law is applicable to the air carrier in agreements entered into with third states. This is vital as far as the practical aspects of air transport, such as, safety, security, passenger claims, aircraft maintenance etc. are concerned. In addition to a European clause replacing the nationality clause, in all agreements with third parties must include a clause stating which national law is applicable to the air carrier.

The Court held that Member States may not discriminate against European air carriers on basis of nationality. This includes activities carried out between Member States and third states. However, it must be borne in mind that article 43 of the EC Treaty only applies to European air carriers and their activities on the internal European market. In cases where these carriers carry out activities with third states on the international market outside the EU, article 43 EC Treaty, in principle, does not apply<sup>74</sup>. This means that the European competition regulations apply in full to European transport sector but that the current regulation fails to offer adequate legal certainty to both the sector and the Member States as the Commission's does not have similar powers with respect to international traffic to and from the EU to effectively uphold the competition regulations as it does with respect to air traffic within the EU<sup>75</sup>. The situation is different if it can be clearly proved that the activities carried out between an EU Member State and a third state impede the working of the internal European market<sup>76</sup>. The relevant Member State is always obliged, also in its dealings with third states, to ensure that its conduct does not impede the working of the internal European market. If this is found to be the case, it can be reprimanded for its conduct by the Commission.

The right of freedom of establishment is guaranteed for European air carriers as long as it relates to air routes within the European market. Should Lufthansa wish to move its principal place of business to another Member State, this is legally possible but we have seen that from an air policy and practical perspective it is almost impossible. The right of freedom of establishment only becomes economically interesting if it is possible for European air carriers to operation from within Europe with respect to international air traffic with third countries. If the impediment caused by the nationality clause was to be removed, the question then to be answered would be how to deal with air carriers from third countries wishing to set up an establishment in Europe. In its judgments dated 5 November 2002, the European Court did

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<sup>74</sup> H. Wassenbergh, A Mandate to the European Commission to Negotiate Air Agreements with Non-EU States: International Law versus EU Law, *Air and Space Law Journal*, Volume 28 (2003) Issue 3, p. 139.

<sup>75</sup> COM/2002/0649, § 26.

<sup>76</sup> H. Wassenbergh, *Air and Space Law Journal*, Volume 28 (2003) Issue 3, p. 139.

not address the possibility of granting non-European air carriers the right of freedom of establishment.

The rights pertaining to the seventh and eighth freedoms have not been agreed in all Open Skies Agreements<sup>77</sup>. This hampers the formation of internationally operating community air carriers. In Europe, other than in the United States, it is not possible to develop fully-fledged hubs for intercontinental traffic<sup>78</sup>.

This would change if the Member States could succeed in replacing the nationality clause with the European clause in their Open Skies Agreements with third states. European air carriers would then be entitled to fly from any airport in the EU to the United States and other third states. This could bring about an increase in scale and efficiency gains. Liberalisation leads to more competition and to restructuring, which means that the less-efficient companies will go under. European air carriers with the same basis of operation as their American counterparts are those that will remain. Consequently, the inequality in the competition relationship with the United States is neutralised.

Before this is reached an internal line of resistance within Europe must be overcome. Member States with a weak aviation position will not wish to subject their air carriers to a tough competitive struggle<sup>79</sup>. One option for weak domestic air carriers to avert ruin is to enter into the so-called 'cross-border inter-carrier' alliances<sup>80</sup>. Further liberalisation has led to an increased number of international alliances and other forms of co-operation involving community air carriers and air carriers from third countries. It is envisaged that, also in Europe, such alliances will increase. European aviation could also develop in the direction of hubs and feeders. This would guarantee the efficient organisation of intercontinental air traffic.

European air carriers must pool their resources, not every Member State has its own air carrier. They form alliances in order to better compete with their American competitors. From an economic perspective, it is no longer viable for countries to each have their own air carrier. KLM understood this and has found its partner in Paris. If countries do not exploit and stand by their traditional relationship with aviation they fail to make use of the advantages and the Americans could well profit from this.

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<sup>77</sup> Appendix, part A.

<sup>78</sup> COM/2002/0649, § 35.

<sup>79</sup> H. Wassenbergh, p. 139.

<sup>80</sup> H. Wassenbergh, p. 143.

## 2.8 Societas Europaea

In its judgment dated 5 November 2002, the Court found that the nationality clauses included in these agreements contravened Article 43. However, in the same judgment the Court fails to rule for or against one of the two theories but restricts itself to a ruling of voidness with respect to the clauses upheld by the Member States.

A possibility, which may also be advantageous to the aviation section, is the incorporation of the Societas Europaea (SE). Initially, it was considered to be a new legal entity under private law that would be wholly governed by Community Law and thus would introduce uniform regulations for all aspects of the SE<sup>81</sup>

This supranational idea of a company limited by shares was departed from as there was discord amongst the Member States<sup>82</sup> In 1993, Huiskens describes the SE as a “chameleonic” legal form that changes legal colour to suit the company seat country<sup>83</sup> During an extra meeting held by the Council for Employment and Social Affairs on 20 December 2000, the relevant EU Ministers reached agreement on two issues concerning the European company package, to wit, the Directive 2157/2001<sup>84</sup> and Directive 2001/86/EG<sup>85</sup>. The debate on whether or not to uphold the company seat or incorporation principle is brought to a close by this Directive because the European company regulation uses the doctrine of the real seat as a basis. Article 7 of the Directive stipulates that the statutory seat of the SE must be within the Community in the same Member State as the Management Board. This means that the incorporation of a European company is only possible in the country where the Management Board has its seat. In addition, Article 15 stipulates that the incorporation of the SE is also governed by the national company law of the state where the SE has its statutory seat.

The advantage of this Societas Europaea with respect to the right of freedom of establishment is that choice whether to apply the company seat or incorporation principle is

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<sup>81</sup> J. de Koning, *De Europese vennootschap, Onderneming & Maatschappij op zoek naar vertrouwen*, Koninklijke Van Gorcum, 2003, p. 236

<sup>82</sup> J. de Koning, p. 236

<sup>83</sup> C. Huiskens, *De Europese Vennootschap: Enkele beschouwingen omtrent het ontwerp-statuu (1991) voor een Europese vennootschap*, Tjeenk Willink, Zwolle, 1993.

<sup>84</sup> Council Directive 2157/2001 of 8 October 2002 relating to the statute of the European company.

<sup>85</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the statute of the European company with respect to the role of the employees.

no longer left to the Member States. Nationality criteria also need no longer be formulated because the nationality of the air carrier is clear and ensues from its statutory seat. All uncertainty to date associated with the actual exercise of the right of freedom of establishment has been removed.

## Conclusion

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From case law and the Commission's communications it is clear that European Law on free establishment is not as self-evident for undertakings as at first sight it would seem. The actual interpretation of this law is partly provided by EC Directives, but for another crucial part it is still dependent on national legislation. Given that there is no question of harmonised national company law, the criteria applied for interpretation of the right of freedom of establishment differ. The company seat principle and the incorporation principle have an equal number of supporters in the European Community and, in practice, they both have advantages and disadvantages. With respect to establishment, the ECJ case law has not ruled for or against one of these theories and as a result there is still uncertainty.

Given that the granting of nationality to air carriers remains dependent on domestic company law and the national underlying principles apply, the continuity of the bilateral agreements concluded between the Member States and third countries is uncertain.

It has been pointed out that the nationality clause used by Member States when concluding Open Skies Agreements with third states, contravened article 43 EC and as a consequence, hampers the formation of international operating community air carriers.

Not only do countries and air carriers suffer from the economic consequences of increasing liberalisation in aviation. Ultimately the consumer profits the most from the competitive warfare. The economic advantages that should be yielded by the aviation market do not manifest themselves in the current situation as they are encumbered by bilateral treaties. The Court's judgement has reanimated the discussion at international level on the further liberalisation of the international aviation market.

Whatever happens, new agreements must be reached that will undoubtedly lead to a new economic balance of power in aviation. Some air carrier will cease to exist or lose their independence; others will be able to offer flights on a market that had previously been closed to them. On balance, the more offerors, the better for the consumer and the liberalisation policy would have achieved its goal.

## Part A: Freedoms of Air

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### **First Freedom**

To overfly one country en-route to another.

Ex.: NW flies over Germany from Boston to Moscow.

### **Second Freedom**

To make a technical stop in another country.

Ex.: NW makes a stop for fuelling purposes in Reykjavik on a flight between Boston and Amsterdam.

### **Third Freedom**

The carriage of traffic (passengers and cargo) from the home country of the airline to another country.

Ex.: KLM carries traffic from Amsterdam to Detroit.

### **Fourth Freedom**

The carriage of traffic to the home country from another country.

Ex.: KLM carries traffic from Detroit to Amsterdam.

### **Fifth Freedom**

The carriage of traffic between two foreign countries by an airline of a third country, which carriage is linked with third and fourth Freedom traffic rights of the airline.

Ex.: NW operates a service originating in Boston to Amsterdam, and then on to New Delhi, picking up traffic in Amsterdam with destination New Delhi.

### **Sixth Freedom**

The carriage of fifth Freedom traffic between two foreign countries via the home country of the airline.

Ex.: KLM carries traffic originating in Munich via Amsterdam to Boston.

### **Seventh Freedom**

The carriage of traffic between two foreign countries by an airline of a third country, which carriage is not linked with third and fourth Freedom traffic rights of the airline.

Ex.: NW carries traffic between Frankfurt and Rome on a service, which is unrelated to a point in the US.

### **Eight Freedom**

The carriage of passengers cargo between two points in a foreign country on a route with origin and/or destination in the home country of the airline.

Ex.: KLM carries traffic between Boston and Detroit, on a flight Amsterdam-Boston-Detroit.

### **Ninth Freedom**

The carriage of passengers and cargo between two points in a foreign country on a route, which is unrelated to the home country of the airline.

Ex.: NW carries traffic between Hamburg and Munich on a service, which is unrelated to a point in the US.

Source:

P. Mendes de Leon, Before and After the Tenth Anniversary of the Open Skies Agreement Netherlands-US of 1992, *Journal of Air and Space Law*, volume XXVIII/4/5 September 2002, p. 313, 314.

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