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THE IMPACT OF EU MEMBERSHIP ON IRELAND'S SOVEREIGNTY OVER ITS AIRSPACE AND THE IMPLICATIONS FOR GOVERNMENT REGULATION OF THE IRISH AIR INDUSTRY.[1]

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A INTRODUCTION

Ireland's accession to the European Union has had a substantial impact on Ireland's sovereignty over its airspace. EU membership brought about a profound change in the character of the Irish constitutional and legal order. Arising from the doctrine of the supremacy of EU law, the provisions of the Constitution may not be invoked to invalidate EU legislation and where a conflict arises between EU law and domestic law, the domestic provision must be disapplied. The dramatic change triggered in Ireland's constitutional arrangements by EU membership has had far-reaching effects and has substantially ousted Ireland's competence in the regulation of air law. The Community is empowered by Article 80 paragraph 2 of the EC Treaty to assume responsibility in relation to the regulation of aviation matters and, by virtue of Article 94, the Commission is entrusted with the necessary powers to unify technical standards and regulations throughout the Community. Two major initiatives by the institutions of the European Union have had profound implications for the Member States with respect to the regulation of air law. The first involved the proceedings brought before the ECJ by the Commission against eight Member States resulting in the 'Open Skies' judgment, the effect of which was to invalidate certain provisions in bilateral air services agreements between Member States and the US. The second was the decision by the European Union to negotiate an Open Aviation Areas Agreement with the United States with the aim of bringing about liberalisation in the air transport market between the US and the European Union. In this article, it is intended to demonstrate that, despite the apparent diminution in Ireland's law-creating competence that has taken place arising from these initiatives, Ireland's membership of the EU has, in fact, had the paradoxical effect of removing constraints which inhibited the development of its aviation industry, facilitating the replacement of outdated, anti-competitive regulatory structures with open market economic models enabling the indigenous aviation industry to restructure and prosper.

B CONCEPT OF SOVEREIGNTY OVER AIRSPACE

A state's national airspace has been interpreted as referring to the three-dimensional portion of the atmosphere which extends horizontally over a state's physical land-mass and the coastal areas reaching to a 12 mile outward limit. The concept of a nation's sovereignty over its airspace is the creature of customary international law.[2] Developed as an analogue to

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[1] See generally ICAO CD-Rom World's Air Services Agreements; Jacob Schenkman *International Civil Aviation Organisation* (E Droz Geneva 1955); Brian Havel *In Search of Open Skies* (Kluwer Law International The Hague 1997); PS Dempsey *European Aviation Law* (Kluwer Law International 2004); A Dukes & F Sorensen *EU/US Air Transport Agreement – Potential Impact on Ireland* (Dublin Chamber of Commerce/Air Transport Users Council); House of Commons Select Committee on Environment, Transport and Regional Affairs 18th Report *Air Service Agreements between the United Kingdom and the United States.*

[2] The International Civil Aviation Organisation divides airspace into seven different classes, designated alphabetically from A to G. Classes A to E represent controlled airspace whilst classes F and G describe areas in uncontrolled airspace. Controlled airspace refers to the regions of airspace which are subject to air traffic

Grotius's notion of a state's right to exercise sovereignty over its territorial waters, the concept became entrenched during World War 1 as European States shut down their aerial borders to protect their citizens from aerial bombardment by enemy forces. A corollary of the recognition of a nation's sovereignty over its airspace was the right of a host state to exclude another state's aircraft from its airspace. Thus, an aircraft was not entitled as of right to cross another state's airspace; authorisation had to be sought from the host state before an aircraft could exercise a right of passageway through its airspace. Up until 1919 Ireland exercised complete and exclusive sovereignty over its airspace.

The first inroad into Ireland's sovereignty over its airspace occurred as a result of its decision to become a party to the International Air Convention, adopted at the Paris Peace Conference in 1919. Chapter 1 of the Convention, entitled 'General Principles,' deals with the issue of sovereignty in relation to airspace. Article 1 provides that '[t]he High Contracting Parties recognise that every power has complete and exclusive territory over the air space about its territory.' Conditioning the position, Article 2 provides that 'each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States … ' The encroachment into States' national airspace envisaged by Article 2 was very slight, being confined to mere passage, and did not extend to permitting aircraft to land for refuelling or for taking on or discharging passengers.

The United States, a major pioneering player in the sphere of aeronautical experimentation, had not ratified the Paris Convention.[3] The flight and operation of aircraft in the Americas was governed by an alternative air law regime – the Havana Convention[4] – which, upon receiving ratification by the requisite number of States, entered into force in 1928. The existence of two air law regimes, codifying potentially conflicting rules of air law was liable to cause uncertainty and confusion among administrators involved in applying the rules of international air law. Jurists, disconcerted by the development, advocated a reforming measure, entailing displacement of the two disparate regionally-based air law regimes by the prescriptive coherence of a single unified aeronautical framework.[5]

In 1944, the United States, in a bid to internationalise the challenge of creating a system of air law, called an international conference in Chicago for the purpose of devising an international regulatory framework. The efforts of the participants resulted in the 'Convention on International Civil Aviation,' ('the Chicago Convention') which, on 7 December 1944, was signed by fifty-two states. Chapter 1 of the Convention reaffirms the principle that every State has complete and exclusive sovereignty over the airspace above its territory. Chapter II prescribes rules for flight over territory of contracting states. Each contracting state is accorded the right, in respect of non-scheduled flights, to make flights into or in transit non-stop across the territory of another contracting state, and to make stops for

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control. By contrast, in uncontrolled airspace, air traffic control has no executive function, merely a possible advisory role. In deciding on the use and allocation of its airspace, a state's regulatory authorities may sub-divide the airspace into zones of defined dimensions, and assign specified operational activities to those zones.

[3] The United States had not become a member of the League of Nations and, therefore, the possibility of its becoming a party to the Convention Relating to the Regulation of Aerial Navigation Convention did not arise.

[4] Officially designated the Pan American Convention of Commercial Aviation, the 'Havana Convention' was the creature of a Pan American Conference held in Chile in 1923, the central mission of which was to construct an air law regime contoured to the specific needs of the States of the Western Hemisphere. See Duane W Freer *Special Series* ICAO Bulletin June 1986 <http://www.icao.int/cgi/goto_m.pl?icaonet/arch/index.html> (1 July 2009).

[5] Duane W Freer *Special Series* June 1986 'Regionalism is Asserted, ICAN's Global Prospects Fade 1926 – 1943' 41(6) ICAO Bulletin 66-68 <http://www.icao.int/cgi/goto_m.pl?icaonet/arch/index.html> (1 July 2009).

non-traffic purposes without prior permission. In respect of aircraft engaged in the carriage of passengers, cargo, or mail, the carrier will also have the privilege - subject to the right of the host state to impose conditions - of taking on or discharging passengers, cargo or mail. By contrast, with respect to scheduled air services, permission or authorization is required before such services may be operated over or into the territory of a contracting State. Each contracting State has the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo in the course of a contract of carriage for remuneration or hire and destined for another location within its territory.[6]

The Chicago Convention, thus, rehabilitates the doctrine of a state's sovereignty over its airspace, enabling states to raise aerial frontiers to ensure that, in the context of commercial aviation, the allocation of traffic rights in national airspace is strictly controlled. In tandem with the Convention on International Civil Aviation, the participants at the Chicago Conference negotiated two separate documents, each one specifying the substance of different dimensions of the freedoms of the air. The International Air Services Transit Agreement,[7] which is restricted in its application to scheduled international air services, enshrines two 'technical'[8] freedoms of the air. The rights granted are: (i) to overfly the territory of a Contracting State without landing; and, (ii) to stop in the territory of a Contracting State for refuelling or maintenance on the way to another, without transferring passengers or cargo. The International Air Services Transit Agreement (IASTA) entered into force on 30 January 1945 and, as of 2007, has 123 adherents. Ireland, by virtue of deposit of its notification of acceptance on 19 November 1957, has become a party to the Agreement.

Unlike the IASTA - which is a multilateral arrangement - the International Air Transport Agreement, defining a bundle of five diverse freedoms for scheduled international air service providers, is negotiable between individual states.[9] In addition to incorporating the two freedoms the subject of the IASTA, the International Air Transport Agreement also creates a further three freedoms of the air. The additional rights granted are: (iii) the right to carry passengers or cargo from one's own country to another; (iv) the right to carry passengers or cargo from another country to one's own; and, (v) the right to carry passengers from one's own country to a second country, and from that country to a third country.

By contrast with the 'Two Freedoms Agreement,' only a small minority of States endorsed the 'Five Freedoms Agreement;' its failure to attract a larger number of adherents is attributable to a multiplicity of logistical, technical and economic issues raised by the prospect of granting 'fifth freedoms' rights to all the other Contracting States.[10]

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[6] The right to operate commercial air services within the territorial boundaries of another state is known as 'cabotage'. Regulating the exercise of cabotage has been widely exercised in the global aviation industry though recent developments in the EU context have raised the prospect of the emergence of a 'Single European Sky.'

[7] ICAO Doc 7500.

[8] The rights are so-called 'technical' rights as they are exercisable for reasons not connected with the transport of passengers, cargo or mail.

[9] The United States, a staunch advocate of the freedom of the airs and open competition, was the sponsor of the Five Freedoms Agreement (as it became to be known) which was designed to promote a multilateral exchange of traffic rights. As Havel notes '[a]fter the failure of the Five Freedoms Agreement to prompt a multilateral exchange of rights of access, the bilateral treaty developed as the principal diplomatic and political vehicle for these trades.' See B Havel *In Search of Open Skies* (Kluwer Law International The Hague 1997) 39, n 40.

[10] See ICAO '*Proceedings of the International Civil Aviation Conference*' <http://www.icao.int/icaonet/arch/chicago/conf_proceed.html> (1 July 2009).

By becoming a contracting party to the International Air Services Transit Agreement, Ireland has accepted an inroad into its law-creating competence with respect to use of its airspace, a development which has impacted, in particular, on its ability to exploit its strategic/geographic position at Shannon Airport as a stop-off point on North Atlantic routes. By contrast, in opting not to ratify the International Air Transport Agreement, Ireland has preserved discretion on the issue of regulating use of its airspace for commercial exploitation by airlines of other States. Following the example of the United States and Great Britain, Ireland has adopted the device of the bilateral air services agreement to regulate the allocation of traffic rights in its airspace, utilising its sovereign prerogatives to both define the rights and privileges to be accorded to other States and also to designate the airlines to be permitted to exercise those rights and privileges. By skilful drafting and deployment of individually tailored air services agreements the State has succeeded in producing finely-tuned air regulatory structures to underpin it in the pursuit of its strategic objectives for the aviation sector.

C BILATERALISM – THE BERMUDA AGREEMENTS

In February 1946, the United States and Great Britain concluded a commercial air agreement, - the 'Bermuda Agreement'[11] - which, codifying a flexible framework for exchange of air traffic rights between the two States, was to provide a template for other States seeking criteria for the formulation of air services agreements. Bermuda 1 – as it came to be known – embodied a liberal framework for the exchange of air traffic rights, which neither attempted to fix the frequency of flights on prescribed routes nor prohibit multi-designation of airlines to provide services on the routes. As Havel notes:

> While not a wholesale suppression of state intervention, Bermuda 1's omission of rigid anterior controls over capacity reflected the flexibility sought by the Bermuda negotiators, who hoped to accommodate both American expansionism and British protectionism in the same regulatory formula.[12]

Faithful to its ethos of promoting equity between the parties, the Final Act of the Bermuda Conference provides that each contracting state should have a 'fair and equal opportunity' to operate the agreed international services[13] and that

> [I]n the operation by the air carriers of either [g]overnment of the trunk services described in the Annex to the Agreement, the interests of the air carriers of the other [g]overnment shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes.[14]

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[11] Officially designated *Agreement between the government of the United Kingdom and the government of the United States relating to Air Services between their respective Territories* Bermuda 11 February 1946.
[12] *Havel* (n 1) 42.
[13] (n 13) para 4.
[14] ibid para 5.

By focussing on individual rights and equality of opportunity, the agreement has imposed a straitjacket on the development of commercial aviation resulting in artificial configuration of traffic access rights, allocative-inefficiency, high prices and restriction of consumer choice.

The successful conclusion of the Bermuda Agreement prompted the decision of the United States to withdraw from the International Air Transport Agreement, an initiative which led other States to also denounce the Agreement. The decision of the United States to jettison the Five Freedoms Agreement was undoubtedly a retrograde step, forcing states to exchange traffic rights within a schematic bilateral template in which the three incidents of commercial aviation – fares, access and capacity – would define negotiations and foster the development of anti-competitive regulatory models which would inhibit the growth of international aviation.

The Bermuda 1 Agreement regulated the commercial aspects of aviation between the Contracting States of the Chicago Convention until the 1970s spawning a vast progeny of bilateral air services agreements. Envisaged by the United Kingdom as a vehicle for curbing the financially and politically more powerful United States - which if unconstrained, would be in a position to impose its will on a fledgling air transport industry - it became clear that the Agreement was, in fact, working to the disadvantage of the United Kingdom.[15] In 1977 a revised air services agreement, Bermuda II,[16] was adopted. The renegotiated Bermuda Agreement was a highly restrictive agreement which, as Havel notes, '[replaced] Bermuda 1 style *ex post facto* consultation and compromise [with] a new regime of regulatory architecture where virtually all of the restrictions were negotiated and codified in the treaty itself.'[17] The distinguishing features of the new regime were the imposition of capacity controls on designated routes and, on certain routes, the replacement of multiple designations by monopolies and duopolies. The Bermuda II Agreement, thus, entrenched the 'directive, protectionist and competition restrictive policies'[18] of Bermuda I posing further challenges to the proponents of free trade in opening up air transport to the unbridled forces of competition.

D IRELAND'S AIR SERVICES AGREEMENTS[19]

Ireland's Air Services Agreements constitute the cornerstone of its economic framework for regulating the commercial aspects of civil aviation. The State is a party to a large number of air services agreements the majority of which comprise bilateral arrangements involving other sovereign States and which define the rights and privileges exchanged between the contracting States. Adopting the model Bermuda 1 Agreement as its template, the State has succeeded in crafting panoply of bilateral air service instruments, each instrument individually fine-tuned to dovetail with the exigencies of Irish commercial reality and enabling the State to exercise regulatory control over the granting of privileges in its airspace.

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[15] Airlines in the United States had become disproportionately powerful, deriving large profits from their exclusive monopoly over the US domestic airline market. In the 1960s, US airline companies, spawning the so-called 'hub and spoke' system, had developed trans-Atlantic services from 'gateway' airports in the US linking the services with feeder flights from numerous cities around the United States.

[16] Officially designated *Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the United Kingdom concerning Air* Services, Bermuda, 23 July 1977.

[17] *Havel* (n 1) 46.

[18] Report of *Comité des Sages* cited by *Havel* (n 1) 28.

[19] See generally (n 11).

Socio-economic factors have shaped Ireland's air transport policy. Ireland is a small island state which, at the time of independence, was blighted by a very weak economy. In order to enable its nascent air industry to develop an infrastructure and to become profitable, the State opted for aggressively protectionist policies. In the absence of a tightly controlled regulatory architecture enabling the State to calibrate the interplay of the three variables of commercial aviation - route access, fares and capacity - the fledgling industry would have been swamped by powerful UK and US competitors. Ireland's evolving air transport policy, as manifested by a graduated and increasingly liberal extension of use of its airspace to foreign airlines, parallels the state's progression towards economic prosperity. Originally agrarian in character, Ireland's economy has changed and diversified. A solid industrial base now exists which has boosted economic growth, generated wealth for the people and created high levels of employment.[20] International air transportation, involving movement of input factors to nodes of production and distribution of manufactured goods to ultimate markets, is an indispensable ingredient in Ireland's policy of promoting industrial expansion and entrepreneurial initiative.

The historical evolution of Ireland's bilateral Air Service Agreements records a progressive erosion of a protectionist ethos - primarily designed to protect the 'stop-over' status of Shannon Airport - towards acceptance of the dictates of market forces, a development which has recently culminated in the Irish State's commitment to end Shannon's stop-over status by 2008. With respect to commercial regulation, the State has effectively converted the bilateral air services agreement into a carefully calibrated tool of economic planning which, in conjunction with other elements of the States' dedicated Business Plans for the development of Irish aviation, has facilitated the State in promoting its strategic goals of building a dynamic requirements-driven, results-oriented air transport industry.[21]

E THE EUROPEAN UNION – DIVISION OF COMPETENCE IN AIR TRANSPORT MATTERS BETWEEN MEMBER STATES AND THE EUROPEAN UNION

The Treaty of Rome, which gave birth to the European Economic Community, contains provisions empowering the Community to prescribe regulation for the governance of international transport, specifically directing the Council to formulate measures in the context of a single trade policy. The relevant provisions – applicable to transport by rail, road, waterway and air – are contained in Title IV of the Treaty. The European Court of Justice has held that whilst Article 84(2) of the Treaty does not establish an external Community competence in the field of air transport, it does make provision for a power for the Community to take action in that area albeit one that is dependent on there being a prior decision by the Council. The Court further held that the Community's competence to

[20] According to Dukes and Sorensen (n 1) 26: 'After a decade of sustained economic growth, employment in Ireland in 2004 was higher than at any time since the foundation of the State. Irish living standards exceed the EU average. Government indebtedness has been reduced from the highs of the 1980s and now ranks second lowest in the euro-zone…The *Medium-Term Review 2003-2010*, carried out by the Economic and Social Research Institute (ESRI) projected an average annual GNP growth of 5.4% for the Irish economy in the second half of this decade.'

[21] 'Cullen announces a new Ireland Canada Air Transport Agreement' issued by Department of Transport 28 April 2007; Statement 'Plans by Aer Lingus or other carriers to close down existing services or open new air routes in the future with particular reference to both long and short haul services' Dáil Debate 13 May 2008.

conclude international agreements arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted within the framework of those provisions by the Community institutions. A consequence of this principle is that the exclusive external competence of the Community, arising by virtue of the adoption of internal measures, also has application in the context of Article 84(2) of the Treaty which confers upon the Council the power to decide 'whether, to what extent and by what procedure, appropriate provisions may be laid down' for air transport, including, therefore, for its external aspect. Drawing on and affirming its earlier jurisprudence, the Court asserted that the competence of the Community's institutions in the area of transport arises from the parallelism of internal and external rules and to the extent that common rules had come into being in relation to any aspect of transport, the competence of Member States to negotiate bilateral agreements was correspondingly attenuated. However, the Court pointed out that not all transport matters are covered by common rules and a correct identification of the internal rules in relation to air transport would, at the same time reveal the residual competences reserved to Member States.[22]

F EU TRANSPORT LEGISLATION

Reflecting the Community's aims of harmonising Member States' social and economic policies, Articles 74 to 84 of the Rome Treaty codify a framework to underpin the work of the Council in formulating rules applicable to international transport to or from the territory of a Member State and in specifying conditions may operate transport services. The paramount objective of the Treaty Articles, with respect to air transport in the Community, is to prohibit discrimination manifesting itself in the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods in question. EU air transport legislation today is a hybrid instrument sourced in a labyrinth of regulations, directives and court decisions and encompassing subject-areas as diverse as economic policy, air traffic management, environmental matters, passenger protection and safety and security. In addition to codifying a legislative and regulatory framework for the law-creating organs of the Community, Treaty Articles have also been invoked by the European Commission in support of claims against Member States operating in breach of the Community's air law provisions.

1 The Three Air Transport Packages

Before 1987 the aviation markets in the European Union were nationally regulated and designed to protect the Member States' indigenous aviation industries. Taking cognisance of the fact that the Treaty articles governing competition are applicable to air transport, the Council of the European Commission in the years between 1987 and 1993, adopted a series of 'packages' aimed at removing constraints on the development of the air transport sector. The first[23] and second[24] packages were introduced in 1987 and 1990

[22] *Commission of the European Communities v Republic of Austria* ECJ (5 November 2002) et al, Case C-466/98; Case C-467/98; Case C-468/98; Case C-469/98; Case C-471/98; Case C-472/98; Case C-475/98; Case-C 476/989.

[23] First package comprised three regulations Commission Regulation 2671/88; Commission Regulation 2672/88; Commission Regulation 2673/88.

respectively, initiating various changes touching on, inter alia, air fares and capacity. The 'third package' of measures, introduced in 1993,[25] marked a high-water mark in the curve of economic liberalisation, intending to develop a bundle of freedoms equating to 'cabotage' rights. The package comprised three legislative measures, the most significant of which was Regulation No 2408/92 requiring Members States to grant access to Community carriers to intra-Community air routes falling within Member States' national boundaries. Freedom of air carriers to fix air fares, both in respect of chartered and scheduled flights, was introduced by Council Regulation 2409/92 eliminating the requirement on air carriers to secure approval for their air fare structures from the national regulatory authorities.

2 Competition Law / The 'Open Skies' Judgments

The Open Skies Judgments refer to a series of judgments handed down by the Court of Justice on 5 November 2002 arising from proceedings initiated by the European Commission against eight EU Member States, the effect of which was to invalidate certain provisions in bilateral air services agreements concluded by the eight States with the United States.[26] The Court of Justice ruled that the 'nationality' clauses in the eight air services agreements which accorded traffic rights solely on foot of the carrier's nationality constituted an infringement of Article 52 (now, after amendment, Article 43) of the EC Treaty which prohibits restrictions on the freedom of nationals of a Member State to become established in the territory of another Member State.

In the Commission's case against seven of the eight Member States,[27] the Court found that, by entering into international commitments concerning fares and rates to be charged by carriers of non-member countries on intra-Community routes, the States had encroached on the exclusive competence of the Community arising by Regulation No 2409/92 which prohibits air carriers of non-member countries which operate in the Community from introducing new products or fares lower than the one existing for identical products.

Similarly, the Court ruled that provisions in the 1995 Air Services Agreements of the same seven Member States with the United States in relation to the use by the United States of Computer Reservation Systems in those States had again infringed an exclusive competence of the Community arising by virtue of Regulation 2299/89,[28] which confers on the Community an exclusive competence to contract with non-member countries in relation to the use of CRSs in its territory.

The judgments of the Court of Justice have profound implications not only for the eight Member States involved in the 'Open Skies' litigation but also for all Member States who have negotiated bilateral air services agreements with third countries. Arising from Article 10 of the Treaty, which requires Member States to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by

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[24] Second package comprise two directives Council Directive No 87/601/EEC (OJ 1987 L 374/12) and Council Decision No 87/602/EEC (OJ 1987 L 374/19).

[25] Third package comprised three regulations Commission Regulation 2407/92; Commission Regulation 2408/92; Commission Regulation 2409/92.

[26] Case C-466/98; Case C-467/98; Case C-468/98; Case C-469/98; Case C-471/98; Case C-472/98; Case C-475/98; Case-C 476/989.

[27] The United Kingdom was not found to have breached the exclusive external competence of the Community.

[28] Community Regulation 2299/89 introduced a code of conduct for computerized reservation systems.

the institutions of the Community, Member States upholding ASAs which infringe EU law are required to denounce the agreements in order to ensure compliance with the Judgments of the European Court. It is clear that Ireland's web of bilateral air services agreements, variously containing provisions touching on ground handling, price leadership and ownership and control, are repugnant to EU law, as clarified by the ECJ in the 'Open Skies' Judgment. Ireland is, therefore, necessarily, placed under an obligation to bring her ASAs into line with EU law.

G RELATIONS WITH THE UNITED STATES

In April 1995, the Commission sought a mandate from the Council to negotiate an air transport agreement with the United States.[29] In June 1996, the Council, on foot of the request, made a decision to grant the Community a limited mandate to negotiate with the United States in relation to defined issues, namely, competition rules, ownership and control of air carriers, CRSs, code-sharing, dispute resolution, leasing, environmental clauses and transitional measures.

On 22 March 2007, the European transport ministers unanimously endorsed a first stage air transport agreement between the EU and the United States of America. The EU-US aviation agreement is intended to create a new economic model for international aviation converting the aviation industry into a global enterprise responsive to normal economic forces. Entering into force on 30 March 2008 the Agreement will govern sixty per cent of world air traffic and will generate benefits for passengers, economies and airline operators.

The traffic rights exchanged between the US and the EU in the context of the Agreement include the right for airlines of the United States to perform air transportation from points behind the United States via the United States and intermediate points to any point or points in any Member State and beyond and for airlines of the European Community to perform air transportation from points behind the Member States via the Member States and intermediate points to any point or points in the United States and beyond. The parties are further empowered to operate flights in both directions, to combine different flight numbers within one aircraft operation, to serve behind intermediate and beyond points and points in the territories of the parties in any combination and in any order, to transfer traffic from any of its aircraft to any of its other aircraft at any point and to combine traffic on the same aircraft regardless of where such traffic originates. The Agreement, embodying conditions for exercise of the new freedoms, provides that each party must permit each airline

[29] In the early 1990s, the Commission had launched a number of initiatives to secure mandates from the Council to negotiate air transport agreements with a view to replacing Member States' Air Services Agreements with EU/USA agreements. The first application for a negotiating mandate was lodged on 23rd February 1990 and was based on a proposal for a consultation and authorisation procedure for agreements in relation to commercial aviation relations between Member States and third countries. Reflecting the view of the Commission that the conclusion of international air transport agreements fell within the scope of commercial policy, the proposal was based on Article 113 of the EC Treaty (now, after amendment, Article 133 EC). A second request, based on a slightly modified proposal and, once again, framed with reference to Article 113, was lodged with the Council on 23 October 1992. Both applications were refused, the Council citing the following grounds for its decision: (i) Article 84(2) constituted the proper legal basis for the development of an external policy on aviation; (ii) Member States retained their full powers in relations with third countries in the aviation sector, subject to measures already adopted or to be adopted by the Council in that domain and (iii) negotiations at Community level with third countries could be conducted only if the Council deemed such an approach to be in accordance with the common interest, on the basis that they were likely to produce a better result for the Member States as a whole than the traditional system of bilateral agreements

to determine the frequency and capacity of the international air transportation it offers based upon market considerations and must, in consequence, refrain from unilaterally limiting the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other party.

H IMPLICATIONS OF EU MEMBERSHIP ON IRELAND'S REGULATION OF ITS AVIATION INDUSTRY

The impact of EU regulation on air transport in Ireland will be discussed under three headings; (1) fares, capacity and route access; (2) the removal of national ownership and control provisions in ASAs; and, (3) the EU/US Free Trade Area.

1 Fares, Capacity and Route Access

The EU liberalizing packages have promoted an open trading environment in which air carriers are now free to fix fares and to undercut competitors. The combined effect of the measures has been to force national flag carriers to reduce operating costs, resulting in lower prices for the consumer. The process of restructuring has put considerable pressure on Ireland's national flag carrier, Aer Lingus, forcing it to adopt a range of stringent economic measures in order to become competitive. However, the net effect of the reforms has proved beneficial for the airline as, in the absence of the restructuring measures it has been forced to implement, it is unlikely that the airline would have weathered the global recession which occurred in 2000-2002. It is significant that the Irish-based carrier, Ryanair, rose to prominence during the EU liberalisation process; the economic recession in 2002 affording it the opportunity to consolidate itself as a leading low cost carrier.

The liberalizing measures have, as predicted, fostered the formation of alliances between flag carriers, a development which poses a threat to competition principles potentially affecting airfare structures. However, the entry into the market of low cost carriers, facilitated by the liberalization process, has counteracted the effects of consolidation. Ryanair and Easyjet are diversifying Ireland's air services and have succeeded in deepening their penetration of the traditional markets of the flag carriers. Low cost carriers now account for over 50% of the air transport market in Europe.[30]

The combination of Ireland's increasing economic prosperity and the liberalising measures adopted by the European Union have facilitated a situation where passenger throughput at Irish airports rose exponentially after 1993, more than doubling in the period 1993-2002.[31] Additionally, in the period 1990 to 2002, the route structure of the Irish aviation industry expanded and diversified. In 1990, carriers from Dublin airport flew to 46 destinations; by 2002, the number had reached 67. Domestic flight destinations in Ireland jumped from three to nine. In the period 1992 to 2002, the number of flight destinations from Shannon Airport rose from 15 to 23.[32]

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[30] *Dukes & Sorensen* (n 1) 9.
[31] ibid 28.
[32] ibid.

2 Effective Ownership and Control

The finding by the ECJ that the effective ownership and control provisions in ASAs infringed EU law (thereby necessitating their removal), has removed a major constraint which has impeded the development of international aviation. As Havel observes; '[t]his chauvinistic preference for national ownership has had a significant corollary that sets airlines apart from most other transnational economic enterprises: they have not become multinational corporations.'[33] The ownership/control provisions effectively precluded the possibility of cross-border investments, mergers and acquisitions. The ECJ judgement has created a new range of possibilities for the way in which airlines are owned and controlled. An example of how Ireland has benefitted from the new liberal regime is that Aer Lingus has, for the first time, established a base outside of Ireland. The airline announced in August 2007 that it intended to base three new aircraft at Belfast International Airport and launch eight new routes including Amsterdam, Rome, Geneva, Budapest and Malaga.

3 US/EU Open Aviation Area

The authors of the Brattle Report[34] summarised the economic benefits arising from a projected EU/US Open Aviation Area. The various points made by the authors are highlighted below followed by an analysis of how the open aviation market has enabled the Irish aviation industry to restructure and achieve expansion.

(a) More efficient airlines would replace less efficient ones, or less efficient airlines would adopt the practices of more efficient ones, leading to significant costs savings and industry efficiency.

It has already been noted that the EU liberalizing packages had forced Aer Lingus to restructure and become an efficient industry operator, developing itself into a cost-efficient point-to-point carrier. The airline company, in the intervening years expanded its route structure, developing 48 new routes, its unprecedented achievement prompting its decision to leave the One World Alliance (OAA), whose percentage of flights fell from 14% to 7% between 2002 and 2006. In the wake of the conclusion of the OAA, Aer Lingus in March 2007, announced its intention to introduce additional long-haul flights to the United States and later that year commenced flights to Orlando, San Francisco and Washington DC. As part of its ongoing commitment to reducing costs, Aer Lingus in 2008, embarked on a cost-saving programme to reduce its payroll by €50 million, the measures adopted included the laying off of 1500 workers, cutting back on expenditure on advertising, distribution, airport costs and professional fees and the outsourcing of ground operations, cargo and catering services.[35]

(b) Industry restructuring and consolidation would provide air carriers with opportunities to exploit size-related economies, leading to further efficiency gains.

Discussions on inter-carrier mergers and take-overs have already taken place, British Airways declaring an interest in acquiring KLM and Swissair expressed a similar interest in

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[33] *Havel* (n 1) 63.

[34] The European Commission requested the Brattle Group to undertake a study into the effects of an Open Aviation Area which study was published in December 2002.

[35] See report at <http://archives.tcm.ie/irishexaminer/2008/10/08/story74236.asp> (9 July 2009).

Sabena.[36] It has been predicted that the process of liberalisation will continue to fuel consolidation ultimately producing a scenario in which only five airlines will survive.[37] According to Dempsey,'bankruptcies, consolidations, and mergers. … [will arise resulting] in a highly concentrated group of multinational European megacarriers, all utilizing hub-and-spoke operations and linked to only a few sophisticated computer reservations systems.'[38] However, it is predicted that Ireland, arising from its geographical separateness and its small share of the air transport market will probably be able to insulate itself from the worst effects of consolidation. To brace itself for the increased competitive pressures, the Irish government decided to privatize Aer Lingus in 2006 and, on 2 October that year, the company was floated on both the Irish and London Stock Exchanges. The company quickly received an injection of equity in the order of half a billion euro strengthening its financial stability and enabling it to undertake its ambitious programme of expansion. It has been suggested that another possible method for combating consolidation is for Ireland to develop air freight services.

(c) The dismantling of barriers to integration between EU and US carriers will promote inter-carrier cooperation resulting in price synergies on transatlantic interline routes. As the Brattle Group observes:

> Without coordination each carrier will set the fare for its leg of the flight without considering how it will affect demand for the other legs. If the same carriers are allowed to coordinate, each will have an incentive to set lower fares so as to increase combined profits.[39]

Aer Lingus currently operates codeshare agreements with Jetblue, American Airlines, KLM and British Airways and, in September 2008, it entered into a codeshare agreement with Aer Arann. The various codeshare agreements in place permit Ireland's feeder services and regional airlines link into a variety of hub and spoke systems thereby enabling Ireland' carriers achieve worldwide connectivity. On 8 April, Aer Lingus and United Airlines concluded a codeshare agreement which will give Aer Lingus access to over 200 destinations on United Airlines' route network in exchange for which United Airlines passengers have been granted access to Aer Lingus' Irish and European destinations.

(d) Output Expansion.

According to the Brattle Report, structural changes in markets would occur in an EU/US Open Aviation Area through a combination of three factors: costs savings, price reduction and removal of output restrictions[40] in bilateral agreements. Extrapolating from the data showing the effects of partial liberalisation of the EU-US market in the 1990s, Brattle estimates that a projected Open Aviation Area would result in an additional 2.2 million passengers travelling each year between the United States and the UK, Ireland, Greece and

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[36] *Dukes & Sorensen* (n 1) 185.
[37] See *Dempsey* (n 1) 196 citing Jan Carlzon, former president of SAS.
[38] ibid 186.
[39] European Commission Brattle Group Report *The Economic Impact of an EU-US Open Aviation Area December 2002* iv <http://www.brattle.com/_documents/UploadLibrary/ArticleReport2198.pdf > (8 July 2009).
[40] The US bilateral air services agreement with four EU states - the UK, Ireland Spain and Greece - are characterised by 'output restrictions', that is, they limit the volume of traffic passing between the two countries.

Spain. This result would inevitably promote competition and foster consumer welfare. This output expansion has already occurred in Ireland and has been noted above.

I RECESSIONARY TIMES

The recent downturn in the economy has resulted in job losses in the air transport industry and a significant reduction in passenger throughput in airports. Compounding the problems is the increase in oil prices. It is predicted that the current economic conditions are likely to accelerate the process towards consolidation in the aviation industry enabling airline companies to interlink their networks and achieve price synergies. As noted, deregulation has forced Aer Lingus to undergo radical cost-restructuring and to develop code-share agreements with other airlines, thereby enabling it to become a competitive player in the European and international air transport market. EU law prohibits government from subsidising loss-making airlines, a factor which also certainly precipitated the decision of the Irish government to privatize Aer Lingus. The effects of the decision have produced beneficial effects for the airline. The massive injection of equity administered to Aer Lingus has enabled the airline to fulfil its expansionary objectives and to fortify itself against the effects of recession. Another factor auguring positively for the prospect of the survival of Irish airlines, is that, arising from the process of liberalization, Irish airlines are now permitted to provide transport services within other EU member states. This measure has enabled low-cost carriers such as Ryanair to expand and diversify their services. However, it is arguable that the current legal framework, predicated on principles of free trade and unfettered competition, is excessively rigid precluding a nuanced response on the part of government to the plight of smaller, regional airlines. Doubts have been expressed whether, in the absence of state aid, small, regional airlines such as Aer Arann will be able to survive the current recession, which is being compounded by rising oil prices and growing competition on its domestic routes from the low-cost carrier, Ryanair.[41]

J CONCLUSION

It has been demonstrated that EU assumption of competence in air transport law has, in fact, liberated the Irish state from the constraints imposed by the Bermuda bilateral order which, arising as an outgrowth of the failure of the Chicago Conference to create a regulatory framework for commercial aviation, forced the Irish air industry into a straitjacket inhibiting restructuring and growth. The dismantling of structures inimical to the development of Irish aviation in favour of a new open market regime in which the participating actors are permitted to regulate the economic incidents of commercial aviation has transformed Irish aviation, boosting trade, business and tourism. Augmenting the new liberal framework is the EU's competition law regime which ensures that, in relation to any type of consolidation in the aviation industry arising from inter-carrier alliances and mergers, the participants will be required to repudiate any type of restrictive practice or abuse of a dominant position which could threaten the operation of free market principles.

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[41] 'Breen questions Aer Arann and Ryanair on their future plans for Shannon Airport' See exchanges of Pat Breen TD with CEO of Ryanair, Michael O'Leary, at meeting of Council of Europe 16 July 2008 <http://www.patbreen.ie/2008/07/16/302/> (8 July 2009).