The Transatlantic Common Aviation Area: Competing Legal Orders and State Self-Interest

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1. Introduction

1.1. The Multilevel Regulation Perspective

This chapter discusses the interaction between the international and the supranational legal order on the basis of the establishment of the Transatlantic Common Aviation Area through the Open Skies Treaty 2007 (hereafter, OST 2007). From the multilevel regulation perspective, three remarkable observations can be made: (1) the interaction is structured by law only to a limited degree; (2) the actors are the same in the two decision-making processes; (3) as a result of (1) and (2) the interaction is structured by the self-interest of dominant individual actors. In this chapter we use the battle for the transatlantic aviation market as a means of exploring the processes which determine the eventual effects of multilevel regulation.

1.2. Aviation as an International and Supranational Issue

Aviation cuts across national borders and has therefore been an international issue more or less since its inception. Air transport – regardless of whether it involves passengers or freight – would be impossible without international coordination. As air law forms part of international law, aviation is subject to the regulations and principles of international law. Given the prominent position that international law accords to the sovereignty principle, it is hardly surprising that aviation has traditionally been the preserve of nation states whose primary concern during treaty negotiations is to serve the national interest – which also includes the interest of the national airline industry. Aviation now falls within...
the remit of the EU, ushering in a totally new set-up which could seriously upset the deeply entrenched hegemony of the Member States in this area.

On 1 April 1997 the EU introduced a single market in air transport services, which gave every European provider the right to fly intra-EU routes provided it met the legal requirements. So far it has been impossible to realise a level playing field for European carriers because long-standing bilateral Air Service Agreements between Member States and third countries accord privileges to national airlines.

The European Commission, faced with the tough challenge of removing all impediments to fair competition between European carriers, needs to find a way of bringing an end to these bilateral agreements. The Member States are, of course, reluctant to terminate them of their own accord. To complicate things further, EU law does not take precedence over international law. There is no “natural” order for precedence between EU law and international law, in the same way that EU law, for example, takes precedence over the national law of Member States. However, as the EC Treaty is silent on the matter, there is no ready solution. The jurisprudence of the European Court does provide some openings, but it is up to the Commission to decide whether to use them. What is more, everything that the Commission embarks on takes time – and time is of the essence.

The international treaty – in the form of the Open Skies Treaty 2007 – may be the Commission’s best chance of breaking the deadlock. Open Skies, which was signed by EU and US officials at an EU-US transatlantic summit on 30 April 2007, may well have signalled the fulfilment of a long cherished wish of the European Commission to end anti-competitive Air Service Agreements and establish a Transatlantic Common Aviation Area, and hence realise its free-market ambitions outside EU borders as well.

1.3. Outline of this Chapter

Section 2 discusses the main legal instruments for regulating the aviation services of states. It concentrates specifically on the way in which legal relations between the EU Member States and the USA are defined. Section 3 discusses EU policy and the infringement proceedings that can be initiated against Member States that refuse to terminate bilateral Air Service Agreements.

The case of OST 2007 shows how the key actors (in particular the European Commission and the EU Member States) deal with regulations from different levels of governance and the subsequent contradictions and uncertainties. It also shows how the Member States manipulate the loopholes in the situation to secure secular, national interests. Section 4 traces the formation of OST 2007, which the Commission intends to use to realise the aims it hoped to achieve.