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EUROPEAN UNION EXTERNAL COMPETENCE AND EXTERNAL RELATIONS IN AIR TRANSPORT

A.A. MENCIK VON ZEBINSKY

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ABSTRACTS OF THE THESIS

The thesis includes, in Section I, an analysis of the European Union's internal and external competence in air transport and in matters including air transport within their scope, the nature of such competence and the procedures for conducting external relations. The thesis includes also a description of the progress in European Community competence in air transport, a new classification of the Community's secondary legislative measures in air transport in view of their external effect and the main obstacles to the acquisition by the European Union of external competence in air transport. Section II of the thesis includes an analysis of the use the European Union has made of its external competence in air transport in the areas of external relations with non-Member States and international organizations and of the various problems bearing upon such relations as well as the prospects for the future.

La thèse comporte, dans sa première partie, une analyse des compétences internes et externes de l'Union européenne en matière de transport aérien et dans les domaines qui incluent le transport aérien dans leur champ d'application, de la nature de ces compétences et des procédures applicables pour la conduite des relations extérieures. La thèse comporte également une description du développement des compétences de la Communauté européenne en transport aérien, une nouvelle classification des mesures de droit communautaire dérivé en transport aérien en fonction de leurs effets externes et les principaux obstacles à l'acquisition par l'Union européenne de compétences externes en transport aérien. La deuxième partie comporte une analyse de l'utilisation par l'Union européenne de ses compétences externes en transport aérien sur le plan de ses relations avec les Etat tiers et les organisations internationales ainsi que des problèmes et perspectives futures de ces relations.

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INTRODUCTION

Until the early part of the present century it was possible to argue that public international law was exclusively concerned with the relations between sovereign States[1]. The inadequacies of this approach became apparent with the development of international organisations between the 1914-1918 and 1939-1945 wars, and it finally collapsed in the face of the creation of the United Nations system and judgements of the International Court of Justice[2].

It has now been acknowledged that the powers to enter into foreign relations[3] are the inherent and necessary attributes of international legal personality and are therefore enjoyed by the subjects of international law, i.e. States and international organisations[4]. There is, however, an essential difference between the legal powers of these two entities: while it is generally recognised that every State possesses powers to conclude Treaties without restrictions as to subject, form or procedure, the powers of international organisations, to enter into foreign relations is not unlimited, but restricted to what is necessary for the exercise of their function and the fulfilment of their purposes[5].

The European Union's powers to enter into foreign relations under public international law are assimilated into those of other international organisations rather than being treated as those of a supranational entity sui generis[6].

It is Community law[7] which confers, explicitly or implicitly, powers upon the three European Communities to enter into foreign relations. On the other hand, it is

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[1] Lord Hailsham of St. Marylebone, *Law of the European Communities* (London: Butterworth, 1986) at 477.

[2] Advisory Opinion concerning the Reparation for Injuries Suffered in the Service of the United Nations, [1949] ICJ Report at 174 and at 180.

[3] The concept of power to enter into foreign relations includes not only the capacity to enter into such relations but also the exercise of that capacity.

[4] A.G. Toth, *European Community Law* (Oxford: Clarendon, 1990) at 521.

[5] A.G. Toth, ibid. at 522.

[6] Lord Hailsham of St. Marylebone, ibid. at 477; Article 6 of the Vienna Convention on the Law of Treaties of 1969, [1981] YILC; Vol. II., Part Two [hereinafter the Vienna Convention of 1969]; Preamble and Article 2(1)(j) and 6 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations themselves of 1986 and the commentaries of the International Law Commission on these Articles, [1982] YILC, Vol. II., Part Two, at 21 and 23-24. See also the comments and observations of the European Economic Community on the Article of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations themselves of 1986, [1981] YILC, Vol. II, Part Two, at 201-203 esp. at 202.

[7] The expression Community law refers to the provisions of the three Community Treaties, namely the Treaty establishing the European Coal and Steel Community, the Treaty establishing the European Atomic Energy Community and the Treaty establishing the European Economic Community as amended by the Single European Act and the Treaty on European Union.

public international law which provides the legal basis for and determines the nature of that power insofar as it enables the European Communities to possess a legal personality and to exercise their powers on the international scene.

For this reason, a distinction should be made between the external competence of the European Union[8], i.e. the capacity to enter into Treaties and relations with other subjects of international law, which is only a matter of Community law, and the external relations of the European Union, i.e. the exercise of that capacity, which is a matter of Community law and of public international law, but ultimately only a matter of public international law. These two concepts correspond to the internal and external aspects of external relations and will therefore be examined respectively in Section I, entitled 'European Union External Competence in Air Transport' and Section II, entitled 'European Union External Relations in Air Transport.'

The external competence of the European Union contrasts with the internal competence which consists of the competence of the three European Communities to lay down internal rules which are binding on the Member States and on individual persons and undertakings.

For this reason, Section I, Part A, will examine the European Communities' (internal) competence in air transport and Part B the European Union's external competence in air transport.

When examining, in Part B, the European Union's external competence in air transport, a distinction must be made between the external competence of the European Communities as laid down under Treaty provisions, and under secondary legislation adopted by the Council of the European Communities[9], and the external competence of the European Union, in the strict sense, which consists of the provisions of the Treaty on European Union on a Common Foreign and Security Policy (CFSP). For this reason, Chapter 1 will examine the European Communities' external competence in air transport, and Chapter 2 the external competence of the European Union in air transport.

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[8] The concept of 'the European Union' or 'the Union' in its wider sense includes the three European Communities supplemented by the policies and forms of cooperation established by the Treaty on the European Union, see Article A of the Treaty on the European Union. For more developments on this question, see note 74 and accompanying text.

[9] The Council consists of a representative of each Member State at ministerial level. The Council of the European Communities is the main political organ of the Community. In particular, it ensures the coordination of the general economic policies of the Member States and take decisions on proposals from the Commission. The Council may also conclude agreements between the Community and third States or international organisations after negotiation by the Commission. Since the entry into force of the Treaty on European Union, the Council of the European Communities has been renamed the Council of the European Union. [Hereinafter the Council].

Part C will examine the obstacles to the European Union's external competence in air transport.

Section II will examine the European Union's external relations in air transport. For the same reason as mentioned above, it will also be necessary to distinguish between the external relations of the European Communities and of the European Union. In Part A the European Communities' external relations with non-Member States will be examined, then, in Part B, the European Communities' external relations with international organisations, and finally, in Part C, the European Union's external relations.

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and take decisions on proposals from the Commission. The Council may also conclude agreements between the Community and third States or international organisations after negotiation by the Commission. Since the entry into force of the Treaty on European Union, the Council of the European Communities has been renamed the Council of the European Union. [Hereinafter the Council].

SECTION I: EUROPEAN UNION EXTERNAL COMPETENCE IN AIR TRANSPORT

PART A: EUROPEAN COMMUNITIES COMPETENCE IN AIR TRANSPORT

INTRODUCTION

There are provisions relating to the European Communities' competence in transport in two Treaties, the Treaty establishing the European Coal and Steel Community (ECSC Treaty) and the Treaty establishing the European Economic Community (EEC Treaty)[10].

The first Treaty is the ECSC Treaty[11]. The limited provisions of the ECSC Treaty are confined to the carriage of coal and steel, principally oriented to the modes of transport employed for this purpose[12], and are limited in their objective to the removal of distortions of competition[13]. The ECSC Treaty provisions on transport will not be examined since they relate essentially to inland modes of transport and are of little importance.

The transport policy envisaged by the EEC Treaty is conceived in a more comprehensive way[14]. It envisages all the principal modes of transport and the carriage of all goods and persons and is linked to the more general objectives of the EEC Treaty. Indeed, the Common Transport Policy (CTP) is one of the major policies expressly envisaged by the EEC Treaty, by which the fundamental purposes of the Community[15] will be achieved. Transport has been chosen as one of the major policies because of its economic importance[16], its key role in the creation of the

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[10] The EEC Treaty was signed in Rome on 25 March 1957. To designate this Treaty specifically the expression 'EEC Treaty' is used while the expression 'EC Treaty' refers to the Treaty establishing the European Community, i.e. the EEC Treaty as amended by the Single European Act and by the Treaty on European Union.

[11] The ECSC Treaty was signed in Paris on 18 April 1951.

[12] The three forms of inland transport, rail, road and inland waterway, with the emphasis on rail transport.

[13] Lord Hailsham of St. Marylebone, supra note 1 at 867.

[14] For the question of the relations between the EEC Treaty and the ECSC Treaty, see Lord Hailsham of St. Marylebone, supra note 1 at 867.

[15] When the 'Community' is referred to this is taken to mean the European Economic Community (EEC) which since the entry into force of the Treaty on European Union on 1st November 1993 is denominated the European Community (EC). To refer to the three 'European Communities' the expression 'the European Communities' is used.

[16] This importance is shown by the fact that transport represents a greater part of the gross national product than agriculture.

common market[17] and the particularities of the transport sector[18]. When looking at the EEC Treaty provisions on transport, one should bear in mind that such provisions have been amended by the Single European Act (SEA)[19] and by the Treaty on European Union (TEU)[20]. Since it is of interest to highlight the amendments introduced by these two Treaties, each Treaty will be examined separately.

CHAPTER 1: THE EEC TREATY

The adoption of the CTP will be examined first, and then the way the EEC Treaty envisages that sea and air transport might become subject to the CTP.

a) Adoption of the Common Transport Policy

The tasks of the European Economic Community (EEC) are stated in Article 2 of the EEC Treaty. These activities, as set out in Article 2, are to include the adoption of a Common Policy in the sphere of transport (Article 3(l)) as provided for in the EEC Treaty, and in accordance with the timetable set out therein. The other provisions of the Treaty which explicitly envisage transport, apart from Article 61(1)[21] are contained in Title IV of Part Two (Articles 74 to 84).

Article 74 of the EEC Treaty provides that the objectives of the Treaty in transport matters are to be pursued by Member States within the framework of a CTP[22].

A certain ambiguity attaches to the expression CTP. Its scope is determined by the indications given in the transport Title of the EEC Treaty and particularly the five modes of transport mentioned (rail, road, inland waterway, sea and air transport), with a special regime provided for the last two modes[23]. The word 'policy' itself is also ambiguous. It may be interpreted as meaning either the principles and guidelines, of a more or less coherent nature, which are designed to inspire particular actions in the field of transport, but which have not yet been translated

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[17] Free circulation of persons and goods cannot be achieved unless there are efficient means for transporting them.

[18] Among these particularities are the exceptional political sensitivity of the area and the very strong international element in transport.

[19] The Single European Act was signed by nine Member States in Luxembourg and by three Member States in the Hague on 28 February 1986, OJ No L 169 of 29.6.1987.

[20] The Treaty on European Union was signed on 7 February 1992 in Maastricht and it entered into force on 1 November 1993, OJ No C224 of 31.8. 1992 at 33.

[21] See infra note 47 and accompanying text.

[22] For the significance and legal consequences of this provision, see Lord Hailsham of St. Marylebone, supra note 1 at 678.

[23] Lord Hailsham of St. Marylebone, supra note 1 at 678. For the question whether a matter relating to one of these modes but also relating to another Article of the Treaty should be treated as a transport matter or not, see Lord Hailsham of St. Marylebone, ibid. at 678-679.

into a legal form[24], or the sum of actions actually taken, particularly those of a normative and durable nature, which are in force at any one time[25].

The progress made by the CTP is represented by the measures of secondary legislation adopted by the Council.

The Council is empowered by Article 75 of the EEC Treaty to adopt secondary legislation for the purpose of establishing the CTP whilst taking into account the distinctive features of transport[26].

The duty of the Council to adopt measures for the purpose of establishing the CTP was considered by the European Court of Justice (ECJ)[27] in Case 13/83[28].

The measures[29] which may be enacted are:

a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;
b) the conditions under which non-resident carriers may operate transport services within a Member State;
c) any other appropriate provisions.

Heading a) covers international transport, including both carriage between Member States, and also carriage to and from a Member State and a third country[30].

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[24] The main source of transport policy in the first sense is to be found in the communications on transport policy and action programs submitted by the Commission to the Council. A recent important communication is this respect is the White Paper of the Commission on 'Future developments of the Common Transport Policy', COM(92) 494 final of 2.12.1992. Other important sources are reports and resolutions of the European Parliament and of the Economic and Social Committee.

[25] Lord Hailsham of St. Marylebone, ibid. at 678.

[26] For the question of whether Article 75 has a direct effect, see P. J. Slot, P. D. Dagtoglou. *Toward a Community Air Transport Policy: The Legal Dimension* (Boston: Kluwer Law and Taxation, 1988) at 13-15.

[27] The Court of Justice consists of thirteen Judges assisted by six Advocates-General. The Court of Justice ensures that in the interpretation and application of the Treaties the law is observed.

[28] Case 18/83, European Parliament v. EC. Council, [1986] I CMLR 138, ECJ. Although this Case deals with the failure of the Council of Ministers to act in the sphere of inland transport and although it does not refer in the same way to Article 84 and the implementation of sea and air transport policies, A-G Otto Lenz was of the opinion that the obligation to adopt a CTP extends also to sea and air transport. The Court did not specifically contradict A-G Otto Lenz in this respect, see P. Haanappel et al., *EEC Air Transport Policy and Regulation, and their Implications for North America* (Boston: Kluwer Law and Taxation, 1989) at 12.

[29] This include regulations, directives, decisions, recommendations and opinions, see EEC Treaty, Article 189.

[30] This has been confirmed by Case 22/70, Case 22/70, Commission des Communautés européennes v. Conseil des Communautés européennes, Judgement of 31 March 1971, [1971] ECR 263, ECJ.

Heading b) covers transport services which are provided by a non-resident carrier entirely within a Member State.

According to Article 75(1) the Council may take the necessary measures, acting by a qualified majority at the end of the second stage[31] on a proposal from the Commission of the European Communities[32] and after consulting the Economic and Social Committee and the European Parliament[33].

By way of derogation from the normal voting rule laid down in Article 75(1) an exception is made by Article 75(3) where the application of provisions concerning the principles of the regulatory system for transport would be liable to have a serious effect on standards of living and on employment in certain areas and on the operation of transport facilities, in which case the relevant measures are to be adopted by the Council acting unanimously[34].

b) Provisions on sea and air transport

Article 84, para. 1 reads: *[t]he provisions of this Title shall apply to transport by rail, road and inland waterway.*

Para. 2 reads: *[t]he Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.*

During negotiations on the EEC Treaty, a compromise was reached; it was decided to mention these two modes of transport in the Treaty but to avoid the automatic application of the transport Title to sea and air transport. This compromise has the merit of permitting further action in these two modes of transport but has left a large

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[31] The common market was to be established progressively during a transitional period of twelve years divided into three stages of four years each (Article 8 of the EEC Treaty). The transitional period ended in 1970.

[32] The Commission consists of seventeen members nominated by the Member States but who are independent from governments in the performance of their duties. The Commission is responsible, in particular, for ensuring that the provisions of the Treaties are applied and for submitting legislative proposals to the Council. Since the fusion of the institutions in 1967 the term 'Commission' refers not only to the Commission of the European Community but also to the High Authority of the European Coal and Steel Community and to the Commission of the European Atomic Energy Community, see OJ No 152 of 13 July 1967). [Hereinafter the Commission].

[33] The European Parliament consists of representatives of the people of the Member States elected by direct universal suffrage. In particular, the European Parliament participates in the legislative process and adopts the budget of the Community.

[34] Article 75(3). According to Balfour it is arguable that a decision which could create Community competence for aviation relations with third countries could have such effects and would therefore require unanimity, see Memorandum of J. Balfour, House of Lords, Select Committee on the European Community's External Aviation Relations, London, 1991 at 7.

number of questions unresolved. Among these questions one which is of particular importance for the present purpose is the controversy regarding the applicability of the general rules of the Treaty to sea and air transport.

Applicability of the general rules to sea and air transport

As long as the Council has not adopted any secondary legislation in the field of sea and air transport there could be some doubt as to the applicability of the EEC Treaty to these modes of transport. This question has been resolved in Case 167/73[35].

In this Case the Court stated:

[w]hen Article 74 refers to the objectives of the Treaty, it means the provisions of Articles 2 and 3, the attainment of which the fundamental provisions applicable to the whole complex of economic activities seek to ensure.

Far from involving a departure from these fundamental rules, the object of the rules relating to the CTP is to implement and complement them by means of common action. Consequently, those general rules must be applied insofar as they can achieve these objectives. Furthermore, the Court stated: *[w]hilst under Article 84(2), therefore, sea and air transport, so long as the Council has not decided otherwise, is excluded from the rules of Title IV of Part Two of the Treaty relating to the CTP, it remains, on the same basis as other modes of transport, subject to the general rules of the Treaty.*

The Court thus made clear that the general rules of the Treaty must automatically apply in the field of transport as long as the Council, acting under Article 84(2), has not decided otherwise. The consequences of this ruling are of great importance.

It means that the Commission is under the legal[36] and political[37] duty to ensure that the general rules of the Treaty are applied in sea and air transport[38]. These general rules set the framework for action under the CTP and may also circumscribe the powers of action which Member States retain under their parallel competence until the Community acts on a particular matter[39]. This is of importance for the European Union's external competence in air transport since Member States currently retain considerable powers in this area.

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[35] Case 167/73, Commission v. France, [1974] ECR 359, [1974] 2 CMLR 216, ECJ. The Court has subsequently confirmed its legal analysis in Case 156/77, EC Commission v. Kingdom of Belgium , Judgement of 12 October 1977, [1978] ECR 1881, ECJ, para. 10.

[36] See recourse for failure to act, Article 175 of the EEC Treaty.

[37] See the powers of the European Parliament, Articles 137 to 144 of the EEC Treaty.

[38] Provided that the general rules do not exclude their applicability to such modes of transport (see by comparison Article 42 in the field of Agriculture) and that the applicability of the general rules is not conditional upon the adoption of a common sea and air transport policy.

[39] Lord Hailsham of St. Marylebone, supra note 1 at 677.

It also means that legislation adopted by the Council, on the basis of Article 84(2), cannot contradict or ignore the general rules of the Treaty but must instead implement and adjust[40] them to the particular circumstances of the sea and air transport sector[41].

Finally it means that the provisions of the Title relating to inland transport shall apply to sea transport and air transport only if the Council so decides.

The conclusion that those general rules of the Treaty include the freedom of movement for workers was all that was necessary to decide Case 167/73. The ECJ was able to leave open the issue as to what other provisions of the Treaty should be included among those general rules. That issue has subsequently been resolved in various other judgments of the ECJ.

Examples of such general rules are:

- Part One, 'Principles', Articles 1 to 7 c of the EC Treaty[42].
- the 'Four Freedoms'; Free Movement of Goods[43] (Articles 9 to 37 of the EC Treaty), Persons, Services and Capital and Payment (Articles 48 to 75h of the EC Treaty).
- the Common Rules on Competition[44].
- the Common Commercial Policy[45].
- the Social Policy rules (Articles 117 to 122 of the EC Treaty)[46].

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[40] Provided that the general rules permits such adjustments.

[41] E. E. Henrotte, *L'application des règles générales du Traité de Rome au transport aérien* (Brussels: Université de Bruxelles, 1988).

[42] Article 6 of the EC Treaty must be read subject to Article 61(1).

[43] Case 16/78, Choquet, [1978] I CMLR 535, ECJ.

[44] In Case 156/77, the so-called 'Belgian Railway Case', the Court applied the competition rules of the Treaty in the rail sector making it unequivocally clear that the competition rules of the Treaty must be viewed as 'general rules', EC Commission v. Belgium, Judgement of 12 October 1977, [1978] ECR 1881, ECJ. Case 111/85, the so-called 'Flemish Travel Agencies Case' upholds the proposition that the competition rules apply to the supply of services, VZW Vereniging van Vlaamse Reisbureaus v. VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten, Nederlandse Jurisprudentie, 1988, Nr 998. The Commission attitude at that time is shown clearly in Case 246/81, Lord Berthell v. Commission, Judgement of 10 June 1982, EC Commission v. Belgium, [1982] ECR, 2277 at 2289, ECJ.

[45] We agree with Henrotte that the CCP is part of the general rules of the Treaty, E. E. Henrotte, supra note 41 at 74. Contra J. Balfour, *Air Law and the European Community* (London: Butterworth, 1990); G. Close, 'External Competence for Air Policy in the third phase -trade policy or transport policy?'(1990) 3 European Air Law Association Second Annual Conference at 36.

[46] Cases 43/75 and 149/77 made clear that the social provisions of the Treaty apply to air transport, Case 43/75, Defrenne v. Sabena (I), Case 149/77, Defrenne v. Sabena (II) [1976] ECR 455, ECJ [1978] ECR 1365, ECJ.

Among the general rules applicable to transport, a special mention should be made of Article 61(1). Article 61(1) states: *[f]reedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.* According to Otto Lenz, a special exemption is provided by Article 61(1) under which freedom to provide services in the field of transport is to be governed by the provisions of the Title relating to transport[47]. In this respect it was not entirely clear whether the exemption provided by Article 61(1) is applicable to sea and air transport because Article 84(2) excludes the automatic application of the transport Title to such modes of transport. The importance of this exemption has diminished because it seems that the majority of writers consider that, at present[48], Article 59 (freedom to provide services) is directly applicable to sea and air transport[49]. Even if one disagrees with this majority opinion and considers that the purpose of Article 61(1) is to exclude the freedom to provide services in all modes of transport, including sea and air transport, it must be noted that there is an important limitation to the scope of application of Article 61(1). This limitation is related to the question: what exactly does the term 'transport' in Article 61(1) mean and what therefore is excluded from the provisions on freedom to provide services? In the field of air transport this question has been (partly) resolved by the ECJ[50] and by a Decision of the Commission[51].

CHAPTER 2: THE SINGLE EUROPEAN ACT

a) Voting rule

The EEC Treaty envisaged the qualified majority only for sectors where a Community policy was laid down clearly. This was the case with transport policy. When the qualified majority voting rule was about to become effective[52], France requested, during a seven-month-long crisis, that the Council abstain from a vote when a Member State declares a 'vital interest.' Although the French request never

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[47] K. Otto Lenz, 'The contribution of the European Court of Justice to the common air transport policy', London, November 1989 [unpublished].

[48] Van der Esch has argued that Article 59 will be directly applicable to sea and air transport only after the internal market has been completed, i.e. after the end of 1992, see P. J. Slot, P. D. Dagtoglou, supra note 26 at 14.

[49] The main arguments are that Article 59 of the EEC Treaty is directly applicable to air transport because Article 84(2) excludes sea and air transport and because otherwise such modes of transport would be completely exempted from the freedom to provide services, see P. J. Slot, P. D. Dagtoglou, ibid. at 14. According to Case 167/73 a complete exemption from the freedom to provide services can only be based on explicit Treaty provisions such as in the case of capital movement (Article 61(2) of the EEC Treaty), supra note 35.

[50] Case 2/74 decided that only directly related air transport services are excluded from the general rules of the Treaty, and that all other activities in air transport are subject to such general rules, Reyners v. Etat belge, Judgement of 21 June 1974, [1974] ECR 631, ECJ.

[51] The Commission Decision of 23 January 1985 decided that auxiliary services such as ground-handling services are subject to the general rules of the Treaty, OJ No L 46 of 15 February 1985. See generally Fifteenth Report on Competition Policy, [1981], para. 74.

[52] On 1 January 1966.

formally succeeded, the practice became established of not proceeding to a vote, even for business of little importance. Instead, the Council undertakes a systematic search for unanimity.

At the beginning of the 1980's it became increasingly common to call for a vote, but the advocates of the concept of 'vital interest' did not agree to give up this escape clause.

The SEA has consolidated this practice of recourse to a vote by extending the areas where the voting rule is the qualified majority[53].

In the area of sea and air transport the SEA has laid down that the Council *may, acting by a qualified majority, decide whether, to what extent and by what procedure, appropriate provisions may be laid down for sea and air transport*[54].

The SEA has, however, not extended the qualified majority voting rule to all areas, and has provided some exemptions. In the field of sea and air transport, the SEA, by stipulating that the procedure of Article 75(3) shall apply, has allowed the Council, in certain instances, to decide matters affecting sea and air transport by a unanimous vote.

b) Procedural provisions

Under the EEC Treaty it was permissible to consider that the Council had the power to determine the rules of procedure according to which appropriate provisions might be laid down for sea and air transport. The SEA has partially resolved this problem by stipulating that: *[t]he procedural provisions of Article 75(1) and(3) shall apply.* This means that the rules of procedure for sea and air transport are identical with those for inland transport[55]. However, the SEA left intact the previous drafting of Article 84(2) which states: *[t]he Council may [...] decide [...] by what procedure appropriate provisions may be laid down for sea and air transport.* This apparent contradiction must be resolved by an interpretation in conformity with the objectives of the SEA, according to which the rules of procedure of Articles 75(1) and (3) shall

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[53] And by obtaining, during the negotiation of the SEA, a political agreement on the need to amend the internal rules of procedure of the Council. A subsequent change to the Council's internal rules of procedure has given the Commission the powers to require recourse to a vote within the Council.

[54] See the unilateral declaration of Greece and Portugal to the SEA which specifies that the change from unanimity to qualified majority should not injure the vital sectors of their economy and that transitional measures should be taken whenever that might prove necessary to prevent any negative consequences for these sectors.

[55] For the question of whether the changes brought by the SEA to the EEC Treaty have imposed an obligation upon the Council to act in sea and air transport matters, see Memorandum of J. Balfour, House of Lords, Select Committee on the European Community's External Aviation Relations, supra note 34 at 7.

apply, and it is only inadvertently that the word *procedure* in Article 84(2) has not been eliminated[56].

c) Competence of the Commission

The SEA, by envisaging that in the fields of sea and air transport the procedural provisions of Articles 75(1) shall apply, has made clear that the Council can legislate only on a proposal from the Commission.

Furthermore, the SEA has confirmed that the Commission is 'the natural executive body' of the Community[57] and that the Council may reserve for itself the right to exercise directly implementing powers only in specific cases[58].

CHAPTER 3: THE TREATY ON EUROPEAN UNION

a) Transport

In the field of transport the Treaty on European Union (TEU) brought three changes.

- The TEU added to Article 75(1) that the Council shall lay down *measures to improve transport safety* .

- The TEU has provided that the Council shall act *in accordance with the procedure referred to in Article 189c*. Under this procedure the Council shall always act on a proposal from the Commission, and do so after obtaining the opinion of the European Parliament. This procedure assigns important powers to the European Parliament since, when the European Parliament rejects a proposal adopted by the Council on a qualified majority, on a second reading unanimity is required for the Council to be able to act. The European Parliament has, therefore, almost the power to block the adoption of the Council's common position, since it is unlikely that Member State(s) having voted, on a first reading, against the proposal, and having been supported in their opposition by the European Parliament, will agree to adopt the proposal unless important concessions have been granted.

- The TEU has made clear that, when the conditions of Article 75(3) are met and thus provisions are to be adopted by the Council acting unanimously, the Council can legislate only on a proposal from the Commission, and after

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[56] E. E. Henrotte, supra note 41 at 42-45.
[57] J. De Ruyt, *L'Acte Unique Européen* (Brussels: Université de Bruxelles, 1989) at 139.
[58] Article 10 of the SEA.

having consulted the European Parliament and the Economic and Social Council[59].

On 29 March 1994 the Council decided that: *[i]f Members of the Council representing a total of 23 to 26 votes indicate their intention to oppose the adoption by the Council of a Decision by qualified majority, the Council will do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by the Treaties and by secondary law, such as in Articles 189b and 189c of the Treaty establishing the European Union, a satisfactory solution that could be adopted by at least 68 votes.*

b) Trans-European networks

In order, in particular, to achieve the objectives of the internal market[60] and to promote the harmonious development of the Community[61] the TEU has stipulated that the Community shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures[62].

The aims of the trans-European networks is to promote the interconnection and the inter-operability of national networks as well as access to such networks, while taking into account the need to link island, landlocked and peripheral regions with the central regions of the Community[63].

To this end Article 129c stipulates that the Community:

- *shall establish a series of guidelines [...][which] shall identify projects of common interest;*

- *may support [by various means] the financial efforts made by the Member States for projects of common interest financed by Member States, which have been identified in the framework of the guidelines referred to in the first indent.*

The Community may also contribute to the financing of specific projects in Member States in the area of transport infrastructure through the Cohesion Fund.

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[59] Under the EEC Treaty and the SEA, in the event of use of Article 75(3), the Council was not obliged to act on a proposition by the Commission after consulting the European Parliament and the Economic and Social Committee.
[60] Article 7a of the EC Treaty.
[61] Article 130a, ibid.
[62] Article 129b(1), ibid.
[63] Article 129b(2), ibid.

According to the TEU the Community guidelines referred to in Article 129c(1) shall be adopted by the Council acting in accordance with the procedure referred to in Article 189b. The other measures shall be adopted under the procedure referred to in Articles 189c. In both cases the Council shall act after consultation with the Economic and Social Committee and with the Committee of the Regions.

Likewise, guidelines and projects of common interest which relate to the territory of a Member State need the approval of the Member State concerned.

In the field of the trans-European transport network, at the present moment, the Commission has initiated the first step, provided for in Articles 129c(1) of the TEU, by establishing a series of guidelines which identify projects of common interest. In 1990, the Council adopted a Resolution on High Speed Trains[64] and in 1993 three Council Decisions establishing the networks on roads, inland waterways and combined transport[65]. These three Council Decisions have demanded that the Commission pursue its policy of defining a Community framework for developing the trans-European transport infrastructures. The Commission has recently adopted a Proposal for a European Parliament and Council Decision on Community guidelines for the development of the trans-European transport network[66]. These Community guidelines comprise network schemes for the various modes of transport, outlines for measures forming a development process leading to a multi-modal integrated network for transport, and criteria, as well as a procedure, for the identification of projects of common interest to implement the envisaged measures.

Under these Community guidelines the Commission has developed a multi-modal approach[67] with a view to integrating the infrastructures for the various modes of transport into one multi-modal network[68].

Three important results of the trans-European transport network are foreseeable in the field of air transport[69]:

- the identification of approximately 280 airports, located within the Community, and open to commercial air traffic, as being of Community

[64] Council Resolution of 17 December 1990, See (90) 2402.
[65] Council Decisions 628/93/EEC, 629/93/EEC, 630/93/EEC of 29 October 1993, OJ No L 305 of 10.12.1993.
[66] COM(94) 106. [Hereinafter Community guidelines].
[67] Therefore replacing the mode-oriented approach taken in the past by the Council, and Council Decisions 628-630 /93/EEC, ibid.
[68] The concept of network as such is composed of the physical infrastructure for axes (routes, lines) and nodes (intra and inter-modal links) supported by non-material elements like services, e.g. management systems.
[69] Such results are only foreseeable since the discussions on the Community guidelines at the level of the Council only started in April 1994.

interest[70], and the identification of development priorities for these airports[71].

- the identification of an air traffic management network[72] and the identification of various priorities for the development of such network.

- the identification of projects concerning the establishment of satellite positioning and navigation infrastructures as being of common interest for all network components and for the network as a whole[73].

PART B: EUROPEAN UNION EXTERNAL COMPETENCE IN AIR TRANSPORT

INTRODUCTION

The negotiations for the TEU, which lasted one year, took place during two intergovernmental conferences one on European monetary union and another on political union[74]. A unanimous agreement was reached at the Council of Maastricht on the 9, 10 and 11 December 1991.

The TEU provided the European Union with a structure composed of three pillars.

- Title II to IV (Article G to I) constitute the first pillar[75].

- Title V entitled 'Provisions on a CFSP (Article J to J.11) constitutes the second pillar.

- Title VI entitled 'Provisions on Cooperation in the fields of Justice and Home Affairs' (Articles K to K.9) constitutes the third pillar.

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[70] Classified according to their function within the airport network as Community connecting points, regional connecting points and accessibility points in accordance with a number of quantitative and qualitative criteria.

[71] Four developments priorities have been identified: the enhancement of existing airport capacity, the development of airport capacity, the enhancement of environmental compatibility and the development of access to the airport and interconnections with other networks.

[72] Comprising the aviation plan (the airspace reserved for general aviation, aviation routes and aviation aids), the traffic management system and the air traffic control system (control centre, surveillance and communications facilities) necessary for safe and efficient aviation in European airspace.

[73] The Commission will support both the air traffic management network and the projects concerning the establishment of the satellite positioning and navigation infrastructure.

[74] These conferences took place following a decision of the Council of Dublin on 25 and 26 June 1990.

[75] Titles II to IV contain respectively the provisions amending the Treaty establishing the European Economic Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community.

These three pillars are surrounded by Title I entitled 'Common Provisions' (Articles A to F) and Title VII entitled 'Final Provisions' (Articles L to S)[76].

Although the TEU has provided some links between the three pillars[77] and contains some provisions on the unity of the three pillar structure[78] there is a clear separation between each of the three pillars, and especially between the first pillar and the other two. The separation is essentially due to the fact that the Community approach[79] applies to the second and to the third pillars in a different manner from that in which it applies to the first pillar, one of the major differences being that the ECJ has no powers concerning the last two pillars[80].

The three pillar structure has an important consequence for the European Union's external competence in air transport because two different entities are competent to undertake external relations. External relations can be undertaken either by the three European Communities following a strict Community approach or by the Member States of the European Union, acting in the context of the CFSP, on the basis of their membership of the European Union.

This distinction will be taken into account in the following manner.

The European Communities' external competence will be examined first since this undoubtedly constitutes the most substantial part of the external competence of the Union in the field of air transport. The European Union's external competence will be examined subsequently as this may in the future play an increasingly important role in the field of air transport.

CHAPTER 1: EUROPEAN COMMUNITIES EXTERNAL COMPETENCE IN AIR TRANSPORT

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[76] The TEU is completed by 17 Protocols and 34 Declarations all grouped (except one) in the Final Act.

[77] These links are provided by Article J.8 and K.8 both of which make applicable to the second and the third pillars some provisions relating to the institutions of the European Communities.

[78] Title I of the TEU contains some key provisions on the unity of the structure of the Union. For instance Article A(3)(f) states: *[t]he Union shall be founded on the European Communities supplemented by the policies and forms of cooperation established by this Treaty* and Article C(2) provides: *[t]he Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies.* The Council and the Commission are specifically entrusted with the task of ensuring such consistency.

[79] The principal characteristics of the Community approach are the existence of institutions independent from the Member States (Commission, European Parliament , ECJ, ...), the existence of a supranational method (the Commission monopoly on legislative initiatives, qualified majority voting, ...), the existence of independent financial resources, and the transfer of certain powers from Member States to the Community.

[80] Except the powers conferred by the third subparagraph of Article K.3(2)(c), see Article L(2)(b) of the TEU.

a) Introduction

The external competence of the European Communities is based on provisions of the three founding Treaties, as interpreted by judgements and opinions of the ECJ, and as amended by the SEA and the TEU. Progress in the field of the external competence of the European Communities is represented by measures of secondary legislation adopted by the Council.

Firstly the provisions of the three founding Treaties will be examined. The provisions of the ECSC Treaty and of the Treaty establishing the European Atomic Energy Community (Euratom Treaty) will be examined briefly, and the provisions of the EC Treaty will be examined in detail.

Secondly there will be an examination of the external competence of the European Communities as provided by measures of secondary legislation adopted by the Council[81].

The examination will concentrate as far as possible on air transport matters. However, as initiatives in other areas include air transport within their scope, or are of importance for the European Communities' external competence in air transport, it will be necessary to examine some of these initiatives[82].

b) Treaty provisions

(1) The ECSC Treaty

The ECSC Treaty states that in foreign relations, the European Coal and Steel Community enjoys the legal capacity it requires to perform its functions and attain its objectives (Article 6(2)). There are no provisions in the ECSC Treaty dealing explicitly with treaty-making, but this has not prevented the conclusion of a series of agreements with third countries and international organisations.

(2) The Euratom Treaty

The external competence of the European Atomic Energy Community as provided in the Euratom Treaty is the most explicit of all three communities. Article 101 of the Euratom Treaty provides that the Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a

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[81] In this respect, only the external competence of the European Community will be examined and not the external competence of the Euratom and of the European Coal and Steel Community.

[82] The following areas which are of importance for the Community's external competence in air transport will, however, not be examined: the industry policy, the research and technological development policy, the environment policy and the development cooperation policy.

third state, an international organisation or a national of a third State. The negotiation of Euratom agreements or contracts is a matter for the Commission acting in accordance with Council directives. Agreements are concluded by the Commission with the approval of the Council, acting on a qualified majority. When implementation requires no action by the Council and can be effected within the limits of the relevant budget, it is to be negotiated and concluded solely by the Commission, although the Council must be kept informed.

There is a also a special procedure (Article 103) for ensuring that agreements or contracts concluded by Member States will not impede the application of theEuratom Treaty, and there are special provisions governing relations with international organisations (Articles 199 to 201)[83].

(3) The EC Treaty

(A) INTRODUCTION

When looking at the EC Treaty's provisions on external relations, the first thing to notice is that no Article of the EC Treaty, as opposed to the Euratom Treaty, is drafted in such a way as to confer a general competence upon Community institutions to enter into external relations. On the contrary, it is recognized that Community institutions have no free choice of the means for the fulfilment of the purposes of the Treaty[84], and that each institution shall act within the limits of the competence conferred upon it by the Treaty[85]. This is also confirmed by the wording of Article 228 which stipulates that the institutions shall act internationally *[w]here this Treaty provides for the conclusion of agreements between the Community and or more States or international organisations.*

As mentioned previously, in the field of inland transport no provisions in the EEC Treaty are directed at international relations with non-Member States or international organisations, and neither the SEA nor the TEU have changed this situation. Likewise, it is up to the Council to decide whether appropriate provisions may be laid down for sea and air transport[86]. For this reason, under the old doctrine based on the theory of 'compétence d'attribution', it was possible to conclude that the Community's external relations in the field of (air) transport would only be possible on the basis of a Decision by the Council under Article 235[87].

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[83] Only Article 201 has been amended by the SEA.

[84] Article 3b of the TEU states: *[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives to it therein.*

[85] Article 4 of the EC Treaty.

[86] See infra note 34 and accompanying text.

[87] Or if States, having adopted a common position, negotiate and conclude an agreement with third States on behalf of the Community, see A. Lowenstein, *European Air Law: Toward a New System of International Air Transport Regulation* (Baden-Baden: Nomos, 1991) at 126;

Nevertheless, three important changes subsequently took place: (i) the ECJ rapidly came to the conclusion that there is not only explicit external competence but also implicit external competence and that the European Communities have implicit external competence in the area of transport (including sea and air transport) (ii) the European Communities have used their explicit external competence to conclude agreements establishing an association which include (air) transport within their scope (iii) the TEU has granted treaty-making competence to the European Communities in the areas of the trans-European transport network.

Consequently, under EC Treaty provisions, there are currently three possibilities upon which to found the European Communities' external competence in the field of (air) transport[88].

The first is to found external competence in the field of (air) transport on the theory of implicit external competence as developed by the ECJ[89].

The second is to rely on the Treaty provisions explicitly granting external competence. This could be done either by attaching the matter of (air) transport to a matter which benefits from an explicit grant of external competence[90] or by relying on the TEU stipulations on the external competence of the European Communities in the field of the trans-European transport network.

The third is to rely on Article 235 of the EC Treaty.

In order to examine the EC Treaty's provisions on the European Community's external competence the following procedure will be used.

The first question to be examined is whether treaty-making competence is explicitly mentioned (explicit external competence) or whether it has to be implied from a

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C. Vedder, *Kommentar zum EWG-Vertrag* (Germany: Grabitz, 1987) and infra note 296 and accompanying text.

[88] For two other possibilities under Community secondary legislation upon which to found the Community's external competence in the field of (air) transport, see infra note 207 and accompanying text.

[89] This possibility is to be examined also in the next section dealing with the external competence of the European Community as provided by Community secondary legislation, see infra note 206.

[90] As will be seen below, this possibility has already been used in the fields of the Agreements establishing an association. This is also what the Commission intends to do when claiming that the legal basis for external relations in air transport is Article 113 of the Common Commercial Policy, see Proposal for a Council Decision on a consultation and authorization procedure for agreements concerning commercial aviation relations between Member States and third countries, COM(90) 17 final of 23.2.1990 [hereinafter Communication of 23 February 1990]; Air transport relations with third countries, Communication from the Commission to the Council, COM(92) 434 final of 21.10.1992 [hereinafter Communication of 21 October 1992].

Treaty provision which does not contain a specific clause to this end (implicit external competence) will be examined.

Secondly, it will be necessary to examine the nature of the Communities' (external) competence, and more precisely whether Member States still have (external) competence in relation to a particular matter.

Thirdly, the procedure under which the Communities are competent to conduct their external relations will be examined.

(B) TREATY MAKING COMPETENCE

(i) Explicit external competence[91]

(a) Common Commercial Policy[92]

The Common Commercial Policy (CCP) is the policy according to which the Community conducts its formal commercial relations with third countries[93].

Article 3(b) of the EEC Treaty provides that for the purpose set out in Article 2, the activities of the Community are to include a CCP.

Article 113, by stating: *[w]here agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations* establishes explicitly that the European Community has treaty-making competence in the field of the CCP.

There are many things to be said about the European Communities' external competence in the field of the CCP. Only three problems which are of major importance for the question of the external competence of the Community in the field of air transport will be examined.

The first problem relates to the question of whether the Community is competent to act in external commercial matters before having developed the internal market.

The second problem relates to the matter covered by the concept of CCP.

The third problem relates to the applicability of Article 113 to air transport.

Community competence to act in external commercial matters

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[91] Sometimes also referred to as express competence.

[92] Since the TEU, provisions relating to the CCP are contained in Part Three, Title VII (Articles 110, 112, 113, 115).

[93] Lord Hailsham of St. Marylebone, supra note 1 at 505.

In Case 1/75[94], the Court said that a Common Policy is in fact made up by the combination and interaction of internal and external measures, without priority being taken by one over the others. Sometimes agreements are concluded in the execution of a policy fixed in advance, sometimes that policy is defined by the agreements themselves. The CCP is above all the outcome of a progressive development based upon specific measures which do not necessarily presuppose, by the fact that they are linked to the field of a CCP, the existence of a large body of rules, but combine gradually to form that body[95]. This is of importance for the external competence of the Community in the field of air transport, because an argument often encountered against such competence is that the Community must first develop an internal air transport policy before starting to seek external competence in air transport matters.

Matters covered by the concept of CCP

In Case 1/75 the Court held that the concept of CCP is the same *whether it is applied in the context of the international action of a State or that of the Community.* Once the central purpose of the agreement is determined to fall within an area of Community competence, the fact that it has links with other issues does not take it out of that area. In Case 1/78[96] the Court stated that Article 113 empowers the Community to formulate a commercial policy based on *uniform principles* and that the Community should be able to apply *any other process intended to regulate external trade* thus showing that the question of external trade must be governed from a broad point of view[97].

For many years the Commission has argued in favour of a broad scope of application of the CCP.

The Commission first argued that the scope of application of the CCP shall be determined in accordance with an 'instrumental approach'. Under this approach, any measure which uses the instruments of the CCP, in particular the one enumerated in Article 113, is part of the CCP[98].

With the decision taken at the meeting at Punta del Este (in Uruguay), on 20 September 1986, to include trade in services within the Uruguay Round of

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[94] Case 1/75, Understanding on Local Cost Standard, Opinion of 11 November 1975, [1975] ECR 1355, [1976] 1 CMLR 85, ECJ.
[95] Lord Hailsham of St. Marylebone, supra note 1 at 507.
[96] Case 1/78, International Agreement on Natural Rubber, Opinion of 4 October 1979, [1979] ECR 2871, [1979] 3 CMLR 639, ECJ.
[97] Case 1/78, ibid. para. 45. See also Case 8/73, Massey Ferguson, Judgement of 12 July 1973, [1973], ECR 857, ECJ.
[98] P. Demaret, 'Les compétences implicites de la Communauté européenne' (1986) 45 Collège d'Europe at 4.

Multilateral Trade Negotiations, the Commission has argued that any measure related to trade in services is part of the CCP.

During the negotiations for the TEU, the Commission proposed the replacement of the term CCP with the term External Economic Policy[99] and the inclusion within the scope of the External Economic Policy of all commercial and economic measures relating to trade in goods and services, including trade in air transport services[100]. This suggestion, as well as others[101], has been rejected by a majority of delegations, mainly because they fear that services such as transport will fall within the scope of the CCP[102].

Following this rejection two important and related events have taken place.

On 15 December 1993, the Final Act Embodying the Results of the Uruguay Round was completed[103]. The Final Act includes the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) and contains the framework for the liberalization of international trade in a large number of services, including certain aspects of air transport services[104].

The second event is the signing in Marrakesh on 15 April 1994 of GATT and GATS by the 125 contracting parties and by the President of the Council and Commission[105].

Member States have, however, argued that the European Community has no exclusive competence to adopt the Final Act inasmuch as it relates to trade in services and intellectual property rights. The Commission has asked the ECJ to give an opinion on this question. The ECJ has given its opinion on 15 novembre 1994 and decided that trade in services and intellectual property rights are not matters of exclusive Community competence and therefore that both the Community and the Member States should adopt the Final Act so long as it relates to such matters. This

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[99] Including the Common Foreign and Security Policy (CFSP), the External Economic Policy and the Development Policy.

[100] See the Working Paper of the Commission dated 27.2.1991 [unpublished].

[101] The suggestions to include within the scope of the External Economic Policy of only those services linked to trade of goods or to include some services and to exclude others such as transport have also been rejected, J. Cloos, *Le traité de Maastricht* (Brussels, Bruylant, 1993) at 341.

[102] The delegations also rejected this suggestion because they preferred to adopt a three pillar structure for the Union, instead of a unitary structure as proposed by the Commission, see supra note 77 and accompanying text.

[103] GATT Doc. MTN. TNC/W/FA. [Hereinafter the Final Act].

[104] See infra note 629 and accompanying text.

[105] Together with the agreement establishing the World Trade Organisation (WTO) which should replace the GATT Secretariat as from 1 January 1995 and an agreement on Intellectual Property Rights.

ruling seems to exclude the possibility of attaching the matter of (air) transport to the CCP.

Applicability of Article 113 to air transport.

There are two basic ways to view this applicability.

Firstly, some writers hold that Article 113 is clearly one of the general rules of the Treaty and it therefore applies automatically to air transport[106]. The next question is: what are the consequences of the obligation upon the Council not to contradict or ignore Article 113 when it legislates in air transport matters? Indeed, Article 113 is merely a legal basis for action and therefore a rule of procedure which has no substantive normative value, and is therefore to be distinguished clearly from a general rule of the Treaty in the sense in which the Court used the term in Case 167/73[107]. Nevertheless, one could argue that the substance of Article 113 is to establish Community competence for commercial relations with third countries and that Article 84(2) cannot be used to change that situation. It seems to us that this argument is valid but that it is difficult to draw a dividing line between two different situations: a situation, such as the present one, where Article 84(2) is rarely used to establish Community external competence in air transport and a theoretical situation where Article 84(2) is used to exclude or to withdraw Community external competence in air transport, in contradiction of the substance of Article 113. This relates to the difficult problem of determining when a general rule of the EEC Treaty has not been respected, when the general aims of the rule are contradicted or when the substance of the rule is contradicted.

The second way to conceive this applicability is to consider that air transport is included within the scope of Article 113. This question, to some extent, is separate from the question of the scope of application of the CCP. Indeed, the fact that trade in services is included within the scope of the CCP does not automatically mean that all economic activities relating to air transport are covered by the notion of a CCP in Article 113[108]. The question of what aspects of air transport are included in the scope of Article 113 depends on the interpretation of Article 113. There are three recognized method for the interpretation of a provision of Community law: a textual interpretation; a systematic interpretation and a teleological interpretation[109].

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[106] F. Soerensen, 'Presentation to the ICAO World-Wide Air Transport Colloquium', Montreal, 1992, WATC-2.11, 7/4/92. For the application of the general rules of the Treaty, see supra note 35 and accompanying text.

[107] P. J. Slot, P. D. Dagtoglou, supra note 26 at 144.

[108] P. Pescatore, *La politique commerciale*, (Brussels: Ganshof van der Meersch, W.J. Les Nouvelles-Droit des Communautés européennes) No 1631 at 2229.

[109] A. Lowenstein, supra note 87 at 113-115.

A textual or grammatical interpretation of Article 113 does not give information about its exact scope since Article 113 contains only a non exhaustive enumeration of the possible fields to be covered by the CCP[110].

A systematic interpretation seeks to explore the meaning of a provision as it arises from its situation and context within the system of a legal text[111]. The TEU has grouped the former Parts Two and Three of the EEC Treaty into Part Three. Part Three, entitled *Community Policies*, includes, in particular, provisions which are, as mentioned previously, general rules of the Treaty, and other rules which might be viewed as having special characteristics, among which are three Community Common Policies: Agriculture, Transport, and Commercial.

Two extreme positions can be distinguished among writers who have used the systematic method of interpretation.

On the one extreme, some writers rely on the fact that Part Three of the TEU includes provisions which are general rules of the Treaty[112]. They argue that all the provisions of Part Three must be viewed as general rules applicable to all economic activities covered by the TEU. Since there is a need for a general legal basis of competence for external relations, all these economic activities are covered by the notion of a CCP in Article 113 of the EC Treaty. In the field of (air) transport this includes the economic activities which are excluded by Article 61(1) from the provisions of the Title relating to transport and the economic activities which are included in the provisions of the Title relating to transport, and in appropriate provisions laid down by the Council.

On the other extreme, some writers rely on the fact that the Treaty has conceived the three Community Policies on the same level and as each constituting a separate and independent Common Policy. On this basis they have concluded that the three Common Policies have special characteristics[113]. Consequently, they hold that it is impossible to submit the CTP to the CCP, and that transport, including air transport, is not covered by the notion of a CCP in Article 113.

Under a teleological interpretation of Article 113, one must refer to the aims of the Treaty. Since para. 6 of the Preamble to the Treaty underlines the desire of the contracting parties to abolish progressively, by means of a CCP, the restrictions on

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[110] This has been confirmed by the ECJ in Case 8/73, supra note 97 and in Case 41/76, Suzanne Criel née Donckerwolke and Henri Schou v. Procureur de la République au Tribunal de Grande Instance de Lille, Preliminary Ruling of 15 December 1976, [1976] ECR 1921, [1976] 2 CMLR 535, ECJ.

[111] A. Lowenstein, supra note 87 at 114.

[112] H. Van der Groben et al, *Kommentar zum EWG-Vertrag Vorb. a zu Article 113 bis 116*, 3rd ed. (Nomos: Baden Baden 1983).

[113] J. Mégret et als, *Le droit de la Communauté européenne, Commentaire du Traité et des textes pris pour son application* (Brussels: Bruylant, 1981).

international trade, and since the contracting parties to the TEU have made clear their desire to assert the identity of the European Union on the international scene[114], one could argue that any activity which favour the realization of such wishes would fall under the CCP and entitle the Community to act on the basis of Article 113[115]. Consequently, provided that the Commission can prove that Community action in the field of external relations in air transport will be beneficial for the abolition of restrictions in international trade and for asserting the identity of the Community on the international scene, one could consider that Article 113 is a legal basis for the Community's external competence in (air) transport.

In conclusion, the question of the applicability of Article 113 to air transport is a very complex issue to which there is still no clear solution.

The Commission's position regarding this is as follows; on the one hand, the Commission does not rule out the importance of the special characteristics of transport, but on the other hand it considers that it is Article 113 which is the legal basis for the Community's external competence in trade in services, including trade in air transport services. According to the Commission, a distinction has therefore to be made between two categories of measures[116]. Measures on market access, capacity, tariffs and associated measures concerning trade in services are referred to as 'commercial measures'. 'Commercial measures', insofar as they constitute the regulation of international trade in transport services, should be based on Article 113. From the Commission's point of view it is not entirely clear whether the economic activities which relate to transport, but which are excluded by Article 61 from the Title relating to transport, are considered as 'commercial measures'. All other measures, which may form part of a transport agreement with third countries and which cannot be considered as commercial measures, e.g. measures aimed at the harmonization of condition for competition in social, environmental, technical and safety fields, and measures concerning infrastructure problems should be based on Article 75 or 84(2) of the EC Treaty. In this latter case, the Community's external competence depends on the result of the application of the case law of the ECJ with regard to implicit external competence[117].

There is very strong opposition to the Commission's position from the Council, the European Parliament[118] and probably the majority of writers[119].

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[114] Article B of the TEU.

[115] A. Lowenstein, supra note 87 at 115.

[116] J. Erdmenger, 'The External Dimension of the EC Common Transport Policy'(1992) 4 Revue pour L'étude Scientifique des Transports at 426; Communication of 23 February 1990, supra note 90.

[117] See infra note 127 and accompanying text.

[118] For the position of the European Parliament, see infra note 339 and accompanying text.

[119] From all this widespread criticism it is sufficient to mention that, in the opinion of some writers, it would be extremely difficult to disentangle the purely commercial aspects of the CTP from its other aspects, and this would lead to demarcation disputes.

The legal service of the Council has made clear, in the context of the EEC-Norway-Sweden Air Transport Agreement (ATA)[120], that the legal basis for such an agreement is Article 84(2). The legal service argues that the choice of the legal basis of a legislative proposal does not depend only on the objectives and the aims of Community institutions but also on neutral elements susceptible to judicial control by the ECJ. Over and above these elements is the content and the purpose of the proposed legislative measure. Since the content and purpose of the EEC-Norway-Sweden ATA is to extend the freedom to provide air transport services to Norway and Sweden and since Article 61(1) states that the freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport, the legal service of the Council concludes that Article 84(2) is the proper legal basis for the conclusion of the EEC-Norway-Sweden ATA.

Given this situation the opinion of the ECJ on 15 novembre 1994 is of great importance. The Court made clear that Article 113 is not the proper legal basis for the conclusion of international (air) transport agreements and that the proper legal basis for the conclusion of such agreements is to be found in the Transport Title.

(b) Trans-European networks

The TEU stipulates: *[t]he Community may decide to cooperate with third countries to promote projects of mutual interest and to ensure the inter-operability of networks*[121]. As it will be seen in detail later on, this explicit legal basis for external competence is currently used by the Community to undertake external relations with EFTA and Central and Eastern European countries in the field of trans-European transport networks[122].

(c) Agreements establishing an association

Article 238[123] states that:

[t]he Community may conclude with one or more States or international organisations *agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.*

Unlike Article 113, no matter is specified for agreements concluded under Article 238. Therefore Article 238 must be regarded as a kind of catch-all Article which groups together all the Community's competence existing under the Treaty in the internal field and bearing on the area of external relations[124]. Since the political

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[120] For the content of this agreement, see note 512 and accompanying text.
[121] Article 129 C3.
[122] See infra note 471 and accompanying text.
[123] As amended by the TEU.
[124] P. Desmaret, supra note 98 at 8.

implications attached to the use of this Article are still important[125] the Community has, in the past, made little use of Article 238. Nevertheless, this Article has recently been used to conclude the European Economic Area Agreement (EEA Agreement) establishing an association with the EFTA countries members of the EEA Agreement and a series of Europe Agreements with individual Central and Eastern European countries. These agreements of major economic importance include air transport within their scope[126].

(ii) Implicit external competence[127]

(a) Foundation

The concept of implicit external competence has been developed by the ECJ in Case 22/70, in Joined Cases 3, 4, 6/76 and in Case 1/76.

In Case 22/70[128] the Council has contended that since the Community only has such competence as been conferred on it, competence to enter into agreements with third countries cannot be assumed in the absence of an express provision in the Treaty. More particularly, according to the Council, Article 75 of the EEC Treaty relates only to measures internal to the Community and cannot be interpreted as authorizing the conclusion of international agreements.

The Court did not agree with the Council's contention and said that the competence to enter into international agreements arose not only from an express conferment by the Treaty[129] but may equally derive from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the institutions of the Community. This was the first time the Court has ruled in favour of implicit external competence.

It seems that in Case 22/70 the Court has ruled in favour of implicit external competence, because of the need to preserve the integrity of the competence the Community has exercised and to ensure a uniform application of the objectives of the EEC Treaty. Consequently, the Court made clear that implicit external competence is conferred only to the extent (internal) Community rules are promulgated in order to attain the objectives of the Treaty. To this extent, when the Community adopts internal rules in a particular matter, it automatically acquires the

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[125] K. H Hendry, 'International Agreements and the EEC: the Practical Implications of a Constitutional Conflict' (1980) Lloyd's Maritime and Commercial Law at 121.
[126] See infra note 477 and 485 and accompanying text.
[127] Also called implied or virtual competence.
[128] The issue in this so-called ERTA Case, dealing directly with transport matters, was whether the power to negotiate and conclude a European Agreement concerning the work of crews of vehicles engaged in international road transport was vested in the Community or in the Member States, Case 22/70, see supra note 30.
[129] As is the case with Articles 113 and 228 of the EC Treaty.

competence to enter into external relations in respect of the same matter. This is called the doctrine of parallelism of competence or the so-called ERTA doctrine.

Since Case 22/70 the issue has been not whether there can be implicit external competence, but in what circumstances such competence exists.

In Joined Cases 3, 4, 6/76[130], the Court has not founded implicit external competence on the previous exercise of internal competence. On the contrary, the Court considered that the competence of the Community to act externally in the matter derived from the fact that the Community has at its disposal, on the internal level, competence to take measures similar to those that it might take externally[131].

This Case has lead to Case 1/76[132] where the mere existence of internal competence regarding commercial traffic on the Rhine was held to be sufficient to confer Community competence in regard to an international agreement which reduced the number of carriers and compensated those adversely affected.

In these two latter Cases the foundation of the Community's powers to act externally is not so much rooted in the need to preserve the integrity of the competence the Community has exercised but derives rather from the fact that an external action on the part of the Community is necessary for the attainment of one of the objectives of the Community. This latter ruling gives to the Community a more far-reaching implicit external competence than under the so-called ERTA doctrine.

(b) Conditions for the Community implicit external competence

According to Case 22/70 the conditions for the Community's implicit external competence are as follows:

- the Community must act to implement a Common Policy envisaged by Article 3 of the EEC Treaty.
- the Community must have promulgated provisions laying down common rules, whatever form they may take[133].

According to Case 1/76 the conditions are the following:

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[130] Joined Cases 3, 4, 6/76, Officier van Justitie v. Kramer, Preliminary Ruling of 14 July 1976, [1976] 2 CMLR 440, ECJ. The issue in this Case was participation in the North-East Atlantic Fisheries Convention subsequent to Community action on fisheries and conservation, the subject of the Convention.

[131] Point 33, Joined Case 3, 4, and 6/76, ibid.

[132] Case 1/76, Draft Agreement establishing a European laying-up fund for inland waterway vessels, Opinion of 26 April 1977, [1977] ECR 741, 2 CMLR 279, ECJ.

[133] Some writers consider that the Community measure must be a Council Regulation. This opinion seems in contradiction with the Court ruling in the Case 22/70, according to which the Community measure can be of *whatever form*, see supra note 30.

- the existence of internal competence to realize pre-determined objectives.
- the necessity for an action by the Community.

It should be noted that according to Case 1/76 the only paramount condition is the necessity for a Community action. There is a difference between the necessity for an action and the opportunity for such an action. These two notions differ in their nature and in their consequences[134]. The requirement of the necessity for a Community action is of a legal nature, while the appreciation of the opportunity for a Community action is only political. The consequences are also different; while the conclusion that there is a necessity for a Community action implies an attribution of competence to the Community, the conclusion that it is opportune to undertake a Community action has no influence on the legal competence of the Community[135].

(iii) Article 235

Substantial, if indeterminate, scope for the Community's external competence arises from Article 235, by which the Council may take appropriate measures if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the EEC Treaty, and this Treaty has not provided the necessary powers. The scope of Article 235 is wider that the scope of the European Community's external competence as determined by the theory of implicit external competence, since there is no requirement for the existence of internal competence to realise the determined objectives[136]. Article 235 has provided the basis of competence in particular for a series of wide-ranging, non-preferential Community cooperation Treaties concluded with third countries[137].

(C) NATURE OF COMMUNITY COMPETENCE

The first question is the nature of the Community competence in relation with a particular matter and whether Member States still have (external) competence in relation to such matter.

With respect to the CCP, in Case 41/76, the Court established that the whole field of commercial policy falls within the exclusive competence of the Community[138].

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[134] P. Demaret, supra note 98 at 28.
[135] P. Demaret, ibid. at 28.
[136] See generally F. Tschofen, 'Article 235 of the Treaty Establishing the European Economic Community: Potential Conflicts between the Dynamics of Lawmaking in the Community and National Constitutional Principles', (1991) 12 Michigan Journal of International Law 471; P. Demaret, supra note 98 at 30.
[137] Brazil, Canada, India, Yemen and groups of countries such as ASEAN and the Andean Pact, see infra notes 638 and 639.
[138] Case 41/76, supra note 109. See also Case 1/78, supra note 96.

This means that the Community is immediately and definitively competent[139]. It is of no importance whether the Community has exercised its competence or not[140].

With regard to the trans-European networks it seems, from the wording of the TEU[141], that the competence of the Community is a joint competence[142], that is to say that the competence of the Community must be shared with Member States, and that the Community and the Member States remain always free to act in their particular areas of competence. In respect of the trans-European transport networks this means that both the Community and the Member States are competent to cooperate with third countries to promote projects of mutual interest and to ensure the inter-operability of networks.

With regard to agreements establishing an association, such agreements emanate from the exclusive competence of the Community despite the predominant position of the Council in the negotiation of these agreements[143].

The CTP envisaged by the EEC Treaty rests on a system of concurrent competence[144]. This means that the Community is not immediately and definitively competent, that is to say that unless the Community has exercised its competence in a particular area by means of secondary legislation, the Member States remain free to act.

The second question is this: when exclusive or concurrent (external) competence exists for the Community, do Member States still have competence, and if so, in which particular matters?

Three different periods can be distinguished.

It is probably Case 22/70, dealing with transport matters, which first made it clear that the Community's (implicit) external competence excludes the Member States[145]. In Case 22/70 the Court stated that since the issue falls within the scope of already

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[139] Therefore when the Community has exercised its competence, the competence of Member States is only conceivable if the Community transfers its competence back to the Member States, K. Lenaert, 'Les répercusions des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de 'preemption' (1986) 45 Collège d'Europe at 41. In this respect see Article 115 of the EEC Treaty.

[140] K. Lenaert, ibid. at 41.

[141] The provisions of the TEU on the trans-European networks often refer to the need for a collaboration between the Community and the Member States, see Article 129 b(1), 122 c(1) third indent and (2), 129 d(2).

[142] M. Waelbrouck et al., *Le droit de la Communauté européenne* (Brussels: Bruylant, 1981) at 103.

[143] D. Lasok, J.W. Bridge, *Law and Institutions of the European Communities*, 4 ed. (London: Butterworth, 1987).

[144] Also called parallel competence.

[145] Case 22/70, see supra note 30.

promulgated Community rules, the Community has been empowered to negotiate and conclude the agreement and such powers preclude the possibility of concurrent competence on the part of Member States. It should be noted that the already promulgated Community rule was in fact Council Regulation (EEC) No 543/69 providing an explicit grant of external competence to the Community under Article 3 of the said regulation which states: *[t]he Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation*. One might wonder whether the court ruling would have been the same if there were no such explicit grant of external competence as it is currently the case for secondary Community legislation on air transport.

In Case 22/70, the Court spoke as if the Community's external competence precluded action by Member States where that affected the rules adopted by the Community[146]. Consequently, external (implicit) competence excludes Member States insofar as internal competence has become exclusive by reason of the Community exercise of it[147]. In fact external (implicit) competence excludes Member States by the fact that the Member States participation would not be compatible with the subsequent implementation of the agreement by the Community[148].

In Case 1/78 a narrower doctrine was enunciated: the freedom of action of Member States is constrained insofar as is necessary to protect a policy which the Community has developed or might develop in the area in question[149]. Consequently, Member States may only conclude international Treaties in areas other that of the Community.

The ECJ has since relaxed its previous case law.

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[146] Lord Hailsham of St. Marylebone, supra note 1 at 484; J. Steenbergen, 'The Common Commercial Policy' (1980) 17 CMLR at 233.

[147] It should be noted that the failure of the Council to agree does not restore the competence of Member States, J. Temple Lang, 'The Constitutional Principles governing Community Legislation' (1980) 40 Northern Ireland Legal Quarterly 227.

[148] This has been confirmed by Case 41/76 dealing with commercial matters, where the Court stated that, since full responsibility in the matter of common policy was transferred to the Community, measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community, see supra note110.

[149] Case 1/78 conflicts with Case 1/75, supra notes 92 and 94. In Case 1/75 the Court said that Member State participation is excluded even if the obligations and financial burdens inherent in the execution of the agreement envisaged are borne directly by the Member States, whereas in Case 1/78 the Member States could share competence with the Community if they financed the contribution directly rather than via the Community budget, see J. Steenbergen, supra note 146 at 233.

In Case 104/80 the Court decided that the implementation of commercial policy agreements may be effected by Member States according to the state of the Community law on the subject concerned[150].

In Case 59/84 the Court decided that the full application of the principle of free movement to goods imported from non-Member countries is conditional upon the establishment of a CCP, based, in accordance with Article 113, on uniform principles. Since there is not yet complete uniformity as regards conditions for the importation of the products, in point of fact textile products, originating in third countries, the Court decided that the Commission has the power, under Article 115, to authorize Member States to take, with respect of these products, protective measures to prevent deflections of trade or economic difficulties, and specifically to make the import of these products subject to the grant of a licence[151].

In Case 174/84, the Court decided that, although Article 113 of the EEC Treaty prohibits the general exclusion of certain products from the field of application of the CCP, the Council may nevertheless, in the exercise of the discretion which it enjoys in economic matters of such complexity, provisionally exclude certain products, in point of fact crude oil, from the Commission's rules on exports. Such an exclusion was specifically permissible in the case of crude oil, in view of the international commitments entered into by certain Member States and taking into account the particular characteristics of that product, which is of vital importance for the economy of a State and for the functioning of its institutions and public services[152].

In conclusion, it is important to note the complexity of the problem and the evolution of the case law of the ECJ. The ECJ has recently favoured a freer interpretation of the exclusive nature of the Community competence in the field of the CCP. Because of this evolution, it might be less difficult for Member States to admit that the scope of the CCP includes trade in services, including air transport services and that the Community has exclusive external competence in these areas. Indeed, under the recent case law of the ECJ the Commission might authorize Member States to take certain protective measures in the field of international trade in air transport services or, even, the Council might use its discretionary powers to exclude certain aspects of such trade from the Commission's rules.

(D) PROCEDURE

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[150] See Case 104/81, Kupferberg Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A., Preliminary Ruling of 26 October 1982, [1982] ECR 3641 at 3659, 1 CMLR 1, ECJ.

[151] Case 59/84, Tezi Textiel BV v. Commission of the European Communities, Judgement of 5 march 1986, [1986] ECR 887, ECJ; see also Case 242/84, Tezi BV v. Minister for Economic Affairs, Preliminary Ruling of 5 March 1986, [1987] ECR 93, ECJ.

[152] Case 174/84, Bulk Oil (Zug) AG V. Sun International Limited and Sun Oil Trading Company, Preliminary Ruling of 18 February 1986, [1986] ECR 559, ECJ.

(i) Article 228

As mentioned previously, during the TEU negotiations, the Commission proposal to integrate all external policies of the European Union within a single Chapter was rejected[153]. It was agreed, however, to have a common procedure in the field of Community competence, for the negotiation and the conclusion of agreements between the Community and one or more States or international organisations[154].

This common procedure is provided by Article 228 of the TEU.

According to Article 228, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. Agreements are to be negotiated by the Commission, in consultation with special committees appointed by the Council[155] and within the framework of the directives the Council may issue it. Agreements are to be concluded by the Council, on a proposal from the Commission, except when such power has been vested in the Commission.

The Council shall act on a qualified majority except *when the agreement covers a field for which unanimity is required for the adoption of internal rules.*

This means, with regard to the areas where the Community's external competence includes (air) transport within its scope, that the Council shall always act by a qualified majority except in the following cases where unanimity will be required:

- for the adoption of international agreements in the field of (air) transport when the conditions provided in Article 75(3) are met[156].

- for the adoption, on a second reading, of international agreements in the field of (air) transport when the European Parliament has rejected the Council's common position.

- in certain circumstances[157] for the Council to adopt the Community guidelines referred to in Article 129c(1) with the idea of identifying projects of common interest in third countries in the field of trans-European (transport) networks.

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[153] See supra note 101 and accompanying text.
[154] Ibid.
[155] In the field of the CCP the committee to referred to is the 113 Committee (called after the relevant Article of the EEC Treaty). In the field of air transport the Commission has proposed the creation of an 'Ad Hoc Aviation Committee' to assist the Council and the Commission, see Communication of 21 October 1992, supra note 90 at para 60 and 64.
[156] See supra note 34 and accompanying text.
[157] When the European Parliament has rejected the Council's position.

- in certain circumstances[158] for the Council to adopt the other measures provided for in Article 129c(1) for the adoption of international agreements in the field of trans-European (transport) networks[159].

- for the Council to conclude an agreement establishing an association with one or more States or international organisations[160].

As mentioned previously[161] according to the TEU the Council voting rule for adopting external rules shall be, in principle, the same as that required for the adoption of internal rules. During the negotiation of the TEU it was decided to make an exception to this principle because it was felt that the procedures referred to in Article 189b and 189c were incompatible with the requirement, for the adoption of external rules, of a quick and easy procedure.

Instead, the following system was agreed upon: except for the agreements referred to in Article 113(3)[162] the European Parliament is always consulted before the conclusion of international agreements by the Council. The European Parliament is merely consulted even where the agreement covers an area for which the procedure referred to in Articles 189b and 189c is applicable for the adoption of internal rules.

By derogation, agreements referred to in Article 238, agreements establishing a specific institutional framework by organizing cooperation procedures, agreements having important budgetary implications for the Community and agreements entailing the amendment of an act adopted under the procedure referred to in Article 189b shall be concluded after the assent of the European Parliament has been obtained[163].

This means, with regard to areas where the Community's external competence includes (air) transport within their scope, the following.

- For international (air) transport agreements the European Parliament is merely consulted except where such agreements are of a kind requiring the assent of the European Parliament[164].

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[158] The Council must act unanimously on the amendments of the European Parliament on which the Commission has delivered a negative opinion, see Article 189b(3) of the TEU.

[159] In the field of trans-European networks the Community guidelines referred to in Article 129c(1) are to be adopted according to the procedure referred to in Article 189b) while all other measures shall be adopted in accordance with the procedure referred to in Article 189c. In both procedures special voting rules (absolute majority (Article 189b) or unanimity (Article 189c) are provided when the Council is in opposition with the European Parliament.

[160] Article 228(2) in fine.

[161] See supra note 156 and accompanying text.

[162] See also infra note 168 and accompanying text.

[163] The Council and the European Parliament may, in urgent situations, agree upon a time limit for the assent.

[164] See supra note 163 and accompanying text.

- For trans-European (transport) networks, any international agreement with third countries will be concluded after consultation with the European Parliament, except if such agreements are of a kind requiring the assent of the European Parliament[165]. It should be mentioned that under the procedure for the adoption of internal rules the European Parliament has much stronger powers.

- For association agreements Article 228 provides expressly that such agreements need the assent of the European Parliament before being concluded by the Council[166].

Article 228 also provides for a special procedure to set up a time limit for the European Parliament to deliver its opinion, and in the absence of an opinion within that time limit, the Council may act. Likewise, a special procedure is laid down by which the Council, the Commission or a Member State may obtain beforehand the opinion of the ECJ as to whether a proposed agreement is compatible with the provisions of the Treaty. The purpose of this latter special procedure is to avoid the complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding on the Community. Where the opinion of the Court of Justice is adverse, the agreement may come into force only in accordance with the amendment procedures of the Treaty[167].

(ii) Common Commercial Policy

Exceptionally, Article 113 sets out a specific procedure for agreements dealing with trade matters, which involves the Commission making recommendations to the Council, which shall authorize the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council and within the framework of such directives as the Council may issue to it[168]. In the absence of other provisions in Article 113 the provisions of Article 228 should apply. Although the Council has not been legally obliged to consult the European Parliament since 1973 the European Parliament is consulted on common commercial agreements in accordance with the 'Luns-Westerterp' procedures[169]. In addition, the Commission has stated that the Stuttgart

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[165] Ibid.
[166] Such assent is obtained if a simple majority of the European Parliament votes in favour.
[167] Article N of the TEU.
[168] Article 113(3) as amended by the TEU. More details about this procedure are contained in Council Decision of 16 December 1969 on the progressive standardization of agreements concerning commercial relations between Member States and third countries and on the negotiation of Community agreements, OJ No L 326 of 29.12.1969 at 39.
[169] D. Rogalla, C. Schweren, *Der Luftverkehr in der Europäischen Union* (Baden-Baden: Nomos, 1994) at 96. Under this procedure the Council inform the Parliament as a whole (as

Declaration of 19 June 1983 requires the European Parliament to be consulted on all significant international agreements by the Community, regardless of their legal basis[170].

The Council, in exercising all the powers conferred upon it by Article 113, shall act by a qualified majority[171].

(iii) Mixed agreements

The Euratom Treaty especially envisages 'mixed agreements', i.e. where one or more Member States are also parties to agreements or contracts. The Euratom Treaty provides that mixed agreements are not to enter into force until the Commission has been notified, by all the Member States concerned, that these agreements had become applicable in accordance with national laws[172].

Mixed agreements are used, with increasing frequency, when the matter of the agreement falls partly within the competence of the Community and partly within the competence of the Member States. In most cases of double competence, both the Community and the Member States take part in the negotiations and become parties to the resulting agreement. The Community will assume responsibility for the areas of its competence and the Member States for theirs[173].

Usually such techniques reflect a wish to avoid discussions on competence, and even the question of whether or not Member States are entitled to participate is often settled on political rather than legal grounds[174].

c) Secondary legislation

The progress in the European Community's external competence in air transport is represented by measures of secondary legislation adopted by the Council in air transport matters, or in matters having air transport within their scope.
First the development of the European Community's (external) competence in air transport will be examined, and then the present situation with respect to such external competence.

(1) Development of European Community competence in air transport

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opposed to its Committees) of the content of the agreements after it has been signed but before conclusion.

[170] Dr. D. Rogalla, C. Schweren, ibid. at 96.

[171] Article 113(4).

[172] Article 102 of the Euratom Treaty.

[173] House of Lords, Select Committee on the European Community's 's External Aviation Relations, supra note 34 at 8.

[174] K. P. Hendry, supra note 126 at 124; Lord Hailsham of St. Marylebone, supra note 1 at 484.

(A) INTRODUCTION

In this section there will be an examination of the various projects and initiatives of Community institutions which appear to have an impact on the Community's present (external) competence in air transport.

All these projects and initiatives have one thing in common: they show a willingness to adopt a common approach to the problem of air transport. There has been, however, an evolution: at the beginning the idea was to integrate air transport in such a way that a single organisation, the Community, would be responsible for the regulation and the supervision of all aspects of air transport, including extra-Community air transport. In 1984, the Civil Aviation Memorandum No 2 launched the idea of first integrating the intra-Community side of air transport. This idea, which was endorsed by the Commission's White Paper of 14 June 1985 on the Completion of the Internal Market, was very much followed with the consequence that today, few aspects of extra-Community air transport are integrated at a Community level.

(B) FIRST INITIATIVES

The first steps in Europe towards integration in civil aviation were undertaken as early as 1934[175]. After that, but still before the conclusion of the EEC Treaty, in 1957, a few proposals regarding the organisation of European civil aviation were submitted to the Council of Europe[176]. Following the conclusion of the EEC Treaty,

[175] Some resolutions regarding civil aviation were put forward by the 'Pan European Economic Conference', see (1934) IV Revue Aeronautique Internationale, 389.

[176] Three plans were submitted to the Council of Europe: the 'Bonnefous' plan, the 'Vander Kieft' plan and the 'Sforza' plan (the most ambitious), See (1951) XIV Revue Générale de l'Air, 359-372.

the Commission and the European Parliament, probably motivated by some initiative from the private sector[177], in 1960-1961 put forward two documents on air transport[178] which have not been a great success.

(C) DOGMATIC COMMUNITY PROJECTS

It was at the end of the period of transition of the EEC Treaty, in 1970, that the Commission took a major initiative in the field of air transport.

In June 1970, the Commission transmitted to the Council a Communication (presented officially in the form of a Declaration) proposing a series of measures in air transport. The intention of the Commission was to proceed rapidly to a complete transfer of national authority in the air sector to the European institutions. The main interest for us is that the Commission, at that time, proposed to integrate both the intra and the extra-Community side of air transport. Indeed, among the series of measures proposed it was mentioned that the Commission would examine with Member States and airlines the traffic rights between Member States and non-member countries as well as international cooperation in aeronautical matters[179].

On 30 June 1972, the Commission submitted to the Council a proposal for a Council Decision pertaining to the first elements of a common action in air transport[180]. The European Parliament gave its opinion on the Commission's proposal in the 'Noe Report'[181]. In this report, the European Parliament recommended that air transport competence should be transferred from Member States to the Community, and that cooperation regarding relations between airlines and third countries shall be encouraged[182].

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[177] See in particular the consortium SAS created by the Consortium Agreement of 8 February 1951 between three mother companies, Swedish ABA, Danish DDL and Norwegian DNL and the attempt in 1958 to create an European airline, to be known as 'Europair'. For more information, see P. Haanappel, *EEC Air Transport Policy and Regulation, and their Implications for North America*, supra note 28; E. Du Pontavice, J. Dutheil de la Rochère, G. Miller, *Traité de droit aérien* (Paris: Librairie générale de droit et de Jurisprudence, 1989) at 38ff; M. Folliot, Les voies et moyens de l'évolution réglementaire du transport aérien en Europe (1986) 40 RFDA at 24.

[178] Memorandum 51/61 of the Commission on the 'General Lines of a Common Transport Policy' of 10 April 1961 and the Report 107 of Corniglion Molinierto, rapporteur to the European Parliament. See also the Memorandum of the Council on 'The Applicability to Transport of the Rules of Competition set out in the EEC Treaty and on the Interpretation and Application of the Treaty in Relation to Sea and Air Transport' of 12 November 1960.

[179] E. E. Henrotte, supra note 41 at 198.

[180] Commission Proposal for the development of intra- and extra-EEC air services and for the coordination of tariff policies, Doc. COM(72), 675 final in OJ No L 110 of 18.10.1972 at 6.; A. Lowenstein, supra note 87 at 65.

[181] Noe Report, European Parliament, Word Doc. 195/72 of Sess 1972/73 P. E. 30 at 248; Doc. PE 30.248 déf Doc. 195/72 and 328/72.

[182] See also European Parliament Resolution of 16 March 1973, OJ No C 19 of 12.4.1973 at 52.

The Economic and Social Committee gave its opinion on the Commission's proposal in the 'De Grave Report[183].' The Economic and Social Committee considered that there was a need to develop a common policy regarding the relations with non-member countries.

It is necessary to stress that the Commission's proposal, the 'Noe Report' and the 'De Grave Report' denotes a dogmatic conception of the problems of aeronautics in Europe and show an ignorance of the social consequences of the recommended measures as well as of their political and legal environment (in particular the existence of international regulation in air transport)[184]. None of these initiatives have led to concrete measures or have been well accepted by the Member States. In view of this failure, the Commission decided to call upon the ECJ.

(D) THE 1975 ACTION PLAN AND THE 1976 COMMUNICATION

The Commission did not seek to benefit from the judgement of the ECJ in Case 173/73[185] but instead adopted a more flexible and realistic approach by seeking the collaboration of the governments and of the airlines[186]. While adopting this new approach it is important to note that the Commission still proposed at that time to integrate simultaneously the internal and the external side of Community air transport.

The 1975 action plan[187] for the European aeronautical sector (or 'Spinelli Report') established the principle that the Commission has, parallel to the implementation of the general rules of the Treaty, to implement a CTP, on the basis of Article 84(2). This policy would have two general objectives. The first would be, in close cooperation with Member States and air carriers, to create a European air space regulated at a Community level, and the second being the joint negotiation with non-member countries of, in particular, traffic rights[188]. Among the actions to be implemented the 'Spinelli Report' recommended that links should be set up with international organisations such as International Civil Aviation Organisation (ICAO) and the European Civil Aviation Conference (ECAC).

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[183] 'De Grave Report', published on 27 February 1973, Doc. R/CES/75/73.
[184] E. E. Henrotte, supra note 41 at 202.
[185] Case 167/73, see supra note 35 and accompanying text.
[186] E. E. Henrotte, supra note 41 at 202
[187] The Action Program for the European Aeronautical Sector, Doc COM(75) 475 final of 1.10.1975. This action plan included a Communication from the Commission and two proposals transmitted to the Council on 3 October 1975, Bulletin EC, suppl. 11/75, OJ No C 265 of 19.11.1975.
[188] E. E. Henrotte, supra note 41 at 204.

The 1976 Communication (or 'Scarrascia-Mugnozza Report')[189] added that relations with ICAO and ECAC should be based on Article 229 of the EEC Treaty and proposed an exchange of letters to this end.

On the basis of this more flexible and realistic approach the Council decided, in June 1977, to launch the process of applying the EEC Treaty to air transport[190]. However, this process needed an impetus, which came from the Commission with the Civil Aviation Memorandum No 1.

(E) THE CIVIL AVIATION MEMORANDUM NO 1 (1979)[191]

In this document the Commission sought to create a debate on the contents of a Common Air Transport Policy (CATP) among the institutions of the Community, and to propose certain specific actions in order to improve the scope for better air transport services in Europe.

The Commission's approach was prudent: comparison with deregulation in the United States was rejected and the proposed action had only a positive impact on air carriers[192].

There were very few actions proposed in this Memorandum regarding action on air transport external relations. It was only mentioned that the Commission, which had signed cooperation agreements with ECAC and Eurocontrol, would endeavour to improve its cooperation with ICAO. In addition, the Commission announced its intention to use the procedure laid down by Council Decision 80/50/EEC in the field of air transport questions to deal with international organisations and developments in relations between Member States and third countries in air transport.

The Civil Aviation Memorandum No 1 was the subject of a relatively favourable reception by the other Community institutions, the airlines and the users' committees, but the labour unions and ICAO were more critical[193].

(F) THE CIVIL AVIATION MEMORANDUM NO 2 (1984)[194]

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[189] SEC (76) 2466.

[190] The Council asked the Permanent Representatives Committee to create a working party specializing in air transport and initially instructed it to draw up a list of priorities. The Member States took care to retain control of this group since it falls within the competence of the Council and not within the competence of the Commission.

[191] The Civil Aviation Memorandum No 1 (1979) 'Air Transport: A Community Approach', COM(79) 311 final of 06.7.1979, Bulletin of the European Community, supplement 5/79.

[192] Among the proposed action was a specific proposal for the Council which led to Council Decision 80/50/EEC, see infra note 291 and accompanying text.

[193] The first arguing that social aspects had been neglected and the second stating that technical improvements were not the responsibility of the Community Institutions.

[194] The Civil Aviation Memorandum No 2 (1984) 'Progress towards the Development of a Community Air Transport Policy', COM(84) 72 final of 15.3.1984.

The purpose of this Memorandum was to propose an overall framework for air transport in the Community and to describe the measures the Commission intended to take. In the Memorandum, an important policy decisions was taken. The Commission stated in the Chapter III of the Memorandum that a system suitable for application between the Member States of the Community will not necessarily be suitable for application on routes to third countries. For this reason the Commission proposed to concentrate on air transport between the Member States. It is the first time that the decision to concentrate on the intra-Community side of air transport has been clearly and firmly taken. Some writers, like Naveau, regret this lack of ambition on the part of the Commission and would have preferred to see the Commission embracing at one and the same time the internal and the external side of Community air transport[195].

(G) THE COMMISSION'S WHITE PAPER ON THE COMPLETION OF THE INTERNAL MARKET (1985) [196]

The White Paper on the internal market, transmitted by the Commission to the European Council[197] of Milan on 28-29 June 1985, stressed the need to complete the internal market and the need to deal first with internal Community matters[198].

In the field of transport the White Paper underlined the importance that the Commission attached to implementation of the CTP, which registered among the top priorities to be implemented[199].

(H) FURTHER COMMISSION INITIATIVES

The Commission addressed two letters to Member States.

The first in September 1989 was based on Article 234 of the EEC Treaty and relates to the requirement for Member States to eliminate any incompatibilities with the Treaty arising from Bilateral Air transport Agreements (BATAs) concluded with third countries, before the entry into force of the Treaty, as well as the obligation, after the Treaty comes into force, to refrain from concluding BATAs incompatible with the Treaty.

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[195] J. Naveau, *Droit Aérien Européen: les nouvelles règles du jeu* (Paris: Institut du Transport Aérien, 1992) at 37.

[196] Commission's White Paper of 14 June 1985 on the Completion of the Internal Market, COM(85) 310 Final, para. 108 at 9.

[197] The European Council defines the principles and general guidelines for the Common Foreign and Security Policy (CFSP).

[198] P. Haanappel et al., *EEC Air Transport Policy and Regulation, and their Implications for North America*, supra note 28 at 19.

[199] In this respect it specified that in the absence of a decision by the Council on CTP and air transport, it would, on the basis of Article 89 of the EEC Treaty, tackle agreements and decisions among air carriers considered to be illicit.

The second, in March 1990, relates to the grant of fifth-freedom traffic rights to non Member States and seeks to obtain from Member States an undertaking that they would respect the procedure laid down in the Council Decision of 16 December 1969[200].

Both letters have been ignored by Member States essentially because they have feared that the re-negotiation of existing BATAs will lead to the obligation to grant additional concessions to their bilateral partners[201].

(I) TRANSPORT COUNCIL MEETING OF JULY 1990

The Transport Council meeting of July 1990 recognised that the achievement of the internal market made it more necessary for the Community to acquire external competence in the field of the CTP. The Transport Council agreed to a transfer of competence to the Commission but decided that a mandate to this effect would only be given after a policy framework had been agreed between the Council and the Commission. A mandate would then be given on the basis of Article 75-84(2) of the EEC Treaty, even though the Commission has insisted that the legal basis should be Article 113.

(J) TRANSPORT COUNCIL MEETINGS IN 1992

The Communications from the Commission of 21 October 1992[202] was the subject of a presentation by the Commissioner for Transport at the Transport Council meeting held on 26 October 1992 and of a preliminary discussion at the Transport Council meetings held on 7 and 8 December 1992.

(K) TRANSPORT COUNCIL MEETING OF 15 MARCH 1993

The Transport Council meeting of 15 March 1993 embarked on a discussion of the fundamental issues of Community external air transport without specific reference to the Communications from the Commission on air transport relations with third countries.

The discussion led to the following conclusions:

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[200] Member States also freared that the negotiation of Community agreements will be governed by Council Decision of 16 December 1969 which provides the Commission with wide-ranging powers, see supra note 168 and infra note 548 and accompanying text.

[201] For additional reasons, see J. Naveau, Droit Aérien Européen: les nouvelles règles du jeu, supra note 195 at 114.

[202] See supra note 90.

- Member States should remain fully responsible for their external relations in the field of air transport.
- In their negotiations with third countries Member States must take account of obligations arising from the EEC Treaty, including secondary legislation and, in particular, the measures resulting from the third air transport package.
- The validity of existing bilateral agreements shall not be challenged.
- A Community approach to third countries should be contemplated only when in the Council's view there is a clearly defined common interest among Member States.
- Negotiations at a Community level shall be authorized ad hoc by the Council and only when analysis has shown that a better result for all Member States concerned can be reached with negotiations at Community level, compared to bilateral negotiations conducted by Member States[203].

(2) European Community external competence in air transport

(A) INTRODUCTION

One of the most important questions with respect to the European Community's external competence in air transport under secondary legislation is to determine whether the Community is, or might become, competent in a 'piecemeal fashion' or in a 'gradual fashion'[204]. This needs some explanations.

As mentioned previously, the EEC Treaty does not provide for the Community's explicit external competence in air transport.

A series of cases before the ECJ have, nevertheless, decided that the Community enjoys implicit external competence in air transport. Consequently, to the extent that the Community has promulgated internal rules in air transport matters or including air transport within their scope[205] and that these secondary legislative measures have an external effect[206] the Community acquires the competence to negotiate and conclude international agreements with third countries.

On the other hand, as mentioned previously, the Council, acting under Articles 75-84(2), may lay down common rules applicable to international transport to or from the territory of a Member States or passing across the territory of one or more

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[203] H. Wassenbergh, *Principles And Practices in Air Transport Regulation* (Paris: Institut du transport aérien, 1994) at 21.

[204] House of Lords, Select Committee on the European Community's External Aviation Relations, supra note 34 at 25.

[205] Or simply, according to Case 1/76, to the extent the Community has internal competence to realize a determined objective, see supra note 132 and accompanying text.

[206] This effect, as we will see, can be horizontal, negative or positive, see infra note 209 and accompanying text.

Member States. It is arguable that this provides the Council with the power to adopt secondary legislation granting to the Community external competence in air transport.

Thus, there are two possible ways for the Community to acquire external competence under secondary air transport legislation.

- First the Community, by relying on the ECJ theory of implicit external competence, can assume external competence in a 'piecemeal fashion' and take over the negotiation and conclusion of international agreements in air transport matters or in matters including air transport within their scope which are covered by internal rules adopted by the Council.

- Secondly, the Commission can propose to the Council, acting under Articles 75-84(2), that it should adopt a legislative measure confirming explicitly the Community external competence. The Community can then take over in a 'gradual fashion' the negotiation and conclusion of international agreements in all air transport matters.

Therefore it is of importance to determine whether existing Community secondary legislation has external effects.

The answer to this question determines whether or not the Community can already rely on existing Community secondary legislation having an external effect and thus assume external competence in a 'piecemeal fashion'.

This in turn will determine whether or not external competence has already shifted from Member States to the Community, with the consequence that Member States must ensure that in their relations with third countries they do not agree to anything inconsistent with existing Community secondary legislation having an external effect[207].

The answer to this question will also influence the likelihood of the Commission convincing the Council that it is more appropriate for the Community to assume its external competence in a 'gradual fashion' rather than in a 'piecemeal fashion' and that, therefore, it is necessary for the Council to confirm explicitly that the Community has external competence in all air transport matters.

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[207] Indeed, according to the case law of the ECJ, Member States are constrained insofar as is necessary to protect a policy which the Community has developed or might develop in the areas in question, see Case 1/78, supra note 96.

Finally, the answer to this question will determine whether or not there already exists a 'fortress Europe' vis-à-vis non-Community air transport operators[208].

When trying to determine whether existing Community secondary legislation has external effects it is intriguing to note that all Community measures in air transport or including air transport within their scope have an external effect in the sense that they all have an effect on extra-Community air transport.

In view of the large number of such measures and also the variation in their nature and in their external effect a new classification of these measures appears to be necessary.

Accordingly, all the Community measures have been grouped into the following four categories:

- a wide range of Community measures of harmonization in matters other than air transport include air transport within their scope, and have what might be called a horizontal external effect[209]. This means that such measures grant rights and provide obligations to economic agents operating within the Community, regardless of their nationality, and this therefore includes non Community air transport operators operating within the Community.

- Some Community measures of harmonization in air transport matters have what might be called a negative external effect. This means that the rights granted by such measures and the obligations provided relate only to Community air transport operators. This is done either by restricting the scope of application of Community measures to intra-Community air transport operations undertaken by Community air transport operators or by excluding foreign, i.e. non Community air transport operators operating within the Community[210] from the benefit of the rights granted and from the obligations provided by such measures.

- Some Community measures of harmonization in air transport matters have what might be called a positive external effect. This means that such measures grant rights and provide obligations to all air transport operators, usually without distinguishing between Community and foreign air transport operators.

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[208] As used here, the term 'air transport operators' not only includes air carriers but also travel agencies, CRS operators, ground-handling agents, etc.

[209] The subject-matter of these measures can be either CTP measures relating to all the modes of transport or even measures lying outside the CTP and with a scope of application wide enough to concern a large range of economic activities undertaken within the single market.

[210] Notably air carriers operating fifth-freedom traffic. For definitions of the freedoms of the air, see B. Cheng, *The Law of International Air Transport* (London: Stevens and Sons, 1962) at 8-16 and 403-410.

- Some Community measures have what might be called a direct external effect. This means that the purpose of such measures is to assign to the Community external competence in air transport.

The Community measures classified in the first three above-mentioned categories only indirectly assign to the Community external competence in air transport. External competence is assigned indirectly since the Community must first adopt internal rules and then undertake external relations based on the case law of the ECJ on implicit external competence.

On the other hand, Community measures contained in the fourth category assign explicit external competence in air transport directly to the Community.

An examination of all these Community measures will show that, if much Community secondary legislation has assigned external competence in air transport indirectly to the Community, only very little Community secondary legislation has directly assigned such competence to the Community.

(B) MEASURES HAVING A HORIZONTAL EXTERNAL EFFECT

A large number of the Community's harmonization measures in other matters than air transport but including air transport within their scope have a so-called horizontal external effect.

Only a few examples will be given.

(i) Council Directives on summertime arrangements

The Council Directives on summertime arrangements[211] have a horizontal external effect, since such arrangements introduce a common date and time for economic agents operating in the Community, including non Community air transport operators. The European Parliament and the Council have recently adopted a Council Directive on summertime arrangements in all of the Community for the years 1995 to 1997[212].

(ii) Freedom of establishment and freedom to provide services

Since the ECJ has ruled that the principle of freedom to provide services must be introduced by the Council[213] the Community has introduced measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in

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[211] These directives were adopted on the basis of Article 100a of the EC Treaty.
[212] Seventh Directive 94/21/EEC of the European Parliament and the Council of 30 May 1994, OJ No L 164 of 30.6.1994 at 1.
[213] See Case 18/83, supra note 29 and accompanying text.

respect of the activities of self-employed persons in certain services incidental to transport and travel agencies and in storage and warehousing[214].

(iii) Border crossing

The Community has adopted measures concerning the elimination of controls and formalities applicable to the cabin and hold baggage of persons taking intra-Community flights and the baggage of persons making intra-Community sea crossings[215]. Regarding intra-Community flights these measures are applicable to all persons irrespective of the nationality of the aircraft performing such flights.

(iv) Taxation measures

The Community has adopted harmonization measures of in the field of taxation which have a horizontal external effect[216].

- Member States are required to exempt from turnover tax certain activities in the public interest. In particular, these include the supply by the postal service of services other than passenger transport and telecommunication services[217], and the supply of transport services for sick or injured persons[218]. Member States are also required to exempt from turnover tax certain goods and the supply of services in connection with the importation of such goods. This includes a number of aspects of air transport particularly aspects as the supply, modification, repair maintenance, chartering and hiring of aircraft[219], of goods for the fueling and provisioning of aircraft[220] and of services to meet the direct needs of aircraft[221].

- Action has also been taken by the Community to exempt goods contained in the personal luggage of travellers coming from a third country from certain customs duties, agricultural levies, excise duties, value added tax and other

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[214] Council Directive 82/470/EEC.
[215] Council Regulation (EEC) No 3925/91 of 19 December 1991 concerning the elimination of controls and formalities applicable to the cabin and hold baggage of persons taking an intra-Community flight and the baggage of persons making an intra-Community sea crossing, OJ No L 374 of 31.12.91 at 4. See also Commission Regulation (EEC) No 1823/92 of 3 July 1992 laying down detailed rules for the application of Council Regulation (EEC) No 3925/91 concerning the elimination of controls and formalities applicable to the cabin and hold baggage of persons taking an intra-Community flight and the baggage of persons making an intra-Community sea crossing, OJ No L 185 of 4.7.92 at 8.
[216] Lord Hailsham of St. Marylebone, supra note 1 at 719.
[217] Council Directive 77/388/EEC, Article 13A(1)(a).
[218] Ibid., Article 13A(1)(p).
[219] Ibid., Article 15(7).
[220] Ibid., Article 15(8)
[221] Ibid., Article 15(9).

import charges[222]. In the case of intra-Community transport there is a similar exemption from turnover tax and excise duty[223].

- Member States are required to exempt from customs duties and other taxation the temporary import from another Member State of private aircraft and of normal spare parts, accessories and equipment imported for this means of transport[224].

[222] Council Directive 69/169/EEC (Article 1(I) substituted by Council Directive 78/1003/EEC and amended by Council Directive 85/348/EEC); Council Regulation (EEC) No 1544/69 (amended by Council Regulation (EEC) No 3061/78); Council Regulation (EEC) No 1818/75 and Council Regulation (EEC) No 2780/78).

[223] Council Regulation (EEC) No 69/169 Article 2 (amended by Council Directive 72/230/EEC, Council Directive 78/1032/EEC, Council Directive 78/1033/EEC, Council Directive 81/933/EEC, Council Directive 82/443/EEC, Council Directive 84/231/EEC and Council Directives 85/348/EEC).

[224] Council Regulation (EEC) No 83/182.

(v) Common rules on packages

Council Directive 314/90/EEC[225] obliges Member States to adopt common rules relating to package travel, holidays and tours sold or offered for sale in the territories of the Community, irrespective of the nationality of the organizers of the packages, of the retailers and of the consumers.

(vi) Unfair terms in consumer contracts

Council Directive 93/13/EEC[226] obliges Member States to ensure that all contracts concluded between a seller or supplier and a consumer do not contain unfair terms. The Directive is applicable irrespective of the nationality of the seller or supplier and consumer and obliges Member States to take the necessary measures to ensure that the consumer does not lose the protection granted by the Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract[227].

(C) MEASURES HAVING A NEGATIVE EXTERNAL EFFECT

(i) Before the first air transport package

Two Community legislative measures adopted before the first air transport package have a negative external effect: Council Directive 80/51/EEC and Council Directive 83/349/EEC.

Council Directive 80/51/EEC[228] places an obligation upon Member States to ensure that certain civil aircraft registered in their territory are granted noise certification on the basis of evidence that the aircraft complies with specified ICAO noise requirements.

Council Directive 83/349/EEC[229] applies to procedure for authorizing scheduled inter-regional air services for the development of intra-Community air transport for the carriage of passengers, mail and cargo on journeys which both originate and end

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[225] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ No L 158 of 23.6.90 at 59.
[226] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ No L 95 of 21.4.1993 at 26.
[227] Article 6(2), ibid.
[228] Council Directive 80/51/EEC of 20 December 1979 on the limitation of noise emisssions from civil subsonic aircraft, OJ No L 18 of 24.1.80 at 26, Article 1.
[229] Council Directive 83/349/EEC of 25 July 1983 concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States, OJ No L 237 of 26.8.1983 at 19, amended by Council Directive 86/216/EEC of 26 May 1986, OJ NO L 152 of 6.6.1986 and Council Directive 89/553/EEC of 18 July 1989, OJ No L 226 of 3.8.89 at 14.

in the European territories of the Member States. The rights and the obligations provided by the Directive are restricted to Community air carriers[230].

(ii) The first air transport package[231]

With respect to the external effect of the first air transport package a distinction should be made between the two competition rules, namely Council Regulation (EEC) No 3975/87 and Council Regulation (EEC) No 3976/87[232] and the two other pieces of legislation, namely Council Directive 87/601/EEC and Council Decision 87/602/EEC[233].

While the competition rules have a positive external effect Council Directive 87/601/EEC and Council Decision 87/602/EEC have a negative external effect. Therefore, only these two pieces of legislation will be examined.

The negative external effect is demonstrated by the fact that these two pieces of legislation restrict their scope of application to international transport services[234] between Community airports[235] undertaken by Community air carriers.

Regarding the external effect of the first air transport package, two dispositions of the Council Directive 87/601/EEC are particularly interesting.

Article 4(5) provides that only third and fourth-freedom air carriers shall be permitted to act as price leaders, which means that Community air carriers and foreign air carriers flying on the basis of fifth-freedom rights within the EEC are

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[230] Annex B of the Council Directive provides that Scandinavian Airlines System (SAS), Britannia Airways and Monarch Airways meet the criteria of a 'Community carrier' as long as they are recognized as national carriers by the Member State which so recognizes them at the time of the adoption of the Directive. A similar provision was reiterated in the first, the second and the third air transport packages.

[231] In a Communication of the Government of the Federal Republic of Germany it is stated that the first air transport package is not applicable in the Land of Berlin. Such an exclusion, which was reiterated in the second air transport package, became moot as a result of German reunification and was not restated in the third air transport package.

[232] See infra notes 280 and 281

[233] Council Directive 601/87/EEC of 14 December 1987 on fares for schedules air services between Member States, OJ No L 374 of 12.18.1987 and Council Decision No 602/87/EEC of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States, OJ No L 374 of 19.26.1987.

[234] Article 3 and 4 of Council Decision 87/602/EEC do not apply to those services subject to Council Directive 83/349/EEC as amended by Council Directive 86/216/EEC and Council Directive 89/553/EEC, see supra note 229.

[235] Council Directive 87/601/EEC does not apply to the overseas departments referred to in Article 227 (2) of the Treaty and the application of the provisions of Council Decision 87/602/EEC to Gibraltar airport is temporary suspended. This suspension was reiterated in the second and in the third air transport package, as well as in many Community secondary legislative measures in air transport.

directly limited in their pricing policy since they are not allowed to undercut existing fares[236].

Article 10 states:

[w]here a Member State has concluded an agreement with one or more non-member countries which gives fifth-freedom rights for a route between Member States to an air carrier of a non-member country, and in this respect contains provisions which are incompatible with the directive, the Member State shall, at the first opportunity, take all appropriate steps to eliminate such incompatibilities. Until such time as the incompatibilities have been eliminated, this Directive shall not affect the rights and obligations vis-à-vis non-member countries arising from such an agreement.

Since the purpose of Article 10 is to provide for the status quo of existing fifth-freedom rights and to request Member States to modify BATAs concluded with third countries if they are incompatible with the Directive, in particular because they grant to non-Community air carriers the right to act as price leaders on intra-Community fifth-freedom routes, this Article can be viewed has having a positive external effect[237].

(iii) After the first air transport package

Council Directive 89/629/EEC[238] on the limitation of noise emissions from civil subsonic jet aeroplanes restricts the addition of noisy civil subsonic jet aeroplanes (Chapter Two aircraft) to Member States' national registers[239].

(iv) The second air transport package[240]

The second air transport package, like Council Directive 87/601EEC and Council Decision 87/602/EEC of the first air transport package[241] has a negative external effect. Indeed, all the legislative measures contained in the second air transport

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[236] This provision was reiterated in Article 3(6) of Council Regulation (EEC) No 2342/90 of the second air transport package and in Article 1(3) of Council Regulation (EEC) No 2409/92 of the third air transport package.

[237] This provision was reiterated in Article 11 of Council Regulation (EEC) No 2342/90 of the second air transport package.

[238] Council Directive 89/629/EEC of 4 December 1989 on the limitation of the noise emissions from civil subsonic jet aeroplanes, OJ No L 363 of 13.12.1989 at 27.

[239] With the exception of the overseas department referred to in Article 227(2) of the EEC Treaty.

[240] The second air transport package is composed of three Council Regulations (EEC), 2342/90, 2343/90 and 2344/90 of 24 July 1990, OJ No L 217 of 11.08.1990 at 1. The second air transport package has abrogated Council Directive 87/601/EEC and Council Decision 87/602/EEC of the first air transport package.

[241] See supra note 232.

package restrict their scope of application to international air transport[242] between Community airports undertaken by Community air carriers.

(v) After the second air transport package

Council Regulation (EEC) No 294/91[243] obliges Member States to reduce the restrictions on the operation of all cargo air services operated by Community air cargo carriers between Member States.

Council Directive 91/670/EEC[244] stipulates that Member States recognize all certificates of competency and licences issued by another Member State[245] if they conform to certain standards. The Directive includes recognition of licences issued by a Member State to any foreign national, but only insofar as such licences concern the operation of aircraft registered in a Member State.

Council Regulation (EEC) No 3922/91[246] introduce common rules on the harmonization of technical requirements and administrative procedures in the field of civil aviation and applies to the design, manufacture, operation and maintenance of aircraft and to persons involved in these tasks, insofar as 'Community carriers' are concerned, and to all aircraft operated by a person residing or established in a Member State, using aircraft in accordance with the regulations applicable in the Member State, regardless of their registration[247].

(vi) The third air transport package[248]

While the third air transport package, like the first and the second air transport package, has essentially a negative external effect, Article 4 of Council Regulation (EEC) No 2407/92 refers to the possibility of agreements and conventions to which

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[242] Council Regulation (EEC) No 2343/90 contain special provisions on the airports in the Greek islands and in the Atlantic islands comprising the autonomous region of the Azores (Article 1(4) as well as on the airport of Porto. The provisions on the autonomous region of the Azores were reiterated in Article 1(4) of Council Regulation (EEC) 2408/92 of the third air transport package.

[243] Council Regulation (EEC) No 294/91 of 4 February 1991 on the operation of air cargo services between Member States, OJ No L 36 of 08.2.1991 at 1.

[244] Council Directive 91/670/EEC of 16 December 1991 on mutual acceptance of personnel licences for the exercise of functions in civil aviation, OJ No L 373 of 31.12.1991 at 21.

[245] Except if the cockpit crew operate aircraft registered in a State other than the licensing State.

[246] Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation, OJ No L 373 of 31.12.1991 at 4.

[247] H. Wassenbergh, *Principles and Practices in Air Transport Regulation*, supra note 203 at 31-32.

[248] The third air transport package in composed of five Council Regulations (EEC) No 2407/92, 2408/92, 2409/92, 2410/92 and 2411/92 of 23 July 1992, OJ No L 240 of 24.8.92 at 1. The third air transport package partially replaces Council Regulations (ECC) Nos 2342/92 and 294/91 and abrogates Council Regulation (ECC) No 2342/92.

the Community is a contracting party derogating from the requirements on substantial ownership and effective control of the undertakings to which Member States grant an operating licence[249].

(D) MEASURES HAVING A POSITIVE EXTERNAL EFFECT

(i) Before the first air transport package

Council Directive 80/1266/EEC[250] obliges Member States to co-operate in the investigation and prevention of air accidents involving any civil aircraft whether or not it is registered on the national register of a Member States.

Council Directive 83/206/EEC[251] amending Council Directive 80/51/EEC obliges Member States to ensure that all aeroplanes operating in the territories of Member States, whether they are registered in the territories of Member States or in the territories of non-Member States, are granted noise certification on the basis of evidence that the aeroplanes complies with specified ICAO noise requirements.

(ii) After the first air transport package

Council Regulation (EEC) No 295/91[252] establishes common rules for a denied-boarding compensation system applicable where passengers are denied access to an overbooked scheduled flight departing from an airport located in the territory of a Member State to which the Treaty applies, irrespective of the State where the air carrier is established, the nationality of the passenger or the point of destination.

Council Directive 92/14/EEC[253] obliges Member States to ensure that all civil subsonic jet aeroplanes operating in their territories, whether or not they are registered in the registers of Member States, are granted noise certification on the basis of evidence that the aeroplanes comply with specified ICAO noise requirements[254].

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[249] Article 4(2) of Council Regulation (EEC) No 2407/92.

[250] Council Directive 80/1266/EEC of 16 December 1981 on the future cooperation and mutual assistance between member States in investigation on aviation accident, OJ No L 375 of 31.12.80 at 32.

[251] Council Directive 83/206/EEC amending Council Directive 80/51/EEC on the limitation of noise emissions from civil subsonic aircraft, OJ No L 117 of 04.5.1983 at 15. Greenland is excluded from the scope of application of Council Directive 83/206/EEC.

[252] Council Regulation (EEC) No 295/91 of 7 February 1991 establishing common rules for a denied-boarding compensation system in schedules air transport, OJ No L 36 of 5.7.1991.

[253] Council Directive 92/14 of 2 March 1992 on the limitation of the operation of aeroplanes covered by Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988), OJ No L 76 of 23.3.92 at 21.

[254] The overseas department referred to in Article 227(2) of the EEC Treaty are excluded from the scope of application of Council Directive 92/14/EEC, ibid.

Council Regulation (EEC) No 2299/89 amended by Council Regulation (EEC) No 3089/93[255] lays down a code of conduct for the operation of a computer reservation system (CRS)[256] when offered for use and/or used in the territory of the Community irrespective of the status or nationality of the system vendor, the source of the information used or the location of the relevant central data processing units or the geographical location of the airports between which air carriage takes place[257].

Since the CRS code of conduct has a positive external effect the Community considered it was necessary to adopt some kind of reciprocity clause. In this respect, Article 7 releases CRS systems vendors from their obligation vis-à-vis a parent carrier of a third country insofar as CRS outside the Community territory does not offer Community air carriers equivalent treatment to that provided under the revised code of conduct[258]. It also releases the parent carrier or participating carriers from their obligations vis-à-vis CRS systems controlled by (an) air carrier(s) of one or more third country (countries) if the former carriers are not accorded equivalent treatment to that provided under the revised code of conduct[259].

Council Regulation (EEC) No 95/93[260] establishes common rules for the allocation of slots at Community airports irrespective of the nationality of the aircraft concerned.

This Regulation goes further than Council Regulation (EEC) No 3089/93 on CRS because it not only contains a reciprocity clause but also considers that third countries should offer Community air carriers de facto national treatment and oblige the third country (countries) to grant to Community air carriers most favoured nation status.

To this aim Article 12 of the Regulation state:

[w]henever it appears that a third country, with respect to slot allocation at airports,
(a) does not grant Community air carriers treatment comparable to that granted by Member States to air carriers from that country, or
(b) does not grant Community air carriers de facto national treatment, or

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[255] Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerized reservation systems, OJ No L 220 of 29.7.1989; Council Regulation (EEC) No 3089/93 of 29 October 1993 amending Council Regulation (EEC) No 2299/89 on a code of conduct for computerized reservation systems, OJ No L 278, 29.7.1989.
[256] Containing air transport products, Article I of Council Regulation (EEC) No 3089/93, ibid.
[257] Article I of Council Regulation (EEC) No 3089/93, ibid.
[258] And under Commission Regulation (EEC) No 83/91, see Article 7 of Council Regulation (EEC) No 3089/93, supra note 251.
[259] And under Commission Regulation (EEC) No 83/91, see Article 7 of Council Regulation (EEC) No 3089/93, ibid.
[260] Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, OJ No L 14 of 22.1.93 at 1.

(c) grants air carriers from other third countries more favourable treatment than Community air carriers,
appropriate action may be taken to remedy the situation in respect of the airport or airports concerned, including the suspension wholly or partially of the obligations of this Regulation in respect of an air carrier of that third country, in accordance with Community law.

(iii) Competition rules[261]

Council Regulation (EEC) No 17/62[262], the first regulation implementing Articles 85 and 86, was adopted in order to ensure observance of the prohibition laid down in those provisions and to define the respective functions of the Commission and the Court of Justice in that area[263].

In a further Council Regulation (EEC) No 14/62[264], the Council retrospectively withdrew transport from the scope of application of first implementing regulation[265] on the grounds, inter alia, that with regard to sea and air transport it was impossible to foresee whether and at what date the Council would adopt appropriate provisions for the regulation of competition in those areas[266].

In view of that not entirely clear legal position it is understandable that clarification was necessary by means of decisions of the Court of Justice.

(a) Joined Cases 209 to 213/84[267]

This Case involves travel agencies and airlines selling tickets to the public at tariffs not approved by the French Government in infringement of the French Code on

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[261] The limitations of this work do not allow to examine the competition rules on public undertakings and on State aid (Articles 90 and 92-94 of the EC Treaty) in which enforcement has not yet reached the same level.

[262] Council Regulation 17/62 of 6 February 1962, OJ No L 124 (1959-1962) at 291. Air transport which is incidental to another activity (e.g. aerial publicity or photography) is probably subsumed under the other activity and is therefore covered by Council Regulation 17/62, see B. Van Houtte, 'Community Competition Law in the Air Transport Sector, [1993] 2 Air & Space Law at 61.

[263] K. Otto Lenz, see supra note 45; P. Haanappel et al., *EEC Air Transport Policy and Regulation, and their Implications for North America*, supra note 28 at 34.

[264] Council Regulation 141/62 of 28 November 1962, OJ No L 204 of 28.11.1962.

[265] In the case of inland transport this exemption was limited in time. In 1968 the Council adopted a regulation applying the competition rules to transport by rail, road and inland waterway, Council Regulation (EEC) No 1017/68 of 19 July 1968, OJ No L 175 of 23.7.1968.

[266] For the question of the scope of application rationae materia of Regulation 141/62, see Olympic Airways and London European v. Sabena, OJ (1985) No L 46 at 51, OJ (1988) No L 317 at 47.

[267] The so-called Case of the French Travel Agency Nouvelles Frontières is know in legal circles as the Asjes Judgement because in five Joined Cases 209-213/84 the French Public Prosecutor's Dept. prosecuted M. Lucas Asjes and four others, Case 209-213/84, Ministère Public v. Lucas Asjes et al., [1986] ECR 173, ECJ.

Civil Aviation[268]. Because of this infringement they were prosecuted by the French Public Prosecutor's at the Paris Tribunal de Police. The Tribunal de Police requested the ECJ to give a preliminary ruling on the compatibility of the French Code on Civil Aviation with the rules of competition in the EEC Treaty.

As a preliminary point the Court examined the issue of whether the competition rules of the EEC Treaty are, as Community law now stands, applicable to airlines. By relying in particular on its previous case law[269] the Court decided that, since, as regards transport, there is no provision in the Treaty which excludes the application of the competition rules or makes it subject to a Decision by the Council, it follows that air transport remains, on the same basis as other modes of transport, subject to the general rules of the Treaty, including the competition rules[270].

After setting out these statements of principle, the Court turned its attention to the fact that in spite of an obligation to that effect the Council has not yet adopted any implementing provisions regarding the application of the competition rules to air transport. In view of these circumstances, and basing itself on the principle of legal certainty, the Court decided that the fact that an agreement, decision or a concerted practice is likely to fall under the scope of application of Article 85 does not in itself constitute sufficient grounds to consider that such agreements, decisions, or concerted practices are automatically void. According to the Court, such a conclusion will be contrary to the general principle of legal certainty since it would have the effect of prohibiting and rendering automatically void (by the decision of a simple national court) certain agreements even before it is possible to ascertain whether Article 85 as a whole, and in particular the possibility of exemption under Article 85(3) is applicable to those agreements.

By so ruling the Court decided that the obligation upon Member States and the Commission to ensure the application of the principle laid down in Article 85 is to be envisaged within the framework of the transitional provisions of the Treaty, i.e. Article 88 and 89[271].

There are two important points to be noted.

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[268] Articles L330-3, R330-9, R330-15.

[269] Namely Case 167/73, and Case 156/77, supra note 35 and 44 and accompanying text.

[270] P. Haanappel et al., *EEC Air Transport Policy And Regulation, and their Implications for North America*, supra note 28 at 38-39.

[271] According to the Article 88, the authorities of Member States are to rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 85, in particular para. 3 and of Article 86, until the entry into force of the required implementing provisions. According to Article 89, the Commission shall investigate cases in which infringement of the competition principle is suspected and, in case of infringement, take appropriate measures to bring that infringement to an end.

First the Court has admitted that the transitional provisions do not permit a complete and integral application of Article 85[272].

Secondly the scope of application rationae loci in the Court's ruling in this case is not entirely clear. It is not clear whether the Court has decided that the competition rules (Article 85) should apply only to intra-Community air transport or also to extra-Community air transport. The fact that among the airlines prosecuted was Air Lanka, which has its principal place of business outside the common market, may be an argument for a wide scope of application.

(b) Case 68/86[273]

A step towards the clarification of these issues may be found in Case 68/86.

In the course of the proceedings in the German Court against two Frankfurt based travel agencies who had been selling tickets for scheduled flights at substantial discounts compared to the prices offered by German airlines, the compatibility of the German law with Community law was challenged. The Court broadened the issue, in comparison with Joined Cases 209 to 213/84 by referring not only to Article 85 of the Treaty but also to Articles 86 and 90[274].

Three questions were put to the ECJ. Among these three, two are of importance for us.

The first question was; were the agreements on the tariffs automatically void (Article 85(2)), even if the competition authorities had not acted under Article 88 or 89.

The Court distinguished two cases: where the procedural regulations applied, and where they did not.

The Court decided that automatic nullity would in principle apply to agreements, decisions and concerted practices to which the procedural regulation applied after its

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[272] These insufficiencies have already been underlined in Case 13/61, Bosh v. Commission of 6 April 1962, [1962] ECR 91. For more information about such insufficiencies, see L. Defalque, 'La position des parties, les conclusions de l'Avocat Général et l'analyse de l'arrêt 'Nouvelles Frontières' (1989) European Transport Law at 540.

[273] Case 68/86, Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewers e.v, Judgement of 11 April 1989, [1989] XXIV European Transport Law 229.

[274] K. Otto Lenz, supra note 47 at 12.

entry into force. But as the scope of the procedural regulation did not extend to extra-Community air transport, such carriage will continue to be subject to the transitional provisions and in this respect the system described in Joined Cases 209 to 213/84 still applies. This means that in respect of extra-Community air transport, the transitional provisions of Articles 88 and 89 still applied, with the result that automatic nullity applied only if the competition authorities had previously taken a negative position[275].

It should be noted that the Court did not decide whether Article 85 also applies when all the airlines concerned are based outside the Community[276].

The second question relates to the applicability of Article 86 of the Treaty and whether the same limitation should be applied to the scope of application of this Article as applies to the Article 85, that is to say whether its direct application should be restricted to intra-Community air transport.

The United Kingdom and the Commission have argued that the same limitation should be applied to the scope of application of Article 86.
This was rejected by the Court on the grounds that the sole justification for the provisional regime in Articles 88 and 89 was the possibility of granting exemptions from the prohibition in Article 85. Since the abuse of a dominant position was not capable of being exempted from the prohibition in Article 86, such abuse is simply prohibited by the EEC Treaty. The necessary conclusion is that the prohibition laid down in Article 86 applies fully and directly to the whole of the air sector[277].

(c) Actual scope of application of the Community competition rules

As mentioned previously Community competition rules in air transport are among the Community's legislative measures having a positive external effect[278]. Such measures are restricted in their scope of application rationae loci to intra-Community air transport but include all air transport operators operating within the Community.

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[275] Or in two other cases as provided in Council Regulation (EEC) No 3975/87/EEC, see infra note 285.

[276] This issue has been clarified in Joined Cases 89, 104, 114, 116, 117, 125 to 129/85, the so-called 'Wood Pulp' Case, Wood Pulp manufacturers v. EC Commission, Judgement of 27 September 1988, [1989] 2 Rev. Trim. dr. Europ. 25, ECJ. [Hereinafter Joined Cases 89/85-129/85].

[277] That is to say to both intra-Community and extra-Community transport. For the question of whether an abuse of a dominant position (Article 86) may be the result of a concerted action between two undertakings and thus capable of falling within the prohibition set out in Article 85, see K. Otto Lenz, supra note 47 at 17.

[278] The Community competition rules include Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings which applies to merger between two non-Community air carriers which operates air services to and from the Community, OJ No L 395 of 30.12.1989 at 1.

This means that non-Community air carriers are submitted to the competition rules at least for the intra-Community part of their flight[279].

The first measures of secondary legislation, adopted in the first air transport package, were Council Regulation (EEC) No 3975/87/EEC[280] and No 3976/87/EEC[281]. These two Council Regulations apply to the provision of international air transport services between Community airports[282]. They also apply, in accordance with the case law of the Court of Justice, to agreements, decisions and concerted practices between Community air carriers and non-Community air carriers with respect to international routes between Community airports, provided that such agreements, decisions and concerted practices affect trade between Member States. It should be noted that international flights between the Member States by definition always affect trade between these Member States[283].

Case 68/86 has prompted the Commission to propose, in the second air transport package, the extension of the scope of the procedural regulation for the application of the competition rules so that it will apply to extra-Community air transport[284] and purely domestic journeys[285].

These two proposals have not been adopted[286].

Subsequently four extensions of the scope of application rationae loci of the competition rules have been adopted by the Council.

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[279] This usually means fifth-freedom traffic but since Member States have the power to grant all traffic rights to non-Community air carriers it might also mean 6th to 9th freedom traffic. As far as we know there are currently twenty fifth-freedom routes which are operated by non-Community air carrier within the Community.

[280] Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules of competition to undertakings in the air transport sector, OJ No C 374 of 31.12.87 at 1.

[281] Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, OJ No C 374 of 31.12.87 at 9.

[282] See Article 1(2) of Council Regulation 3975/87/EEC and Article 1 of Council Regulation 3975/87/EEC, ibid.

[283] Case 68/86, para 28, supra note 273.

[284] Article 1 of the Proposal for a Council Regulation (EEC) on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, OJ No C 248 of 29.9.89, at 10.

[285] Proposal for a Council Regulation (EEC) amending Regulation (EEC) No 3975/87 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, OJ, No. C 248 of 11.10.89 at 9, COM(89) 417 final.

[286] The only legislative measure of the second air transport package concerning competition rules is Council Regulation (EEC) No 2344/90 of 24 July 1990 amending Regulation (EEC) No 3676/87 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, which has extended the period during which block exemptions are granted, OJ No L 217 of 11.8.90 at 15.

- In the third air transport package the scope of application of the competition rules has been extended so that restrictions on competition relating to domestic air services which have a significant effect on trade between Member States[287] are submitted to the competition rules.

- With the adoption of the EEC-Norway-Sweden ATA, Norway and Sweden took over the 'acquis communautaire' including the competition regulations as they stood first under the second air transport package and subsequently under the third air transport package.

- In the framework of the EEA Agreement[288] EFTA countries members of the EEA Agreement have took over the 'acquis communautaire' including the competition rules as they stood first under the second air transport package and subsequently under the third air transport package.

- The substantive 'acquis communautaire' regarding the competition rules (Articles 85 to 94) has been included in the Europe Agreements concluded between the European Communities and Central and Eastern European countries[289].

(E) MEASURES HAVING A DIRECT EXTERNAL EFFECT

Council Decision 80/50/EEC[290]

Council Decision 80/50/EEC which takes as a starting point the Council Decision 77/587/EEC in the field of maritime transport[291] was adopted after modification by the Council on 6 December 1979.

According to the Decision, on request of a Member State or the Commission, Member States and the Community shall consult each other on air transport questions dealt with international organisations, and on developments which have taken place in relations between Member States and third countries in air transport, including the functioning of the significant elements of bilateral or multilateral air agreement concluded in this field within one month as from the request, or as soon as possible in urgent cases.

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[287] For the question of whether restrictions on competition relating to domestic air services might have a significant effect on trade between Member States, see B. Van Houtte, supra note 263 at 64.

[288] See infra note 493 and accompanying text.

[289] For the Europe Agreements, see note 496 and accompanying text.

[290] Council Decision 80/50/EEC of 20 December 1979 setting up a consultation procedure on relations between Member States and third countries in the field of air transport and on action relating to such matters within international organisations, OJ No L 18 of 24.1.80 at 24.

[291] Council Decision 77/587/EEC of 13 September 1977 setting up a consultation procedure on relations between Member States and third countries in the field of sea transport and on action relating to such matters within international organisations, OJ No L 239 of 17.9.1977.

The aims of the consultation differ if it is related to international organisations or developments arising in relations between Member States and third countries. In the former case the aim of the consultation is to allow Member States and the Commission to determine jointly whether the question raises problems of common interest and, if so, to consider whether they should co-ordinate their actions. In the latter cases the aim of the consultation is to examine the relevant issues in question, and to consider any approach which might be appropriate.

The procedure of the consultation also varies according to the matter.
If the consultation relates to international organisations, Member States and the Commission must exchange as soon as possible any relevant information. If the consultation relates to the developments arising in the relations between Member States and third countries, each Member State remains free to decide what it intends to communicate.

As Henrotte has mentioned Council Decision 80/50/EEC does not go beyond the simple exchange of information[292]. The consultation does not apply to the negotiation of bilateral agreements since it takes places only once those agreements have been concluded. Moreover, there is no systematic consultation because consultation takes place when Member States consider that it is likely to contribute to the identification of the problems of common interest and Member States are free of the interpretation of the notion of common interest[293]. Likewise, there is no mixed body[294] created to allow the Community to have access to bilateral files and to help to decide if such agreements fall within the consultation procedure.

All these limitations are confirmed by the limited application the decision has in practice[295].

Nevertheless, Council Decision 80/50/EEC is a real progress since it allows effective co-ordination between Member States and the Community in international organisations and it should not be forgotten that the Decision is the only piece of Community secondary legislation having a direct external effect in air transport.

When looking at the Community practice during these last years it appears that the Community has made little use of the important possibilities provided by Community secondary legislation to assume its external competence implicitly. It is clear, however, the very least that all the Community secondary legislation legislation having an horizontal external effect or a positive external effect external

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[292] E. E. Henrotte, supra note 41 at 234.
[293] E. E. Henrotte, ibid. at 234.
[294] Composed of representative of the Member States and the Commission.
[295] Council Decision (EEC) No 80/50/EEC was used only once when ECAC announced its intention of modifying the provisions relating to air transport capacity and tariffs in Europe.

effect confers implicit external competence to the Community and thus can be used by the Community to assume its external competence.

Recently, there are signs that the Community will more often assume its external competence implicitly. The recent ECJ ruling that international (air) transport agreements are excluded from the scope of the CCP will certainly encourage the Community to do so. It is also clear that the progress in the development of the internal air transport market will be decisive for the possibility that the Commission might assume its external competence implicitly.

(F) CONCLUSION

When looking at the Community practice during these last years it appears that the Community has made little use of the above mentioned possibilities provided by Community secondary legislation to assume its external competence implicitly. It is clear, however, that at least all the Community secondary legislation legislation having an horizontal external effect or a positive external effect external effect confer implicit external competence to the Community and thus can be used by the Community to assume its external competence.

There are signs in new Community secondary legislation in air transport that the Community might assume more often its external competence implicitly. Moreover, the recent ECJ ruling that international (air) transport agreements are excluded from the scope of the CCP will certainly encourage the Community to do so. It is also clear that the progress in the development of the internal air transport market will be determinant for the Commission possibility to assume its external competence implicitly.

CHAPTER 2. EUROPEAN UNION EXTERNAL COMPETENCE IN AIR TRANSPORT

a) Introduction

The TEU has introduced the concept of the European Union. The European Union is not a legal concept as such but a political one. This means essentially that the European Union, as opposed to the European Communities, is not a legal entity and cannot be a contracting party to an international Treaty. Therefore the European Union's external competence consists essentially in the actions of the Member States on the basis of their membership of the European Union.

Actions of the Member States on that basis have developed to a large extent without any structure and in a pragmatic way. Indeed, for many years there have been strong objections to any attempt to formalize political cooperation[296].

The first change to this situation was brought by the SEA. The SEA has that actions of Member States shall no longer be unilateral but should instead develop according to a formal framework.

The TEU has strongly reinforced the political cooperation among Member States by adopting a second pillar dealing specifically with CFSP[297].

The approach followed by the TEU in the second pillar is twofold; (i) the TEU has reinforced the formal framework for the political cooperation as provided by the SEA (ii) the TEU has created a new mode of action, the joint action.

Consequently, with the adoption of the TEU it is necessary to distinguish between three different modes of action[298]:

- Community action.

- Systematic cooperation, i.e. the formal framework for the political cooperation as reinforced by the TEU (Articles J.2 and J 1.4).

- Joint action (Article J.3).

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[296] J. De Ruyt, supra note 57 at 220-225. The only Article of the EEC Treaty which refers to political cooperation was Article 116, which stipulates that, in respect of all matters of particular interest to the common market, Member States should proceed within the framework of international organisations of an economic character only by common action. Article 116 has been deleted by the TEU.

[297] See supra note 75 and accompanying text.

[298] This distinction is provided by Article J.1.3. of the TEU.

Firstly, systematic cooperation and joint action will be examined briefly. Then the institutional provisions applicable to systematic cooperation and joint action will be examined.

b) Systematic cooperation

The TEU has considerably reinforced the provisions of the SEA concerning political cooperation. Henceforth, in any matter of foreign and security policy of general interest, Member States shall inform and consult one another within the Council[299]. Whenever it deems it necessary, the Council, acting unanimously[300] shall define a common position. Member States shall ensure that their national policies conform to the common positions[301] and uphold the common positions in international organisations and at international conferences[302]. Moreover, Member States shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council shall ensure that these principles are complied with[303].

c) Joint action

The essential idea of joint action is to ensure a higher degree of integration than Systematic cooperation in the area in which Member States have important interest in common. This higher degree of integration is provided by the possibility of action on qualified majority and a special structure for devising and adopting joint action. It is the Council which shall decide, on the basis of general guidelines from the European Council, that a matter should be the subject of joint action[304]. The Council shall also, when adopting joint action and at any stage during its development, define those matters on which decisions are to be taken by a qualified majority[305]. Joint action shall commit the Member States in the positions they adopt and in the conduct of their activity[306].

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[299] Article J.2(1) of the TEU.
[300] Except for procedural questions.
[301] Article J.2.2(1) and J.2.2(2), ibid.
[302] Article J.2(3), ibid.
[303] Article J.1(4), ibid.
[304] Article J.3(1), ibid.
[305] Article J.3(2), of the TEU. When the Council is required to act by a qualified majority in the context of CFSP, the votes of its member shall be weighted in accordance with Article 148(2) of the EEC Treaty and for their adoption, acts of the Council shall require at least fifty-four votes in favour, cast by at least eight Member States, Article J.3(2) 2° of the TEU.
[306] Article J.3(4), ibid.

d) Institutional provisions

The TEU has provided two major changes in this respect.

- The Commission now plays a full part in the work carried out in the field of the CFSP since it has the right to refer to the Council any question relating to this field, and may submit proposals to the Council[307].

- The European Parliament is consulted on the main aspects and the basic choices of CFSP, and kept regularly informed on the development of the such policy. The Presidency is entrusted with the task of ensuring that the views of the European Parliament are duly taken into consideration.

PART C: OBSTACLES TO EUROPEAN UNION EXTERNAL COMPETENCE IN AIR TRANSPORT

INTRODUCTION

Firstly, in section 1, the obstacles to the European Communities' competence in air transport will be examined, and then, in section 2, the obstacles to the European Union's external competence in air transport. Since the European Union's external competence in air transport, as a matter of law, grows as the European Communities' competence in air transport develops, the obstacles examined in section 1 are also obstacles to the acquisition by the European Union of external competence in air transport (section 2).

CHAPTER 1: OBSTACLES TO EUROPEAN COMMUNITIES COMPETENCE IN AIR TRANSPORT

a) Political obstacles

(1) The sovereignty of Member States

There is a direct link between the sovereignty of Member States and air transport[308]. Any attribution of competence to the Communities in air transport, therefore, impinges on the sovereignty of Member States.

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[307] This right, to the contrary than in case of Community action, is shared with the Member States, see Article J.9 and J.10, ibid.

[308] Air transport is directly linked to the sovereignty of Member States for the following reasons:
- The impact of air transport on national security.
- The impact of air transport on the economic interests of Member States.
- The impact of air transport on the political interests of Member States.
- The fact that air transport contributes to the national unity of Member States.
- The fact that air transport has an impact on the prestige of Member States.

(2) The Member States' government involvement in air transport

There is a high degree of Member States government involvement in air transport. This high degree of involvement has two sides: the national policies of Member States and their international policies.

With respect to national policies, the acquisition of competence by the Communities interferes[309] with the involvement in air transport of Member States. The Communities have already reduced, to a large extent, Member States' prerogatives in the areas of market access[310] and environmental policy[311] and, to a smaller extent, in the area of public funding[312]. Future measures on the part of the Communities will interfere with the prerogatives of Member States in the areas of environment policy[313], public funding[314] as well as in other areas, such as social policy[315].

With respect to international policies, governments of Member States play a predominant part in the negotiations of BATAs with other Member States and third countries, and often introduce into these negotiations elements which have no direct bearing on the commercial interests of air transport operators, but are related to purely governmental interests. This practice is maybe one of the reasons why governments of Member States tend to prefer Bilateral Air Transport Agreements (BATAs) rather than Multilateral Air Transport Agreements (ATAs).

Governments of Member States tend, moreover, to be directly involved in international organisations having civil aviation within their remit and often seek to assign a secondary role to such organisations.

From this point of view it is clear that the acquisition of competence in air transport by the Communities interferes with the involvement in air transport by the governments of Member States. The Communities, which have already replaced all BATAs concluded between Member States with a set of common rules, are currently seeking to negotiate ATAs with third countries in place of governments of Member States. Moreover, rather than BATAs between Member States and third countries,

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[309] The acquisition by the European Communities of competence in air transport is, however, in principle neutral on the State ownership of air carriers and of air transport infrastructure, see Article 222 of the EEC Treaty.

[310] In particular, see the third air transport package.

[311] See Council Directives on the reduction of noise emissions from subsonic aircraft, supra notes 229, 239, 252 and 254.

[312] In the area of public funding for the restructuring of air carriers. For a list of such interference, see E. E. Henrotte, supra note 41 at 103-108.

[313] The Communities might further restrict the noise and the gaseous emissions of civil aircraft.

[314] The Communities might intervene in the areas of taxation, airport charging principles and State aids to air transport infrastructures.

[315] The Commission's likely initiative aiming at opening up ground-handling markets at Community airports might have important social implications.

the Communities tend to prefer to negotiate and conclude multilateral ATAs[316]. The Communities are also seeking to increase their involvement in international organisations having civil aviation within their remit and are less reluctant to confer important responsibilities upon these international organisations.

(3) United States deregulation policy

The United States deregulation policy, which started in 1975 and reached its peak during the Carter administration, was probably the strongest movement in any country against a high degree of government involvement in air transport[317]. Although United States deregulation has certainly influenced Member States and European Communities institutions, and still exercises an influence today, it seems that in Europe more voices have argued that United States deregulation was a failure instead of a success[318]. Consequently, the overall impact of United States deregulation on the acquisition by the Communities of competence in air transport seems to have been negative, since this acquisition is associated with a reduction of the degree of governmental involvement in air transport.

b) Legal obstacles

When examining the problem of the legal obstacles which public international law or Community law have placed in the way of the Communities, hindering their acquisition of competence in air transport, one should bear in mind that there are two different points of view from which this problem can be examined. There is the point of view of the Communities and the point of view of the Member States.

The Communities cannot adopt legislation contrary to rules of public international law or other rules of Community law binding on the Communities[319]. On the other hand Member States cannot adopt national legislation contrary to the rules of public international law or to Community law. For this reason, Member States often base their arguments on the fact that a proposal of the Commission is incompatible with a rule of public international law or with another rule of Community law, in order to refuse at the level of the Council, to adopt the Commission's proposal and to refuse to change their national legislation when it conflicts with Community law.

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[316] i.e. ATAs between the European Communities and groups of third countries.

[317] This movement was followed by countries such as Australia, New Zealand, Canada, Japan and, in the European Union, the United Kingdom. For the United States, Canada and the United Kingdom deregulation see A. Mencik von Zebinsky, International Business Enterprises, Airlines: Regulated Industries?, McGill University, Term Paper, Montreal, Canada, Winter 1993.

[318] For this question, see A. Mencik von Zebinsky, ibid.

[319] A rule of public international law can invalidate a measure of Community law if two criteria are fulfilled: (i) the rule should be binding on the Communities, (ii) the rule should be capable of conferring rights on citizens of the Communities which they can invoke before a court of law, see generally Joined Cases 89/85-125/89, supra note 277.

(1) Public international law

(A) THE NOTION OF NATIONALITY

The rules of public international law can be either general rules of public international law or treaty rules.

Under general rules of public international law the notion of nationality requires more than a purely formal element; the material criterion of a genuine and continuous link with the State having conferred the nationality must be given[320]. This requirement applies for individuals[321], companies, ships and aircraft.

For companies, the conferment of nationality is provided in some States by the registration of the company in the State registers and in others by the fact that the company is substantially owned and effectively controlled by nationals of the State[322].

For aircraft, the conferment of the nationality is provided by the registration by a State of the aircraft in the national register. Therefore the requirement is of a genuine and continuous link between the State of registration and the aircraft bearing the registration marks of the State.

Under treaty rules in the field of air transport, the requirement of a genuine and continuous link between a State and its air transport enterprises, although not mentioned in the Chicago Convention, is expressly provided in the International Air Services Transit Agreement[323] and in the International Air Transport Agreement[324]. The requirement of a genuine link between the State of registration and its aircraft is expressly provided in the International Air Transport Agreement[325].

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[320] J. Verhoeven, *Droit International Public* (Belgium: Louvain-La-Neuve, 1992).

[321] For the requirement of a genuine link between a State and its individuals, see the so-called Nottebohm Case, Liechtenstein v. Guatemala, Judgement II, [1955] ICJ Reports at 4-65, [1955] ICJ Pleadings 'Nottebohm', vols. I and II.

[322] Barcelona Traction, [1970] ICJ Report at 4.

[323] Article I Section 5 of the International Air Services Transit Agreement provides: *[e]ach contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State [...]*, International Air Services Transit Agreement, Signed at Chicago on 7 December 1944, 15 UNTS 389.

[324] See Article I, Section 6 of the International Air Transport Agreement. Whereas the International Air Services Transit Agreement has been ratified by 99 countries only 11 countries are party to the International Air Transport Agreement.

[325] Article 1, Section I of the International Air Transport Agreement provides that freedoms of the air three to five are only granted through *services on a route constituting a reasonably direct line out, from and back to the homeland of the State whose nationality the aircraft possesses.*

Following these requirement, Member States have almost invariably inserted nationality clauses in their national legislation and in the BATAs they have concluded between themselves and with third countries.

These requirements places obstacles in the way of the Communities, hindering their acquisition of competence in air transport in two different ways.

- The Commission has often requested Member States to change these nationality clauses when they are contrary to Community law[326]. Member States have been extremely reluctant to change these clauses, arguing from the fact that they are compulsory under public international law. This reluctance, and the ensuing delay in finding a solution to the problem is an important obstacle to the acquisition by the Communities of competence in air transport. In particular, it undermines the credibility of the Commission's assertion that the internal market in air transport is about to be completed.

- The requirements that the national criterion should be observed might also be considered an obstacle to the acquisition by the Communities of competence in air transport in the following manner. There might be a conflict between this requirement as provided under general rules of public international law and treaty rules and Community law.

However, insofar as treaty rules are concerned, it is arguable that since the Communities have never formally signed or acceded to the International Air Transport Agreement or to the International Air Services Transit Agreement, such treaty rules are not binding on the Communities[327].

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[326] Supra note 201 and accompanying text.

[327] For the question of whether, under the principles of succession of public international law, the Communities might be considered as legally bound by public international law rules in air transport, infra note 329 and accompanying text.

(B) THE CONVENTION ON INTERNATIONAL CIVIL AVIATION

The Convention on International Civil Aviation[328] as such is not a rule of public international law binding on the Communities, since the latter have never formally signed or acceded to the Convention. Nevertheless, it is arguable that, according to the principles of succession under public international law, the Communities, to the extent that it actually exercises tasks and powers previously exercised by the Member States, is legally bound by the Convention[329].

On the other hand, the Chicago Convention is binding on the Member States because they have all signed and ratified it. Member States, from time to time, have advanced the fact that they are bound, under public international law, to respect the Convention, and on this basis have argued that it will be contrary to their obligations, under public international law, to agree (at the level of the Council) to Community legislation contrary to the Convention.

This argument can be challenged in three different ways.

Firstly when Member States are acting as members of the Council they are obliged to respect Community law and in particular Article 5 and Article 234 of the EEC Treaty[330].

Secondly, when all the parties to the earlier Treaty (the Chicago Convention) are also parties to the latter Treaty (the EEC Treaty) the earlier Treaty applies only to the extent that its provisions are compatible with those of the latter Treaty[331].

Thirdly, as it will be seen, the question of whether present or future Community law conflicts with the Chicago Convention is not certain in all cases.

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[328] The text of the Chicago Convention in the English language was signed at Chicago on 7 December 1944, Convention on International Civil Aviation, 15 UNTS 295. [Hereinafter the Chicago Convention].

[329] In the context of GATT, the ECJ decided that the Community was legally bound by the GATT agreement, see Joined Cases 21-24/72, International Fruit Co NV v. Produktschap voor Groenten en Fruit [1972] ECR 1219, [1975] 2 CMLR I, ECJ. For the question of whether this binding effect is only applicable internally as between the Member States and the Community or also with respect to third countries , see L. Weber, 'EEC Liberalization Policy and the Chicago Convention, External aspects of EEC Air Transport Liberalization' (1990) 3 European Air Law Association Second Annual Conference at note 12.

[330] See infra note 411 and accompanying text.

[331] Article 30(3) of the Vienna Convention of 1969, supra note 6.

(i) General principles of the Chicago Convention

The Chicago Convention contains certain general principles which might conflict with present or future Community law. Many provisions of the Chicago Convention contain the principle of non-discrimination between the contracting parties[332] and one of the aims and objectives of ICAO is to ensure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines[333]. This conflicts with all the existing Community rules in air transport having a negative external effect and with some rules having a positive external effect. Moreover, this might conflict with future Community rules in air transport[334].

(ii) Article 1 of the Chicago Convention

Article 1 of the Chicago Convention confirms the basic principle that each State has complete and exclusive sovereignty over its airspace. Article 1 of the Chicago Convention assigns sovereignty over airspace expressly to the State. Thus, one could conclude that, according to the Convention, no other subject of public international law should be able to exercise the rights and to bear the obligations stated by the Convention. Nevertheless, under public international law it is generally recognized that States are entitled to transfer sovereignty or competence, partly (not entirely), to other subjects of public international law[335]. Moreover, according to Weber[336], such a transfer to the Communities will not be incompatible with Article 1 of the Chicago Convention, provided that the Communities could be regarded as legally bound by the Convention, and provided that the respective third countries , i.e. non EC ICAO Member States, recognize and accept the transfer. It seems to us, that since international recognition by third States has no legal effect, this recognition is not a condition necessary to the validity, under public international law, of such a transfer. On the other hand, international recognition by a third State has important political effects, since it is only after having recognized and accepted such a transfer that third States will agree to have political relations with the Communities in the areas of competence which belonged previously to the Member States.

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[332] See, in particular, Articles 5, 6, 7, 8, 11, 12, 15 and 24 of the Chicago Convention, supra note 329.

[333] Article 44(f), ibid.

[334] For instance the Commission, in its Communication of 21 October 1992, held that the principle of reciprocity shall govern the Community's external relations in air transport, and the European Parliament has invited the Community, when acting in the field of external relations in air transport, to ensure that third countries operating fifth freedoms in the Community shall not be entitled to act as price leaders under such routes, see supra note 90 and G. Luttge Report, 1 July 1993, Doc FR\PR\230\230977-che at 7.

[335] F. Capotorti, R.L. Bindscheldler, T.H. Buergenthal, *Supranationnal Organisations* (Oxford: Encyclopedia of Public International Law, 1983) at 262 and 264.

[336] L. Weber, 'EEC Liberalization Policy and the Chicago Convention, External aspects of EEC Air Transport Liberalization' supra note 330 at 20.

The possibility of such a transfer is also supported by the fact that the Chicago Convention intends to promote international cooperation[337] and permit contracting States to make contracting arrangements not inconsistent with the provisions of the Convention[338].

(iii) Article 7 of the Chicago Convention

Article 7 must be separated into two parts.

Article 7(1) provides:

[e]ach contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory.

Under Community secondary legislation in air transport, Member States are obliged to authorize 'consecutive cabotage'[339] within their territory by Community air carriers licenced by other Member States provided certain conditions are met[340]. Prima facie, this seems incompatible with Article 7(1) since this provision grant to ICAO Member States the right to refuse foreign registered aircraft to operate cabotage within their territory. However, following the case law of the ECJ, insofar as the incompatibilities with the ECC Treaty arise from Member States' pre-existing rights, the position is clear: *by virtue of the principle of international law, a State, in assuming a new obligation contrary to the rights granted to it by a prior Treaty,*

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[337] Article 77 provides: *nothing in this Convention shall prevent two or more contracting States from constituting joint air transport operating organisations or international operating agencies and from pooling their air services on any routes or in any regions [...].* Article 77 is, however, arguably not directly applicable to the situation of the European Communities, see A. Lowenstein, supra note 87 at 163 to 168; C. Economides, 'Air Transport Law and Policy in the Europe of the EEC and ECAC: now and beyond 1992, Institute of Air and Space Law, McGill University, Montreal, Canada, June 1989; P. Mendes de Leon, *Cabotage in Air Transport Regulation* (Dordrecht: Martinus Nijhoff, 1990) at 164-169.

[338] According to Weber, the EEC Treaty can be regarded as an arrangement in the sense of Article 83 of the Chicago Convention since the presumption for the compatibility, contained in the wording of this Article, renders regional cooperation compatible with the Convention provided it does not duplicate the work of ICAO, see L. Weber., 'Les éléments de la cooperation dans le cadre de la Commission Européenne de l'Aviation Civile', [1977] RFDA at 388 and 408.

[339] What the Commission calls 'consecutive cabotage' is to be considered as eighth-freedom traffic while what the Commission calls 'stand-alone' cabotage' is to be considered as ninth-freedom traffic, for the definitions of the freedoms of the air, see B. Cheng, *The Law of International Air Transport*, supra note 210.

[340] Before 1 April 1997, cabotage traffic must be consecutive : i.e. traffic rights are exercised on a service which constitutes and is scheduled as an extension from, or as a preliminary of a service to, the State of registration and the air carrier does not use, for the cabotage service more than 50 per cent of its seasonal capacity on the same service of which the cabotage service constitutes the extension or the preliminary, see Article 3 of Council Regulation (EEC) No 2408/92, supra note 249.

by that act renounces its use of these rights granted, so far as is necessary for the performance of its new obligations[341]. Therefore, Member States, as far as Community air carriers are concerned, have give up this right to refuse foreign registered aircraft to operate cabotage within their territory.

The question of whether Article 7(2) is an obstacle to the acquisition by the Communities of competence in air transport is more difficult.

Article 7(2) provides:

[e]ach contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such privilege from any other State.

According to Naveau there are two different interpretations of this provision[342].

Under a strict interpretation, when State A grants cabotage rights to State B, if other States request the same rights from State A then State A is obliged to grant them. This interpretation in effect holds that Article 7(2) is a most favoured nation clause.

Under a freer interpretation, State A can grant cabotage rights to State B without being obliged to grant similar rights to other States, provided that the grant to State B has not been done on an exclusive basis[343].

Although there are some good reasons to prefer the second interpretation[344] the ICAO Council has not given a ruling on this question[345] and the ICAO Assembly has rejected a proposition aiming at clarifying the situation[346]. It can only be concluded that States are free to choose their own interpretation of Article 7(2) and that, therefore, a degree of legal uncertainty is attached to this Article. There is always the risk that Article 7 may be used by a State to oppose any form of regional cabotage arrangement between two or more States[347].

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[341] Case 10/16, Re Italian Customs Duties on Radio Valves: EC Commission v. Italy, [1962] CMLR 187, ECJ.

[342] J. Naveau, *Les implications de l'Article 7 de la Convention de Chicago sur la politique Communautaire du transport aérien* [unpublished].

[343] J. Naveau, *Les implications de l'Article 7 de la Convention de Chicago sur la politique Communautaire du transport aérien*, ibid.

[344] We agree with J. Naveau that the second interpretation is preferable, see J. Naveau, *Les implications de l'Article 7 de la Convention de Chicago sur la politique Communautaire du transport aérien*, ibid. at 7-19. See also, Memorandum of B. Cheng, House of Lords, Select Committee on the European Community's External Aviation Relations, supra note 34 at 3. Contra Annex II to the Communication of 23 February 1990, supra note 90.

[345] As it was requested to do by the Swedish government in 1967.

[346] See ICAO Plenary Session in Buenos Aires in September 1968.

[347] J. Naveau, *Les implications de l'Article 7 de la Convention de Chicago sur la politique Communautaire du transport aérien*, ibid. at 19.

Therefore the question may arise as to whether the twelve EC Member States have acted legally under Article 7(2) in proceeding to grant to each other, for the benefit of their airlines, namely Community air carriers, cabotage rights.

The answer to this question depends partly on the choice of the interpretation of Article 7(2) and partly on the formulation of the cabotage policy and on State practice which the Member States will adopt vis-à-vis non-Member States[348].

If it is Community law which has formulated the present cabotage policy within the Community, the European Communities have currently little external competence in air transport. Therefore, the question of whether the integration of cabotage rights at a Community level is illegal under Article 7(2) and is an obstacle to the acquisition by the Communities of competence in air transport depends not only on Community law and practices but also on Member States' external air transport policy. In this later respect, it does not seem to suffice, even under the freer interpretation of Article 7(2), for Member States to specify in their BATAs that the granting of cabotage rights is not exclusive or not to specify that such grant is exclusive to meet the requirements of the Chicago Convention. On the other hand, under the freer interpretation of Article 7(2), Wassenbergh consider that Article 7(2) means nothing more than the preparedness to enter into an exchange with everybody, and thereby give everybody equal treatment in equal cases on equal terms, that is equal rights to anybody, on the basis of requiring and getting in return something of similar value[349]. If this statement is true it does not seem that neither Community law and practices nor Member States current external air transport policies are illegal under Article 7(2) of the Chicago Convention.

(iv) Article 17 of the Chicago Convention

According to Article 17, each aircraft must have a single nationality, and that nationality shall be the one of the State in which it is registered. For the Chicago Convention the nationality of the owners of the aircraft is of no importance. The nationality of the airline, currently expressed by the formula of substantial ownership and effective control is a matter of indifference as long as the aircraft has been nationally or internationally registered[350] so that a State or a joint air transport operating organisation or an international operating agency bears responsibility under public international law for the operation of the aircraft. Consequently, Article 17 is not, a priori, opposed to the Community air carrier concept.

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[348] P. Mendes de Leon, Cabotage in Air Transport Regulation, supra note 335 at 160.

[349] H. Wassenbergh, *Principles and Practices in Air Transport Regulation*, supra note 204 at 113.

[350] See Articles 77 to 79 of the Chicago Convention, supra note 329.

(v) States obligations and rights under the Chicago Convention

The Chicago Convention establishes certain particular aviation-related obligations and rights.

In particular, States are obliged to provide every aircraft engaged in international navigation with a certificate of airworthiness[351] and to provide the pilots and the other members of the operating crew of such aircraft with certificates of competency and licences[352]. In addition, Article 12 obliges all contracting States to ensure observance of ICAO rules when aircraft are flying over or manoeuvring within its own territory and to prosecute any aircraft flying over the high seas in violation of the ICAO regulations applicable[353].

On the other hand, the Convention[354] grants to individual States jurisdiction to prescribe and jurisdiction to enforce relating to all matters concerning conduct or persons on board the aircraft.

The Convention seems to reserve such obligations and rights to States. Nevertheless, as mentioned previously, such obligations and rights might be (partly) transferred from Member States to the Communities and in such a case the Communities can be regarded as legally bound by the Convention[355]. Whether this transfer is conceivable from a practical point of view and whether it will occur in the future is far from certain. What is clear from the Chicago Convention is that if the Communities were to acquire full competence in air transport matters, the above-mentioned obligations and rights would need to be transferred from the Member States to the Communities.

Apart from these problems, most writers hold that there are no other important obstacles in the Chicago Convention to the transfer of competence in air transport from the Member States to the Communities[356].

(2) Community law

(A) THE PRINCIPLE OF SUBSIDIARITY

The TEU stipulates: *[t]he objectives of the Union shall be achieved [...] while respecting the principle of subsidiarity as defined in Article 3b of the Treaty*

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[351] Article 31 of the Chicago Convention, ibid.
[352] Article 32 of the Chicago Convention, ibid.
[353] ICAO regulations are mandatory when aircraft are flying over the high seas.
[354] And the international conventions on terrorism, see T. Burgenthal, *Law Making in the International Civil Aviation Organisation* (New York: Syracuse, 1969) at 67.
[355] See supra note 337 and accompanying text.
[356] P. Haanappel et al., *EEC Air Transport Policy And Regulation, and their Implications for North America*, supra note 28 at 166; E. Sochor, 'Air transport in the European Community: The hard-core problem' (1990) ICAO Journal at 17.

establishing the European Community. According to Article 3b, in the areas which do not fall within its exclusive competence[357], the Community shall take action in accordance with the principle of subsidiarity.

The subsidiarity principle restricts the possible acquisition by the Communities of competence in air transport in the following manner.

The Communities must ensure that their legislative proposals are in accordance with this principle[358]. The wording of Article 3b indicate that Community legislative proposals will be in accordance with the principle of subsidiarity only, and insofar as, the following conditions are met: (i) the proposed action cannot be sufficiently achieved by the Member States (ii) the proposed action, by reason of its scale or effect, can be better achieved by the Communities. It is up to the Communities to bring evidence that their legislative proposals are in accordance with the subsidiarity principle[359]. For instance, a proposed action which has a geographical scale wider than national boundaries, and this is often the case for action in the field of air transport, is an action which can be better achieved at Community level.

Since the principle of subsidiarity is not only a legal concept but also a political one, the Council might refuse to adopt the Commission legislative proposals which are contrary to the principle of subsidiarity. In the end it will be the task of the ECJ to determine if the principle of subsidiarity has been respected. However, the ECJ will only be able to determine this in the area of the Community's competence[360] and a posteriori[361].

(B) PRINCIPLES OF FUNDAMENTAL RIGHTS AND FREEDOMS

Article F of the TEU provides that the Union shall respect, as general principles of Community law, fundamental rights, as guaranteed by the European Convention for the Protection on Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States[362]. Among these principles and rights is the principle of proportionality[363] and the right of ownership[364]. These principles and rights, which

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[357] The fact that an area falls within the Community's exclusive competence seems to have lost its importance since the Commission has declared that it will draft all its proposals in accordance with the principle of subsidiarity.

[358] This has been confirmed by the President Delors on November 1992 and by the General Secretariat of the Commission, SEC(92) 2169.

[359] J. Cloos, see supra note 101 at 144.

[360] As opposed to Title V and Title VI of the TEU, see supra note 299.

[361] Article 173 and 177 of the TEU.

[362] For Cases which have applied the principles of fundamental rights and freedoms, see J. Temple Lang, see supra note 148 at footnote 11.

[363] i.e. a measure must not impose inconvenience or loss which is unnecessary or out of proportion to the objectives to be achieved. On proportionality, see Case 276/84, Metelmann [1985] ECR 4057, ECJ; Case 208/84, Produktschap voor Zuivel, [1985] ECR 4025, ECJ;

are directly applicable in the Courts of the Member States, restrict the possibilities for the Communities to acquire competence in the air transport sector.

c) Other Obstacles

The question of whether the geographical, economic and technical characteristics of air transport in Europe are obstacles to the acquisition by the Communities of competence in air transport is difficult to answer.

On the one hand, factors such as the disparity between the North and the South of Europe[365], the fragmentation of the airline market[366], and the social[367], fiscal[368] and other factors in the airlines' operation[369] as well as the fragmentation of air traffic management and control systems[370] - all are obstacles to an acquisition by the Communities of competence in air transport. These factors make it difficult, if not impossible, for the Communities to undertake any harmonization at Community level in the field of air transport. Furthermore, factors such as the financial difficulties of the European carriers oblige air carriers to oppose any Community measure likely to aggravate their financial situation[371] and undermine the full application of Community competition rules.

On the other hand, the above-mentioned characteristics of air transport in Europe and their resultant effects such as the congestion of airspace and airport infrastructures[372] usually cost States and European airlines a great deal of money and

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Case 181/84, R (ex parte Man (Sugar) Ltd) v. Intervention Board for Agricultural Produce, [1985] ECR 4025, ECJ; Case 15/83, Denkavit, [1984] ECR 2171, ECJ.

[364] Case 4/73, Nold, Kolen- und Baustoffgrosshandlung v. EC Commission of the EC, Judgement of 14 May 1974, [1974] ECR 491 at 507, [1974] 2 CMLR 354, ECJ.

[365] The countries of the North are, generally speaking, more advanced in terms of GDP per head of population than the countries of the South.

[366] There are currently 95 scheduled air carriers and 234 non scheduled air carriers in Member States and EFTA countries. There are carriers exhibiting wide intra-regional variations in structures and in unit costs, in contrast with the homogeneity of the structures and cost levels of their American and Asian counterparts.

[367] Social security charges vary from 13% in the United Kingdom, 22% in Germany, 27% in Spain, 33.9% in France and 40% in Italy, see Air transport World, December 1992 at 67.

[368] For instance value added tax (VAT) rates zero in the United Kingdom, 5.5% in France, 12% in Spain and 19% in Italy, see Air Transport World, ibid. at 67.

[369] In each of the Member States there exist, still today, distinct labor, security and safety requirements, user charges and monetary regimes.

[370] According to Air Transport World there are currently 31 different systems supplied by 18 computer manufacturers with 22 different operating systems in over 70 programming languages, Air Transport World, ibid. at 67.

[371] By way of increase in competition among European air carriers, reduction of state financial support to the air carriers or reduction of air fares, see E. E. Henrotte, supra note 41 at 125.

[372] 60 to 70 additional aircraft are usually in the air at any given moment because of congestion of airspace and of airport infrastructures, see Expanding Horizons, a report by the Comité des Sages for Air Transport to the European Commission, January 1994 at 23. [Hereinafter Comité des Sages for Air Transport].

encourage them to request the European Communities to bring about changes in the situation[373]. Likewise, the disparity between the North and the South and the above mentioned fragmentation often encourage States and airlines to favour integration at a Community level, since this integration is likely to reduce such disparity and fragmentation and their resultant effects.

CHAPTER 2: OBSTACLES TO EUROPEAN UNION EXTERNAL COMPETENCE IN AIR TRANSPORT

a) Political obstacles

(1) The attitudes of Member States[374]

Member States' attitudes vis-à-vis the acquisition by the European Union of external competence in air transport has been described as 'nationalistic paranoia'[375].

Member States have from the first strongly protested against the acquisition by the European Union of any external competence in air transport. In particular, if they acknowledge that the EEC Treaty has effected some transfer of external competence to the Community, and away from Member States, they have argued that this is strictly limited to those areas in the Treaty where there is an explicit attribution of external competence[376]. Since Articles 75-84(2) of the EEC Treaty do not provide an explicit grant of external competence to the Community in transport matters, they have considered that the Community has no external competence in transport matters.

When the concept of implicit (external) competence has been recognized by the ECJ[377], Member States have adopted attitudes of various kinds.

Firstly, they have interpreted the EEC Treaty narrowly. In particular, Member States have always refused to interpret the notion of CCP as including (air) transport matters.

Secondly, Member States have watered down EEC Treaty procedures, taking advantage of omissions and protecting themselves with legal exemptions. For instance, the Treaty procedure, under Article 228, for the conclusion of

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[373] One of the most striking examples of this is the more than 100 recommendations contained in the Report of the Comité des Sages for Air Transport a large majority of which are requests for Community actions, see Comité des Sages for Air Transport, supra note 373.

[374] Except maybe some Member States which are less strongly opposed to the transfer of external competence to the Communities.

[375] K. P. Hendry, supra note 126 at 121.

[376] Chiefly under Articles 113 and 238.

[377] See supra note 128 and accompanying text.

international agreements by the Commission, has been watered down by Member States to maintain Council control. Member States have taken advantage of the fact that the EEC Treaty lacks a clear-cut distinction between the areas where the Community is exclusively competent and those where it is not. On this basis, they claim that a large number of international agreements are mixed agreements, and therefore must also be concluded by Member States. From the legal exemption in Article 234(1) Member States have concluded it was neither appropriate nor suitable to change their network of BATAs.

Thirdly, Member States have used the Chicago Convention as an argument. For instance, they have often referred to Article 44(e) of the Chicago Convention which stipulates that one of the aims and the objectives of ICAO is to prevent economic waste caused by unreasonable competition. Arguing from this, they have opposed the transfer of external competence to the European Union since, according to Member States, such a transfer will increase the competition among air carriers to an unreasonable degree[378].

Finally, Member States have utilized factual elements as an argument. For instance, they have argued that the limited staff of the Directorate General of Transport of the European Commission will be unable to cope with the additional amount of work required if the competence to negotiate BATAs with third countries is transferred from Member States to the Commission.

(2) The attitude of the European Parliament

The European Parliament agrees broadly with the Commission's proposal to gradually transfer to the European Union the external competence in air transport currently in the hands of Member States[379]. The European Parliament agrees that such transfer is rendered necessary by the internal market in air transport now (almost) completed, and the need to eliminate discriminatory treatment of air carriers in such a market. In addition, the European Parliament agrees with the Commission that negotiation by the European Union's in one block will reinforce the competitiveness of the European Union air transport industry. It seems that the European Parliament disagrees strongly with the Commission only on one point, and differs slightly from the Commission on points of minor importance. For the European Parliament, the specific nature of air transport, as well as the need to

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[378] For other examples of the use of the Chicago Convention as an argument against the acquisition by the European Union of external competence in air transport, see supra note 336 and accompanying text.

[379] See European Parliament, Report of the Committee on Transport and Tourism, 24 June 1993, Miss MacIntosh, A. rapporteur to the Committee on Transport and Tourism, Doc A3-192/90; G. Luttge Report, supra note 335, Resolution of the European Parliament of 16 November 1993, PV 39, 15 November 1993.

confer a strong democratic legitimacy on external air transport policy, justifies[380] placing the legal basis for the external competence of the Community in air transport on Article 84(2) of the EEC Treaty in conjunction with Article 228 instead of on Article 113. The European Parliament insists on the need to adopt, in one document, clear guidelines on the way the external policy will be conducted, and considers that these guidelines should be discussed at the Council level before the Commission take on any external relations in air transport.

(3) The attitudes of the airlines

European air carriers are divided on the question of the Community's external competence in air transport.

Some European carriers, while not totally in favour of Community external competence in air transport, are strongly against more regulation and favour measures enabling airlines to improve their efficiency and competitiveness[381].

Others[382] advocate some form of return to the regulated environment and are strongly opposed to an 'open skies' policy. While they recognize that there is a problem of imbalance, because air transport between third countries and the United States is dominated by the United States, these air carriers consider that the pre-requisite conditions for the transition from bilateralism to multilateralism are not yet fulfilled, and in particular that the Commission should put forward policy guidelines setting out what the Community will seek to achieve before exercising external competence in air transport[383].

Air carriers of developing countries have expressed concerns that their existing traffic rights should not be diminished as a result of a European Community approach to external relations in air transport[384].

American carriers consider, generally, that the bilateral system is flawed and has no viable future. Therefore, evolution toward a multilateral system is viewed as the only means of providing fair and equal competitive opportunities[385]. According to

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[380] For the question whether the European Parliament is consulted on common commercial agreements, see supra note 170 and accompanying text.

[381] See, in particular, British Airways' and SAS's contributions to the Comité des Sages for Air Transport, supra note 373.

[382] In particular, see the contributions of Air France, Alitalia and Sabena to the Comité des Sages for Air Transport, ibid.

[383] Contribution of Air France to the Comité des Sages for Air Transport, ibid.

[384] See, in particular, Air Mauritius' contribution to the Comité des Sages for Air Transport, ibid.

[385] See, in particular, American Airlines' and Delta Air Lines' contribution to the Comité des Sages for Air Transport, see supra note 373.

American carriers, this multilateral system must be negotiated between the Community and the United States.

Although some Asian/Pacific carriers have expressed interest in the development of the Community's external competence in air transport[386], Asian/Pacific carriers and Arab carriers consider that there must be safeguards against excess capacity and a below-cost fares war[387].

(4) The attitude of the United States government

The initial success of the deregulation of the national airlines led the Carter administration to begin to export its policies into international markets.
In the summer of 1978, Carter issued a statement on international air transport policy which established the objectives of multiple-carrier entry in international markets and increased price competition[388].
The United States began to negotiate liberal-type BATAs[389] with a certain number of carefully selected States[390]. This liberal policy has been a success for the United States in some countries[391] and a failure in others[392].

Since 1979, there have been objections against the Carter administration's implementation of its liberal policy. The main objection was the trading of hard rights[393] against soft rights[394]. Consequently, the United States has adopted a more restrictive attitude particularly by letting their bilateral partners know that there are some areas which cannot be negotiated. In particular, such areas include cabotage, which has always be reserved to United States domestic airlines[395], foreign ownership of United States airlines[396] and foreign control over United States airlines[397].

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[386] See Singapore Airlines' contribution to the Comité des Sages for Air Transport, ibid.
[387] See, for instance, Japan Airlines' and Arab Air Carriers Organisation's contributions to the Comité des Sages for Air Transport, ibid.
[388] The international negotiating objectives of the United States are declared in section 17 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35 (1980).
[389] For the characteristics of liberal-type BATAs, see infra note 433.
[390] Belgium, the Netherlands, Germany and other non European States such as Costa-Rica, Thailand, Singapore, South Korea, Jamaica and Jordan.
[391] For instance the Netherlands and Belgium.
[392] Italy, Japan and New Zealand.
[393] i.e. access to major interior markets in the United States.
[394] i.e. theoretical access to foreign markets, vague promises of liberal pricing opportunities and prohibition against discrimination and unfair practices.
[395] See section 1108(b) of the Federal Administration Act of 1958 as amended by Section 401 of the International Air Transportation Competition Act of 1979, supra note 382. An emergency exception to the cabotage prohibition was introduced by Section 13 of the International Air Transportation Competition Act of 1979, ibid. at S 13.
[396] The Federal Aviation Act of 1958 restricted the ability of foreigners to participate in the United States airline industry, see section 101(3) which set up a foreign personal investment

It seems to us that the liberal policy of the United States had two consequences which are to some extent mutually contradictory.

The United States has been able, especially at the beginning, to score some points in Europe by a policy of divide and rule. Nevertheless, because of criticism emanating from the United States side and increasing reluctance from the European side, the United States today finds it difficult to progress with their liberal policy, and certainly with an 'open skies' policy[398]. Consequently, they start to support the Community in its attempt to acquire external competence in the field of air transport, since this is likely to bring more liberalism. However, since they have been able to achieve their initial success precisely as a result of the absence of any external competence in air transport on the part of the Community, the United States is not pushing strongly in favour of Community competence. Their attitude seems rather to use the Community as a means to win more from the Member States on a bilateral basis.

b) Legal obstacles

(1) Public international law

It does not seems that public international law provides any further obstacles to the acquisition by the Community of external competence in air transport, than it already provides for the acquisition by the Community of competence in air transport in general[399].

However, for the acquisition of internal competence it was less important for the Community to determine whether its proposed legislative measures conflict or not with the rules of public international law. There are two main reasons for this. First the rule lex posterior derogat priori of public international law and of Community law is sufficient basis for the view that internal Community legislation supersedes the prior commitments of Member States under public international law[400]. Secondly an internal transfer of competence from Member States to the Community which has no direct external effect would have less adverse effect on third countries, and would therefore create fewer problems under public international law.

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limit in the United States airlines at 25 per cent of the voting interest, Pub. L. No. 85-726, 72 Stat. 731.

[397] See section 408(a)(4) of the same Act which set up a foreign air carrier investment limit in United States airlines at 10 per cent of the voting interest unless discretionary exemption is granted by the United States administration, ibid.

[398] Like the one provided by the BATA the United States have concluded with the Netherlands in 1992.

[399] See supra note 322 and accompanying text.

[400] See Article 30(2) of the Vienna Convention of 1969, supra note 6.

With respect to the acquisition by the Community of external competence, the situation is different. Any transfer of external competence from Member States to the Community will have a considerable effect on third countries. Although the transfer of competence is not legally affected by its recognition or acceptance by third countries, and such a recognition or acceptance is therefore not conditional upon it, the political effects of any recognition or acceptance by third countries are, however, particularly important. Indeed, no third country is legally obliged to recognize or accept the transfer of competence to Community's institutions. This could lead to a situation in which the status quo blocked the development of the Community's external competence in the field of air transport. Likewise, a rule of public international law regarding third countries is that a Treaty does not create either obligations or rights for a third country without its consent[401]. Third countries are unlikely to give their consent to Community Treaties which are contrary to the rules of public international law binding upon them. Therefore it seems to us to be a particularly important question of whether or not Community legislative measures in air transport having a direct external effect are in accordance with public international law[402].

(2) The Convention on International Civil Aviation

It does not seems that the Chicago Convention creates additional obstacles to the acquisition by the Community of external competence in air transport than it already creates for the acquisition by the Community of competence in air transport. Nevertheless, for the same reasons as those mentioned above, and because the Chicago Convention has been ratified by many third countries[403], it is of great importance for the Community to determine whether or not its proposed legislative measures with a direct external effect[404] conflict with the Convention. The fact that there exists a conflict is not an absolute obstacle to the adoption of a Community legislative measure, but it increases the risk that Member States will object to the proposition, and that third countries will not recognise and accept the transfer of competence to the Community resulting from the proposed measure, and consent to be bound by the external effects of the measure. In addition, as mentioned previously, it is arguable that the Community is legally bound by the Chicago Convention[405]. It might also be argued that, if the Community actually exercises the tasks and the powers previously belonging to Member States in a way contrary to the Convention, the Community is internationally responsible for having infringed the Chicago Convention.

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[401] Article 34 of the Vienna Convention, ibid.
[402] For measures having a direct external effect, see supra note 291 and accompanying text.
[403] There are approximately 185 contracting parties to the Chicago Convention.
[404] For measures having a direct external effect, see supra note 291 and accompanying text.
[405] See supra note 337 and accompanying text.

(3) Community law

(A) CHARACTERISTICS OF COMMUNITY TREATIES

Community Treaties have far reaching consequences for the Member States.

Following the principles of the primacy and of the direct effect of Community law, Community Treaties, concluded in accordance with Community procedure, are binding on Member States[406]. The obligations contained in them often have to be translated into the internals laws of Member States and, on occasions[407], become law in Member States without any further enactment of Community or national legislation. By directly becoming law in Member States, Community Treaties might[408] create rights which may be invoked by individuals.

A Member State which enter into a Treaty on a subject lying within the jurisdiction of the Community will be in breach of its obligation and might be brought before the ECJ under Article 177. If a national legislature enacts legislation which is inconsistent with a directly applicable rule of Community law, the national Courts should not give effect to it[409]. Moreover, the Member States which enacted such national legislation will be in breach of Community law and can be brought before the ECJ under Article 5 of the Treaty and Article 228(7) if the Community rule is an international Treaty.

Member States are well aware of these far-reaching consequences of Community Treaties. For this reason they are reluctant to give the Commission the power to enter into international commitments. Such reluctance is increased by the fact that

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[406] This results from Article 228(2) of the EEC Treaty, see Case 48/74, Charmasson v. Ministre de l'Economie et des Finances, [1974] ECR 1383; Case 104/81, Kupferberg Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A., Preliminary Ruling of 26 October 1982, [1982] ECR 3641 at 3659.

[407] The constitutions of some States require that legislative authority be obtained before any Treaty provision can become part of their internal laws, thereby ruling out the possibility of Treaties being self-executing, except when such authority is obtained in advance.

[408] The ECJ has concluded that Community law recognizes that Community Treaties may have a direct effect. Whether a particular Treaty falls into this category depends on the intention of the parties. The test applied by the Court is to determine whether the Treaty provisions amount to a clear and precise obligation which is not subject in its implementation or effects to the adoption of any subsequent measure see Case 6/64, Costa v. Enel, Judgement of 15 July 1964, [1964] ECR 1269, ECJ; Case 181/73, Haegeman II, Judgement of 30 April 1974, [1974] ECR 459, 1 CMLR 530, ECJ (direct effect of the 1963 Convention of Yaoude); Case 87/75, Bresciani v. Admministrazione Italiana delle Finanze, [1976] ECR 129, [1976] 2 CMLR 62, ECJ; Case 17/81, Pabst und Richarz KG v. Hauptzollamt Oldenburg, [1982] ECR 1331, [1983] 3 CMLR 11, ECJ (direct effect of an Association Agreement with Greece); Case 104/8, Hauptzolampt Mainz v. C.A. Kupferberg & Cie, KG, [1982] ECR 3641, [1983], I CMLR I, ECJ (direct effect of a bilateral agreement concluded by the Community). Contra Joined Cases 21-24/72, supra note 330 (absence of direct effect of GATT provisions).

[409] J. Temple Lang, supra note 148 at 247. Even if the rule of Community law is not directly applicable, it will have effects in litigation to which any public authority is a party.

each time the Community has exercised its external competence, the transfer of competence from the Member States to the Community is irrevocable, and Member States can no longer conduct their external relations independently.

(B) ARTICLE 234 OF THE EEC TREATY

It is necessary to distinguish between two different questions: the question of the validity of BATAs concluded between Member States and the question of the validity of BATAs concluded between Member States and third countries.

Article 234(1) provides no derogation with respect to BATAs concluded between Member States.
With respect to BATAs concluded between Member States before the entry into force of the EEC Treaty the Treaty takes precedence over the agreements[410].

With respect to BATAs concluded between Member States since the entry into force of the EEC Treaty, Member States are under the general obligation to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from actions taken by the institutions of the Community and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty[411]. This general obligation in sufficient to prohibit Member States from concluding between themselves BATAs which are contrary to Community law[412].

With respect to BATAs concluded between Member States and third countries before the entry into force of the EEC Treaty, the purpose and effect of Article 234(1) is *to lay down that the application of the Treaty does not affect the duty of the Member States concerned to respect the rights of non-Member States under a prior agreement and to perform its obligations thereunder*[413]. This means that the rights and obligations resulting from such BATAs are not affected by the Treaty and remain into force even if they are contrary to the Treaty and to secondary legislation adopted by the Council. This is an application of a more general principle of public international law[414] and of Community law[415] that with respect to Treaties concluded between Member States and third countries, the Community is bound by the

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[410] Case 10/61, Re Italian Customs Duties on Radio Valves: EC Commission v. Italy, [1962] CMLR 187, ECJ.
[411] Article 5 of the EEC Treaty.
[412] J. Balfour, 'Factortame: The beginning of the end for nationalism in air transport' (1991) 16 Air & Space Law at 257. It should be noted that in certain areas other than air transport the EEC Treaty itself envisages and encourages the conclusion of bilateral agreements between Member States, see Article 220 of the EEC Treaty.
[413] Case 812/79, Attorney General v. Burgoa, [1981] 2 CMLR 193, ECJ.
[414] See Article 34 of the Vienna Convention of 1969, supra note 6.
[415] See Joined Case 21-24/72, supra note 327; Case 38/75, Douanegent der NV Nederlandse Spoorwegen v. Inspecteur der Invoerrechten en Accijnzen, [1975] ECR 1439, [1976] 1 CMLR 167, ECJ.

commitments previously accepted by individual Member States[416]. However, Article 234(2) obliges Member States to take *all appropriate steps* to eliminate incompatibilities between the Treaty and BATAs concluded before the entry into force of the EEC Treaty[417], and which are contrary to Community law. This relates directly to the question of whether Article 234 is an obstacle to the acquisition by the Community of external competence in air transport. Indeed, Member States often use Article 234(1) as an argument to refuse to modify existing BATAs concluded with third countries and which are contrary to Community law.

Therefore, the two central questions are (i) under which conditions could Member States argue from the exemption clause of Article 234(1) and (ii) what is the nature of their obligations arising from Article 234(2).

According to Otto Lenz[418], the exemption clause of Article 234(1) cannot be invoked by Member States if they have not satisfied their obligations arising from Article 234(2). Likewise, BATAs which are contrary to Community law cannot be used against the Community, which can ignore them and consider them as void. It is important to note that the question of the validity, under Community law, of BATAs is a different question from the validity, under public international law of BATAs concluded with third countries. Between the Member States and the third countries the validity of a Treaty a Member State entered into is a question of public international law. Under public international law it seems to us that a Member State could be held responsible if it has concluded a BATA with a third country which can be considered by the Community as void. The fact that a Member State is unable to fulfil its international commitments seems sufficient to impose upon it international liability vis-à-vis third countries.

In regards the nature of Member States obligations arising from Article 234(2), Otto Lenz has suggested that, while the *all appropriate steps* referred to in Article 234(2) were steps permissible under public international law, such steps include not only the opening of negotiations with a view to amending BATAs concluded with third countries and which are contrary to Community law but also, if necessary, repudiation of the agreement if the third country is not prepared to amend the agreement[419].

With respect to BATAs concluded between Member States and third countries after the entry into force of the EEC Treaty and which are contrary to Community law,

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[416] For the question of the application of Article 234(1) to amendments, agreed after accession to the Treaty, to agreements concluded prior to accession, see J. Balfour, 'Factortame: The beginning of the end for nationalism in air transport' supra note 412 at 259.

[417] Or prior to the accession to the Treaty.

[418] K. Otto Lenz, supra note 47. See also the ruling proposed by Otto Lenz to the ECJ in Joined Case 209 to 213/84, K. Otto Lenz, supra note 47 at 11.

[419] For the question of whether Member States have taken such action in practice, see infra note 609 and accompanying text.

insofar as the incompatibilities with Community law arise from Member States' pre-existing rights, as mentioned previously, the position is clear[420].

The position is less clear with regard to the pre-existing obligations of Member States[421].

(C) LEGAL BASIS FOR COMMUNITY EXTERNAL RELATIONS IN AIR TRANSPORT

The question of the legal basis for the Community to undertake external relations in air transport matters is certainly one of the most important legal obstacles to the European Union's external competence in air transport. This important question has been treated in Part B[422].

(4) Bilateral Air Transport Agreements

The consequences of Article 1 of the Chicago Convention and of the failure of the Chicago Conference[423] to provide for an exchange of commercial rights for scheduled international air services[424], and for an effective exchange of such rights for non-scheduled international air services[425], is that in order to make international air transport possible, BATAs between States were necessary[426]. The bilateral agreement that was most widely held up as a model in many countries was the Bermuda Agreement between the United States and the United Kingdom on 11 February 1946[427].

Following the conclusion of this agreement almost[428] all EC Member States have concluded many[429] Bermuda types of agreements[430] between themselves and third

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[420] See supra note 341 and accompanying text.
[421] J. Balfour, Factortame: The beginning of the end for nationalism in air transport, supra note 412 at 259-260.
[422] See supra note 96 and accompanying text.
[423] The Chicago Conference was held on 1st November 1944 (until 7 December 1944) and was attended by representatives from fifty-four nations.
[424] Article 6 of the Chicago Convention expressly denies any multilateral grant of commercial rights for scheduled international air services, supra note 323.
[425] Article 5(1) of the Chicago Convention (in exception to the sovereignty principle of Article 1) exchanges on a multilateral basis the first and second freedoms of the air, ibid. Article 5(2) exchanges on a multilateral basis the remaining commercial rights, with numerous restrictions, supra note 328. Most States have interpreted these restrictions so widely that they require prior permission for the operation of virtually all non-scheduled international commercial air services. Consequently Article 5(2) is an almost dead letter.
[426] Except for the first two freedoms of the air which were dealt with on a multilateral basis in the International Air Services Transit Agreement, supra note 328.
[427] The Bermuda agreement was renamed Bermuda I when the United Kingdom renounced the Bermuda agreement in 1975 and concluded a more restrictive Bermuda II agreement with the United States in 1976, Agreement between the government of the United States of America and the government of the United Kingdom Relating to Air Services between Their Respective Territories, signed at Bermuda on 11 February 1946, 3 UNTC 253.
[428] Except Luxembourg which has no BATA.

countries. Afterwards, since Member States do not follow the same air transport policy regarding individual third countries, some Member States have concluded pre-determination-type BATAs[431] while others have concluded liberal-type BATAs[432]. Moreover, an increasing number of BATAs were accompanied by a secret memorandum of understanding or an exchange of letters often changing considerably the meaning of the public agreements.

It is clear that the acquisition by the Community of external competence in air transport conflicts with the present situation regarding to the BATAs, and especially the pre-determination-type BATAs, the Member States have concluded between themselves and with third countries.

Indeed, if the Community acquires external competence, the following consequences are foreseeable.

- Member States will have to disclose to the Community institutions the exact content of all their BATAs, including any secret memorandum of understanding or exchange of letters.

- With the gradual development of the Community's external competence, Member States will be required to amend any of their BATAs which conflict with Community law, in particular the competition rules[433], the rules on the rights of establishment[434] and the rules on Computer Reservation systems

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[429] Each Member State has approximately 60 BATAs.

[430] Bermuda types of agreements establish the following principles:
- Fares and rates for air services between the territories of the respective countries shall be subject to the approvals of both governments (dual approval rule).
- The determination of international air fares and rates shall be delegated to the IATA rate-making machinery (subject to the right of government to review, to disapprove, and to fix IATA agreed fares and rates either with or without retrospective effect).
- There could be multiple designation of air carriers, meaning that each nation may designate one or more carriers to perform air service under the transport agreement.
- Free determination of capacity, frequencies, and types of aircraft.
- Free determination of routes.

[431] i.e. prior governmental determination or approval before the services may commence.

[432] Liberal-type BATAs have the following characteristics:
- Unlimited multiple designation of airlines.
- Free route structure
- Free determination by the airline(s) of capacity, frequencies, and types of aircraft to be used.
- No limitation on the carriage of scheduled sixth-freedom traffic.
- Unilateral tariff filing by airlines
- Minimal governmental interference in tariff matters.
- Inclusion of provisions on charter flights.

[433] Many existing BATAs encourage or require carriers to agree on fares, capacity, schedules and revenue sharing contrary to Community competition rules, see Communication of 21 October 1992, supra note 90 at para. 14.

[434] See infra note 605 and accompanying text.

(CRSs)[435]. Moreover, Member States will be required to refrain from concluding new BATAs contrary to Community law. Moreover, Member States will lose many of the powers conferred upon them by the BATAs[436], and, in particular, the powers to determine the three essentials aspects of competition among air carriers[437].

- Finally, in the long term it is likely that each Member State will lose its capacity to develop an external air transport policy which differs from those of other Member States, and that the content of each of its BATAs concluded with third countries will be replaced by a set of common rules, contained either in BATAs concluded by the Community with third countries or in a multilateral ATA between the Community and a third country or countries.

For these reasons Member States strongly oppose the acquisition by the Community of external competence in air transport.

c) Economic obstacles

It is generally argued by the Member States and the European airlines that the European air transport industry is currently at an economic disadvantage when compared with the Asian and American air transport industry. It is also argued that this disadvantage is likely to become worse in the future with the removal of restrictions, and with increased competition, in particular on the extra-Community air transport markets[438]. Consequently, there is a strong resistance among Member States and European airlines to the acquisition of external competence by the Community, since it is generally considered that this acquisition will increase the removal of restrictions and competition, in particular on the North Atlantic market.

The question of whether this fear has any justification will be examined as follows.

The economic competitiveness of the European airline industry will be analysed and compared with that of the Asian and American industry in order to determine whether the European air transport industry is, in fact, at an economic disadvantage, and if so, whether or not this economic disadvantage is likely to be increased by the

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[435] Member States have often accepted clauses in their BATAs which conflict with Community rules on CRSs concerning non-discrimination within CRS displays and non-discrimination among CRS suppliers, see Communication of 21 October 1992, supra note 90.

[436] The capacity to determine frequencies, types of aircraft, etc.

[437] Fares, capacity and access.

[438] This argument was raised in particular during the ICAO World-Wide Air Transport Colloquium held in Montreal in April 1992.

removal of restrictions and by increased competition in the extra-Community air transport markets[439].

(1) Technical efficiency

In general, there is a much higher propensity to fly in the United States than in Europe and internal-United States traffic is much more important than internal-Community traffic[440]. Several factors contribute to this higher propensity[441]. Consequently the major airports in the United States not only produce significantly higher passenger traffic volumes than those in Europe[442], but there are more high-volume airports, and the airlines based in the United States carry more traffic than those based in Europe[443].

The American airlines have the largest fleets ranked by total numbers of seats. Only two European carriers (British Airways and Air France) and one Asian carrier (Japan Airlines) are among the top ten carriers ranked by total seats[444].

In terms of value of the order book, the three largest United States mega-carriers (United Airlines, American Airlines and Delta Air Lines) dominate, and these airlines, by bulk ordering of aircraft, have managed to achieve major economies.

On the other hand, the average fleet age of Asian and European carriers is lower than for North American carriers, and these carriers have fleets more heavily exposed to Chapter 3 noise legislation. Although there is a great variation in the European figures, European carriers generally achieve better utilizations of their fleets than their United States counterparts whose operations are based around the hub-and-spoke systems[445].

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[439] For this analysis we consider it to be hypothetical that the acquisition of external competence by the European Community will result in the removal of restrictions and increased competition in extra-Community air transport markets.

[440] For United States air carriers domestic air services accounts for more than 70 per cent of their total operations, while in the case of the AEA airlines intra-Community services represent less than 30 per cent of their total operations.

[441] For instance the GDP per head of population, which is significantly higher in the United States than in the European Community, the highly mobile population dispersed over the entire territory of the United States and the fact that European air carriers face much more intense inter modal competition than in the United States.

[442] Only three European airports are among the world 's top fifteen airports in terms of passenger movements.

[443] About 55 per cent.

[444] AvMark, The Competitiveness of the European Community's Air Transport Industry, 28 February 1992, 2-2. [Hereinafter AvMark]

[445] In terms of block hours per day or weight and passenger load factors.

(2) Labour efficiency

Since labour costs account for up to 30-40 per cent of an airline's total cost, labour efficiency is an important factor determining the overall unit cost, and thereby the competitiveness of the airline industry. European flag carriers tends to have higher labour costs[446]. Having said that, another problem is to determine which factor is responsible for this competitive disadvantage. It seems that this disadvantage is not due to the smaller size of the European airlines, nor, contrary to a very popular belief, to the higher social costs of labour in Europe[447]. According to AvMark it seems that average sector distance and labour productivity are the two most important factor that determine labour efficiency and that factors such as the level of wages and the degree of unionization are also of importance.

(3) Cost efficiency

Cost efficiency is probably the more critical side of the profit equation. Broadly speaking European airlines tend to pay higher wages than American carriers and much higher wages that Asian carriers[448]. European airlines incur higher fuel costs than American carriers, but lower than Asian carriers. Although their are many reasons for that[449] user costs[450] in Europe tend to be higher than in the United States[451]. Consequently, unit operating costs of European airlines are substantially higher than their counterparts in other regions[452]. However, since the average stage length[453] (which is closely related to aircraft size and to the modes of operation) is one of the major factors determining airline unit costs[454] and since the average stage length for European flag carriers tends to be shorter[455]. European flag carriers might not be so much disadvantaged in respect of airlines unit cost when competing against American and Asian carriers on long haul routes. The biggest regional difference in

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[446] United States airlines produce almost twice the ATK, departures and other types of physical and economical measures of output per employee. For a complete list of these measures see AvMark, ibid., at 3-14 to 3-36.

[447] Comité des Sages for Air Transport, supra note 377 at 14-15.

[448] Except Japan Airlines.

[449] For these reasons, see AvMark, supra note 444 at 4-3 and 4-4.

[450] i.e. airport, ATC and navigation charges.

[451] On average, Europeans paid 3.2 per cent more per ATK for user charges.

[452] In 1989 the unit operating costs of Europeans airlines' averaged 67 per cent, compared to 43 per cent for North American and 40 per cent for Asian airlines.

[453] The kilometres flown per year divided by landings per year.

[454] Such factor has an influence on the technical efficiency, the labor efficiency, the cost efficiency and the financial performance of an airline.

[455] Average distances for flag carriers in the European sector are between 1000 and 1400 kilometres, while distances for carriers in the North American sector tend to be longer than 1600, AvMark, supra note 444. The average distance between major traffic-generating airports in Europe is 951 kilometres. In contrast, the distance between the top 15 United States airports is 2.7 times as long at 2579 kilometres, AvMark, ibid. at 4-11.

fact seems to lie in indirect operating costs (such as user charges and passenger service)[456].

(4) Financial performance

European airlines have lost 2.0 billion USD in 1992[457], more than other airlines, in particular United States carriers. According to the Comité des Sages this is due to a large number of factors[458].

(5) Market power[459]

The overall distribution of market share on the North Atlantic market from 1984 to 1990 has been fairly consistent, with all the European flag carriers capturing on average 51 per cent of the market.

However, travel by non-United States citizens has been the fastest-growing segment of the market[460], and United States carriers have increased their share of this component of the market[461]. The United States has gained such a large share of this component of the market for two main reasons.

First European flag carriers have faced a stronger competition from new United States carriers (United Airlines, American Airlines, Delta Air Lines, etc.) much better positioned to compete for traffic[462].

Second, between 1984 and 1990, while European flag carriers of five Member States[463] have increased their share of the market against competitive United States carriers, European flag carriers of six other Member States[464] have lost part of their share. It is striking to note, maybe with some exceptions, that the five Member States in which European flag carriers have increased their share of the market against competitive United States carriers are precisely the ones having concluded pre-determination-type BATAs with the United States while the six Member States

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[456] Smaller regional differences also lie in direct operating cost such as depreciation and maintenance costs both higher for European carriers.

[457] Comité des Sages for Air Transport, supra note 373 at 13.

[458] The lack of financial instruments comparable to those provided by Chapter 11 in the United States bankruptcy law, less favourable terms for purchasing equipment (less favourable tax-lease treatment), exchange rate risks and limited access to the United States dollar market as a by-product of national effective control requirements, Comité des Sages for Air Transport, ibid. at 13.

[459] We will only examine the United States versus European competition on the North Atlantic market and we will not take into consideration airlines marketing practices.

[460] Comprising 45 per cent of the total in 1990 as against 34 per cent in 1984

[461] Carrying 42 per cent of non United States citizens in 1990, up from 37 per cent in 1984.

[462] These carriers are expanding rapidly and have strong United States domestic feeder networks, AvMark, supra note 444 at 6-74.

[463] Greece, Ireland, Italy, Portugal and the United Kingdom.

[464] Belgium, Denmark, France, Germany, Spain and the Netherlands.

where the European flag carriers have lost their market share are precisely the ones having concluded liberal-type BATAs with the United States[465].

With respect to revenue on the North Atlantic market, the United States airlines did not achieve the unit revenue[466] of the European carriers for a number of reasons[467].

(6) Conclusion

Overall it seems that the European air transport industry is effectively at an economic disadvantage when compared with the Asian and American air transport industry. Such a disadvantage is particularly important in the areas of labour efficiency, cost efficiency, financial performance and market power.

Nevertheless, the European air transport industry is not at an economic disadvantage in terms of revenue on the North Atlantic market, and in the areas of technical efficiency and cost efficiency the disadvantage is not so important as it appears at first sight.

On the other hand, it seems more difficult to agree with the argument of Member States that the removal of restrictions and increased competition will always increase this competitive disadvantage.

On the contrary, the removal of restrictions and increased competition will probably benefit the European airline industry because it will increase the labour efficiency of this industry. Indeed, the removal of restrictions is likely to reduce the level of wages and to increase labour productivity, the two most important factors that determine labour efficiency. It is also arguable that the removal of restrictions and increased competition will lessen the variations among European airlines in unit costs, and therefore increase their efficiency. It is less certain, however, that the removal of restrictions will increase the cost efficiency and the financial performance of European airlines because many of the factors responsible for the economic disadvantage of such airlines are beyond management control and unlikely to be modified substantially in the future. Moreover, there are some areas where further deregulation is likely to augment the competitive disadvantage of the European air transport industry. This might be evidenced by the fact that Member States having concluded liberal-type BATAs with the United States have experienced a reduction of the market power of their flag carriers.

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[465] For instance, one of the largest losses in terms of percentage points of market share (16.5 per cent) from 1984 to 1990 occurred in Belgium, which signed a liberal BATA with the United States whereas, the substantial gain of the Italians in the market share percentage points (8 per cent) can be attributed to a pre determination-type BATA signed with the United States. For the characteristics of such BATA, see supra notes 431 and 432.

[466] Measured in terms of USD per RPK.

[467] For such reasons, see AvMark, ibid. at 6-74 to 6-76.

SECTION II: EUROPEAN UNION EXTERNAL RELATIONS IN AIR TRANSPORT

INTRODUCTION

Each of the founding Treaties of the European Communities contains a statement of legal status[468] and this legal status is currently almost universally recognised under public international law[469].

By virtue of its legal status the European Union maintains a variety of relations, including legal, political, economic, commercial cultural, etc. with a large number of countries and organisations, covering most matters and activities falling within their competence. From a legal point of view, the European Union's external relations may be divided into the following categories:

- European Communities external relations with non-Member States.
- European Communities external relations with international organisations.
- European Union external relations.
- Diplomatic relations.
- International responsibility.
- Settlement of international disputes.

Firstly the European Communities' external relations with non-Member States will be examined, then the European Communities' external relations with international organisations, and finally the European Union's external relations. The diplomatic relations, international responsibility and the settlement of international disputes will not be examined.

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[468] Article 6 of the ECSC Treaty, Article 210 of the EEC Treaty, Article 184 of the Euratom Treaty.

[469] C. Stephanou, *La Communauté Européenne et ses Etats membres dans les enceintes internationales* (Université de Nice: Puf, 1986) at 19-20.

PART A: EUROPEAN COMMUNITIES EXTERNAL RELATIONS WITH NON-MEMBER STATES

INTRODUCTION

The European Communities, by relying on their external competence, as was seen in Section 1, have entered into a large number of bilateral and multilateral Treaties, acting either on their own as contracting parties or jointly with the Member States as co-signatories[470]. Such Treaty relations of the three Communities cover a wide variety of fields. As mentioned previously, in the field of air transport, there have been many attempts by the Commission to propose to the Council the adoption of measures having a direct external effect in air transport and thus susceptible of conferring upon the European Communities the capacity to enter into external relations with non-Member States and international organisations. However, very few proposals have been adopted by the Council, with the consequence that the external relations of the European Communities in air transport are not at a very developed stage. Arguably, the most important measures regarding external relations in air transport have not been adopted or undertaken in the field of air transport as such, but in others fields, including air transport within their scope, such as the trans-European transport networks, the EEA Agreement and the Europe Agreements and trade, commercial and economic cooperation agreements. As it will be seen, the air transport implications of the external relations initiatives in these other fields will be examined first, and then the European Communities' external relations in air transport.

This examination will cover existing Community ATAs, the ATA(s) the Community might conclude in the future, and also the Communications of the Commission to the Council on air transport relations with third countries. Finally there will be a consideration of the most important problems in respect to the European Communities' external relations in air transport, and the future prospects for such external relations.

CHAPTER 1: TRANS-EUROPEAN TRANSPORT NETWORKS

As mentioned previously, in Section I, the TEU provides to the Community an explicit legal basis for external relations in the field of trans-European transport networks.

At an early stage in the development of the trans-European transport network in the Community, the Commission and the European Parliament started to think of ways to extend such a network to the EFTA countries and to the countries of Central and Eastern Europe. This extension has been viewed as especially important in respect

[470] A.G. Toth, supra note 4 at 257.

of the trans-European road, rail and inland waterway transport networks, because the axes of development of these networks often include such countries.

It was the Prague Pan-European Transport Conference in 1991, which gave a political impetus to the process of extending the networks to the EFTA and Central and Eastern European countries. Since this conference a number of different initiatives and actions have taken place.

The European Community has been anxious to involve the EFTA countries in all the discussions regarding the development of the trans-European transport network within the Community[471].

The Directorate General for Transport of the European Commission has worked on an informal basis with experts from a number of international organisations[472], from international financial institutions[473] and from EFTA and Central and Eastern European countries, with a view to preparing Indicative Guidelines for the further development of Pan-European Transport Infrastructure[474]. The starting point of this exercise was the existing Europe Agreements in the field of infrastructure planning[475] and the various legislative measures already adopted with regard to certain modes of transport[476]. In the course of the process, work under way in respect of the European Communities' conventional rail, ports and airports networks as well as on air traffic management and control systems were taken into accounts as well as other initiatives[477].

A list of specific proposals for infrastructure work in Central and Eastern Europe was assembled on the basis of these elements. Participants then considered the availability of financial resources for the realization of transport infrastructure work of potential common interest, and an attempt was made to arrive at realistic projections for aggregate financing available in the next few years[478]. The need to equip international financial institutions and governments with a planning tool for investments in projects of common interest within a network perspective, providing for reasonable economic rates of return for given projects was agreed among

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[471] In particular the EFTA countries have participated in the work of the Committee on transport infrastructure.

[472] The European Conference of Ministers of Transport (ECMT) and the United Nation Economic Commission for Europe (UN/ECE).

[473] The World Bank, the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD).

[474] See Report submitted by the European Community and the Secretariat of the ECMT and the UN/ECE at the Crete Conference on 14-16 March 1994. [Hereinafter the Guidelines].

[475] For the Europe Agreements, see infra note 497 and accompanying text.

[476] TEM and TER networks.

[477] Maps prepared by the ECMT Secretariat and the results of various Regional Conferences as well as the various CSCE meetings.

[478] It is in the framework of the G24 group of Transport Infrastructure that the financial contributions of the OECD donors countries are coordinated on the basis of projects.

participants. Joint work on a common approach giving concrete guidance in short-term investment planning, while recognising the desirability of keeping a medium and long-term perspective, resulted in the suggestion by the experts of a 'three layer' concept for a set of Indicative Guidelines for a common approach in infrastructure planning[479].

The 'three layer' concept consists of:

layer 1, the long term perspective for pan-European infrastructure development of common interest[480];
layer 2, the priorities of common interest for medium term development[481];
layer 3, the short-term priorities of common interest located in layer 2 on the basis of a list of specific projects for Central and Eastern Europe to be implemented within a shorter time period.

In view of both the large number of projects and potential candidates for layer 3[482] and also of the limited financial resources available for such projects, the participants came to the conclusion that it was necessary to scale down the number of projects. For this purpose a number of criteria have been identified[483] as a means of selecting from layer 2 projects to which immediate priority should be given[484].

At the second Pan-European Transport Conference, in Crete on 14-16 March 1994, a number of interesting discussions took place during the plenary session of the conference as well as during meetings of the working groups. While no legally binding decisions where made during the conference, the Conference did consider the report on a set of Indicative Guidelines which covers the main infrastructure corridors for the various modes of transport, as a starting point for future work on a

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[479] See Report submitted by the European Community and the Secretariat of the ECMT and the UN/ECE at the Crete Conference on 14-16 March 1994.
[480] As reflected in the European Agreements in the field of infrastructure planning.
[481] For Central and Eastern Europe these could be a number of corridors covering all modes of transport for development within a time horizon up to 2010.
[482] As it stands at present, none of these projects concern airport infrastructure. However, limited funds have already being made available to Central and Eastern European projects for airport infrastructure under the PHARE and TACIS programmes.
[483] Such criteria aim to take into consideration the following aspects:
- the interconnection and interoperability of international and interregional links
- a realistic timetable
- a modal balance
- environmental impact
- the availability of financing
- an economic rate of return.

[484] It is clear, however, that international financial institutions will continue to apply their specific rules, as will the Commission, in administrating programs such as PHARE and its 'Copenhagen' co-financing scheme, funded by European Union budget.

coherent infrastructure development at a pan-European level[485]. The Commission is currently identifying specific projects in a view to speeding up their implementation. This will be done on grounds of the agreed criteria and in close cooperation with the transport administration of the countries in Central and Eastern Europe

A lot of work in this area remains to be done, especially in the field of air transport, since the discussions on the Trans-European Airport Network and on the Trans-European Air Traffic Management Network within the Community have not yet been finalized.

CHAPTER 2: THE EUROPEAN ECONOMIC AREA AGREEMENT

a) General

In 1972 and 1973, the European Communities concluded with the EFTA countries[486] free trade agreements which envisaged primarily the suppression of customs duties on trade in industrial products.

In 1984, the Communities and their EFTA partners noted the need for and the opportunity of supplementing the free trade agreements. This was the starting-point for the negotiation of the EEA Agreement.

The EEA Agreement was signed in Oporto, on 2 May 1992, by the European Communities and their Member States on the one hand, and the seven EFTA countries on the other[487].

Following the withdrawal of Switzerland, having rejected the EEA Agreement by referendum, the other contracting parties signed a Protocol carrying an adaptation of the EEA Agreement, on 17 March 1993, to take into account the non-participation of Switzerland and the report of the date of entry into force of the EEA Agreement[488]. Moreover, it was decided that Liechtenstein had to re-examine its relations with Switzerland before applying the EEA Agreement.

On the 13 December 1993, the Council of Ministers adopted the Act of Conclusion of the EEA Agreement and the agreement came into force on 1 January 1994[489].

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[485] See point 4.1 of the Declaration by the Second Pan-European Transport Conference, Crete, Greece, 14-16 March 1994.

[486] Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, Switzerland.

[487] The EEA Agreement is composed of the Agreement as such supplemented by a series of 45 Protocols and 22 Annexes. [Hereinafter the EEA Agreement].

[488] In consequence one has to consider Switzerland as an EFTA country non-member of the EEA Agreement.

[489] Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the

b) Content of the agreement

The EEA Agreement covers primarily a series of balanced concessions which revolve around the mutual granting of the 'four freedoms' contained in the EC Treaty, and the transfer into the EFTA countries' legislation of the existing Community legislation in the fields of the 'four freedoms'[490].
In addition, the agreement envisages the reinforcement and the enlargement of the relations of the European Communities and their Member States with the five countries of EFTA in the fields of the horizontal Community policies and of the said Community policies 'of accompaniment' (including the competition rules).

Finally, the agreement provides for an institutional framework comprising: the EEA Council, charged to provide the political impetus for the implementation of the agreement and general guidelines to the Joint committee, the EEA Joint Committee called to ensure the effective implementation and operation of the EEA Agreement, the EEA Consultative Committee, which will serve as a contact forum between the partners' social representatives, the EFTA Surveillance Authority, instructed to take care of the application of the EEA rules in the EFTA countries, and the Court of EFTA which ensures judicial control in these countries.

c) Importance of the agreement for (air) transport

The importance of the EEA Agreement for (air) transport is the following.

The general rules of the agreement are applicable in the field of (air) transport, in particular the 'four freedoms'[491].

The provisions on the right of establishment (Articles 31 to 35) are applicable in the field of air transport. This means that any company or firm incorporated[492] in the territory of Member States or EFTA States shall be treated in the same way as natural persons who are nationals of Member States or EFTA countries. In the absence of a CCP in the EFTA countries, this would have meant that companies and firms controlled by non-Member States or by non-nationals of EFTA countries, but established in the EFTA countries' territory, benefit from the rights to establish anywhere in the Community in circumvention of the Community rules, which reserves this right to 'Community nationals'. To resolve this problem, a specific clause has been inserted into Protocol 17 relating to Article 34 of the EEA

Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, OJ No L 1 of 3.1.1994 at 1.

[490] For such freedoms, see supra note 43 and accompanying text.

[491] For such freedoms, see supra note 43 and accompanying text.

[492] i.e. formed in accordance with the law of a Member State or an EFTA country and having their registered office, central administration or principal place of business within the territory of the contracting parties.

Agreement, which assign to the contracting parties the right to take measures necessary to prevent circumvention.

For the freedom to provide services in the field of (air) transport, Article 36 of the agreement provides that such freedom shall be governed by the provisions of the Chapter relating to transport (Chapter 6).

Chapter 6 of the agreement concerns only transport by rail, road and inland waterways, but mentions that special provisions applicable to all the modes of transports are contained in Annex XIII[493].

With regard to the external effect of the agreement it should be mentioned that the EEA Agreement does not envisage joint external relations between the European Communities and the EFTA countries on the one hand and third countries on the other. The EEA Agreement leaves each block of States free to conduct its external relations independently.

d) Implementation of Community legislation following the signing of the agreement

It was envisaged that the EEA Agreement, signed in May 1992, would enter into force on 1 January 1993. Owing to the fact that this entry into force was delayed by one year, and that the agreement stipulates that the 'acquis communautaire' applies to the countries of EFTA, it was necessary to consider the question of the implementation of Community legislation following the signing of the EEA Agreement. It was decided[494] that Community legislation following the signature of the agreement and prior to the entry into force of the agreement would be contained in an Interim Package[495], applicable to the countries of EFTA by a favourable

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[493] See Article 47 of the EEA Agreement. Annex XIII envisages the application of the following Community rules of interest in air transport:
In the area of competition rules, Council Regulations (EEC) 3975/87 and 4261/88.
In the area of market access, Council Regulations (EEC) 2299/89, 2343/90 and 294/91.
In the area of fares, Council Regulation (EEC) 2342/90.
In the area of technical harmonization and safety, Council Directive 1266/80/EEC.
In the area of consultation procedure, Council Decision 80/50/EEC.
In the area of social harmonization, Council Regulation (EEC) No 295/91.
In the area of transport infrastructure, the EEA Agreement envisage the participation of the EFTA countries to the Committee on transport infrastructure.

[494] COM(93) 466 Final.

[495] Such an Interim Package contains the following Community legislation in civil aviation:
- the third air transport package.
- the slots Council Regulation (EEC) No 95/93.
- the ATM Council Directive 93/65/EEC.
- the Council Directive 91/670/EEC on mutual acceptance of personnel licence
- the Council Regulation (EEC) No 2407/92 on technical requirements.
- the Council Regulation (ECC) No 3089/93 amending Council Regulation (EEC) No 2299/89.

decision of the EC Council and of the EEA Joint Committee. Both the Council and the EEA Joint Committee adopted the Interim Package proposed by the Commission on 21 March 1994. The European Parliament has deliver its assent at its May session and the General Affairs Council of 16 May 1994 has conclude the Agreement. The Interim Package entered into force on 1 July 1994.

CHAPTER 3. THE EUROPE AGREEMENTS

a) General

The European Communities and their Member States have concluded Europe Agreements with Hungary, Poland, the Czech and Slovak Republics, Romania and Bulgaria.

The Europe Agreements concluded with Hungary and Poland entered into force on 1 February 1994[496]. The Europe Agreements concluded with the Czech and Slovak Republics, Romania and Bulgaria are likely to enter into force at the end of 1994[497].

Exploratory talks held in August 1994 with the three Baltic States (Estonia, Latvia and Lithuania) showed their willingness to start negotiations on Europe Agreements with the European Communities as soon as possible[498].

b) Content of the agreements

All the Europe Agreements, concluded on the basis of Article 238 of the EC Treaty, establish an association between the European Communities and their Member States and the Central and Eastern European countries under the supervision of an Association Council.

This association aims at a gradual market integration with a view to helping associated countries to become members of the European Union.

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[496] Decision of the Council and the Commission on 13 December 1993 on the conclusion of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, OJ No L 347 of 31.2.1993 [Hereinafter Europe Agreement with Hungary]; Decision of the Council and the Commission on 13 December 1991 on the conclusion of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, OJ No L 348 of 31.2.1993.

[497] Following the dissolution of the CSFR the Council adopted on 5 April 1993 the negotiating directives for the conclusion of two separate Europe Agreements (almost identical to the text of the Europe Agreement signed on 16 December with the CFSR) with the Czech and Slovak Republics.

[498] It seems likely that the Free Trade Agreements concluded between the European Communities and the Baltic States will be integrated into the future Europe Agreements, possibly after renegotiations of certain trade issues. For the Free Trade Agreements, see infra note 511.

Each Europe Agreement contains similar provisions on the Community's 'four freedoms'[499].

The provisions of the Europe Agreements concerning freedom of establishment do not apply to air transport services[500] but the Association Council can make recommendations for improving establishment and operations in this area[501].

For the supply of services each Europe Agreement provides that the conditions of mutual market access in air transport shall be dealt with by special transport agreements to be negotiated between the parties after the entry into force of the Europe Agreement with a view to assuring a coordinated development and progressive liberalization of transport between the parties adapted to their reciprocal commercial needs[502]. Prior to the conclusion of the special transport agreements, each Europe Agreement imposes a standstill for restrictive and discriminatory measures[503].

Each Europe Agreement contains a similar provision obliging associated countries, during a transitional period[504], to progressively adapt their legislation[505] to Community legislation existing at any time in the field of air transport, insofar as it serves liberalization purposes and permits mutual access to markets of the Parties and facilitates the movement of passengers and of goods[506].

In addition, all Europe Agreements contain similar provisions on economic cooperation between the Community and each of the associated countries in the area of transport[507]. This cooperation should enable associated countries to strengthen their economic links with the Community in a number of transport-related areas[508], certain of which are considered as priority areas[509].

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[499] For such freedoms, see supra note 43 and accompanying text.
[500] See, for instance, Article 51(1) of the Europe Agreement with Hungary.
[501] See, for instance, Article 51(2), ibid.
[502] See, for instance, Article 56(3), ibid.
[503] See, for instance, Article 56(4), ibid.
[504] With a maximum duration of 10 years.
[505] Including administrative, technical and other rules.
[506] See, for instance, Article 56(5), ibid. For more general provisions concerning the approximation of laws, in particular in the area of transport, see, for instance, Articles 67 to 69, ibid.
[507] Europe Agreements also contain provisions on co-operation in the areas of industry, the environment and tourism, which are of importance for (air) transport.
[508] For instance the Europe Agreement concluded with the Republic of Hungary lists the following areas: training programmes, technical assistance and advice, exchange of information and the provision of means to develop infrastructure in Hungary.
[509] See, for instance, Article 81(3) ibid.

Finally, Europe Agreements contain provisions on financial assistance from the Community to associated countries which are particularly important for the development of the transport infrastructures of these countries[510].

CHAPTER 4: TRADE, COMMERCIAL
AND ECONOMIC COOPERATION AGREEMENTS

The European Community has concluded a large number of trade, commercial and economic cooperation agreements with third countries. Among these agreements some include (air) transport within their scope[511].

CHAPTER 5: EXTERNAL RELATIONS IN AIR TRANSPORT

a) Existing Community Air transport Agreements

The EEC-Norway-Sweden Air Transport Agreement

During the negotiations concerning the EEA Agreement, all the EFTA countries formally submitted to the Commission a request for an agreement between themselves and the Community on scheduled air passenger services along the lines of the first air transport package. It was the first time that third countries were aiming at such a comprehensive agreement. The Commission, while recognizing *the need to develop a broad outline on the future negotiations between the Community and third countries*, considered that *there was no immediate reason to link the pursuit of these negotiations with the development of an external relations policy with other countries*[512] and adopted a positive reaction to the EFTA countries' submission. Consequently, the Commission has asked the Council to authorize it to open negotiations with EFTA countries with a view to concluding an agreement on scheduled air passenger services between the Community on the one hand and these countries on the other[513].

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[510] For more developments on this question, see supra note 471 and accompanying text.

[511] See, in particular, Council Decision 92/535/EEC of 26 October 1992 on the conclusion of an agreement between the European Economic Community and the Republic of Albania on trade and commercial and economic cooperation, OJ No L 343 of 25.11.1992; Council Decision 92/535/EEC of 21 December 1992 on the conclusion of an agreement between the European Economic Community and the Republics of Estonia, Latvia and Lithuania on trade and commercial and economic cooperation, OJ No L 403 of 31.12.1992; The Agreement of Free trade and Trade Related Matters between the Republic of Latvia on the one hand and the European Economic Community, the European Atomic Energy Community and the European Coal and Steel Community on the other.

[512] Para. 4 of the Recommendation for a Council Decision authorizing the Commission to open negotiations between the European Economic Community and EFTA countries on scheduled air passengers services, COM(90) 18 final of 14.2.1990.

[513] Ibid. para. 11.

The Council's reaction to this recommendation was ambivalent. Since Norway and Sweden were already linked to Denmark by their common airline SAS, Denmark feared that SAS could face a problem due to its particular legal situation. In consequence, in its meeting of 18 June 1990, the Council authorized the Commission to open negotiations only with two countries: Norway and Sweden[514].

The Commission started to negotiate with Norway and Sweden, in co-ordination and in consultation with Member States, and in accordance with the negotiating directives of the Council.

On 30 August 1990 the Commission proposed that the Council accept the final result of negotiations. The final agreement was approved by the Council Decision on 22 June 1992[515].

The EEC-Norway-Sweden ATA, concluded on the basis of Article 84(2)[516], allowed the establishment of a uniform set of rules concerning market access, airline capacity, as well as price setting. The idea was to found the agreement in an evolutionary way, on legislation in force in the Community[517]. The agreement contains an Annex which adapts the legislation on air transport in force in the Community at the moment of the adoption of the agreement with a view to ensuring its application to Norway and Sweden[518]. The Community secondary legislation in air transport adopted after the approval of the agreement was integrated into the EEC-Norway- Sweden ATA on 26 March 1993[519].

The agreement also applies competition rules similar to Articles 85, 86 and 90 of the EEC Treaty insofar as they concern air transport or associated matters mentioned in the Annex[520].

Finally, the agreement includes a special institutional framework consisting of a Joint Committee, made up of a representative of Norway, of Sweden and of the European Community which is to be responsible for the administration and the

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[514] COM(90) 18 final of 14.2.1990.

[515] Council Decision of 22 June 1992 concerning the conclusion of an Agreement between the European Economic Community, the Kingdom of Norway and the Kingdom of Sweden on civil aviation, OJ No L 200 of 18.7.92 at 20. [Hereinafter EEC-Norway-Sweden ATA].

[516] Against the Commission's proposal based on Article 113.

[517] The agreement does not include items of a more general nature, although they are relevant to civil aviation, such as the right of establishment, company laws, border crossings, tax questions, movement of persons and the like.

[518] The Annex makes all Community legislation adopted before February 1991 applicable to Norway and Sweden. This includes the first and the second air transport package.

[519] Decision of the Joint Committee of 26 March 1993, OJ No L 212 of 23.8.93 at 19. This included the third air transport package.

[520] Article 1(2) specifies that the provisions laid down in the Annex shall apply in accordance with the interpretation provided by the ECJ and the Commission, but the Joint Committee can carry out a discussion concerning these interpretations.

implementation of the agreement[521]. In particular the Joint Committee has to decide whether to revise the provisions of the agreement, so as to incorporate amendments made to the legislation in question or new legislation, if necessary doing so on a reciprocal basis. If a contracting party considers that a decision of the Joint Committee is not properly implemented by another contracting party, the former may request the issue to be discussed by the Joint Committee. Nevertheless, if the Joint Committee cannot resolve the issue, or does not reach a decision within a certain period of time the agreement ceases to be applicable[522].

The initial EEC-Norway-Sweden ATA provided that it would cease from the date the EEA Agreement entered into force[523]. As mentioned earlier, the entry into force of the EEA Agreement was delayed by one year[524]. In order to avoid the possibility of the legislation mentioned in the Annex of the EEC-Norway-Sweden ATA ceasing to be in force when the EEA Agreement came into force it was decided, on 22 July 1993, that the EEC-Norway-Sweden ATA would continue to be in force for a specified period of time[525]. This was decided inasmuch as the same matters are not governed by the EEA Agreement, and subject to the general condition that, in the event of conflict between the provisions of the EEA Agreement and the provisions of the Annex, the former should prevail[526].

b) Future Community Air Transport Agreements

(1) Air Transport Agreement(s) between the EC and Switzerland

An agreement between the Community and the Swiss Confederation relating to road haulage and rail transport was signed on 2 May 1992 and came into force on 22 January 1993. This agreement comsisted of a joint declaration on the removal of restrictions in air transport.

After the failure of the referendum on the EEA Agreement, on 6 December 1992, the Swiss Federal Council expressed its wish to retain the overall direction of its European integration policy, and the Swiss government asked, on 25 January 1993, for the opening of formal negotiations in the air transport sector.

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[521] Article 13 of the EEC-Norway-Sweden ATA, supra note 516.
[522] Article 14, ibid.
[523] Article 19 (3), supra note 515.
[524] See supra note 488 and accompanying text.
[525] Council Decision of 22 July 1993 concerning the amendment of the Agreement between the European Economic Community, the Kingdom of Norway and the Kingdom of Sweden on civil aviation, OJ No L 212 of 23.8.93 at 17.
[526] Since the EEC-Norway-Sweden ATA does not contain any general prohibition on ground of nationality but the EEA Agreement contains just such a general prohibition (Article 4) this decision means that Norway and Sweden will not be allowed to discriminate on grounds of nationality between Community air transport operators and air transport operators from EFTA countries, supra note 515.

The Commission was in favour of opening such negotiations and submitted to the Council, on 23 September 1993, a draft mandate for negotiations with Switzerland.

The Commission's plan was to negotiate with Switzerland an agreement aiming to include in the agreement the 'acquis communautaire' in the field of air transport, including the third air transport package. The negotiations would also cover the application of the general rules of the EEC Treaty, the rules on right of establishment, on freedom to provide services and on State aid[527]. The agreement would include an adaptive mechanism for the development of the 'acquis communautaire'.

The Commission also considered it necessary to take into account the consequences of the Swiss rejection, by referendum, of the EEA Agreement[528].

Indeed, this rejection calls into question the overall balance which had been established by the EEA Agreement. This balance rested, in particular, on the mutual concessions which had been made in the overall context of the EEA Agreement. The Commission took the view that the concessions made in this context were no longer acceptable in the context of a specific agreement on air transport with Switzerland. Consequently, the Commission proposed to the Council that all new specific agreements are negotiated with Switzerland on the basis of the overall balance of reciprocal advantages. In practice, that resulted in the proposal to include in any future ATA a clause making the implementation of such an agreement conditional upon specific agreements in the field of road transport and of freedom of movement for persons. Likewise, the advisability of concluding any agreement is conditional upon an examination of possible developments in bilateral relations in other fields and at the general level at the same time.

In addition, since the Confederation rejected the EEA Agreement, it is no longer subject to its legal and institutional constraints. Consequently, the Commission considered that it was inadvisable to allow a more privileged situation to develop for Switzerland, than that provided for in the EEA Agreement for EFTA countries. To find a solution for this problem, it was proposed that the entry into force of any agreement with Switzerland in the field of transport be conditional upon the entry into force of the EEA Agreement, and that EFTA partners should be consulted during negotiations[529].

The discussions at the level of the Council on the Commission's proposal for a mandate for air transport negotiations with Switzerland were already well advanced when the Swiss, on 20 February 1994, decided by referendum to prohibit, as from the year 2004, road transit across the Alps. Although there are technically no direct

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[527] Articles 5, 7, 52, 85, 86, 90 and 92 of the EEC Treaty.
[528] For this rejection, see note 488 and accompanying text.
[529] For more developments on this later question, see infra note 509 and accompanying text.

links between road and air transport, the Council decided that an agreement giving to the Swiss the 'acquis communautaire' in air transport will be too much in Switzerland's favour. Therefore, the Council requested the Commission to evaluate first the consequences of the Swiss prohibition of road transit before examining further the Commission's proposal on a mandate to negotiate. The Commission will, at the Transport Council of 21/22 November 1994, present a report on the consequence of the Swiss referendum and on how the Swiss intend to implement in their national law the prohibition of road transit across the Alps.

(2) Air Transport Agreement(s) between the EC and Central and Eastern European countries

As mentioned previously, each Europe Agreement provides for the possibility of special transport agreements to be negotiated between the parties after the entry into force of the Europe Agreement[530].

Before the entry into force of the first two Europe Agreements, the Commission organised a round table with Poland, Hungary and Czechoslovakia on 18-19 June 1992 with a view to exploring the possibilities of creating a larger 'European Aviation Area', i.e. to enlarge progressively the geographical scope of application of Community principles to these countries.

On 17 January 1994, the Commission organized a meeting with experts from Member States and Central and Eastern European countries. This meeting expressed support for the Commission's plans to create a 'European Aviation Area' and confirmed the economic advantage of creating a larger air transport market. Therefore the Commission services are currently preparing a Recommendation for a Council decision authorizing the Commission to open negotiations on air transport agreements between the Community and Bulgaria, the Czech Republic, Hungary, Poland, Romania and Slovakia. It is expected that the Commission will approve this Recommendation very soon, leaving open the possibility that the Council will examine it before the end of 1994.

(3) Air Transport Agreement(s) between the EC and Cyprus, Malta and Turkey.

The Community has concluded cooperation and association agreements with Cyprus, Malta and Turkey[531]. These agreements lack strong provisions on the adaptation of aviation law and competition rules and their implementation. Therefore the Commission services consider that it is premature to envisage agreements based on extending the 'acquis Communautaire' to these countries. However, in the longer term, the Commission services are convinced that Cyprus, Malta and Turkey should

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[530] See supra note 503.

[531] For such agreements, see note 511.

be part of the 'European Aviation Area'. Discussions with these countries on the further development of existing agreements will start soon and the Commission services intends to start exploratory talks on (air) transport policy issues. For Turkey, discussions on (air) transport are likely to be held within the framework of the Association Agreement this country has with the Community[532], whereas for Cyprus and Malta it is more likely that the negotiations will be similar to those with Central and Eastern European countries in the framework of the Europe Agreements.

(4) Air Transport Agreement(s) between the EC and the United States

The Commission services have long maintained informal air transport relations with the United States. More recently the Commission services have undertaken informal exploratory talks with the United States and have negotiated formally with the United States on CRS issues.

With respect to the exploratory talks a recent meeting held between the Commission services and the US authorities has revealed that on a large number of major issues the positions of the Commission and of the US administration differ fundamentally. In particular, the ain on the part of the Commission services to negotiate cabotage issues with the US, for instance in the context of a future US-EC air cargo ATA, creates from the US side major difficulties. Likewise, there is also opposition from the US side to the wish of the Commission services that more parties can joint a future ATA and that the US restrictions on foreign ownership and effective control shall be modified.

With respect to the formal negotiations with the US on CRS issues the aim of the negotiations was to discuss the discrimination created by the US rules on CRS regarding the provision of marketing, booking and sales data generated by CRS.

(5) Air Transport Agreement(s) between the EC and the ACP countries

The Lomé IV Convention was concluded between the Community and its Member States on the one part and the ACP countries on the other for a 10 year period starting on 1st March 1990[533]. The Convention, in Title IX, Chapter 4, contains provisions on transport, communications and computers[534].
Article 125 of the Convention provides that the contracting parties shall cooperate in air transport matters in order to meet a set of listed objectives.

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[532] For such agreement, see supra note 511 and accompanying text.
[533] Article 366 of the Lomé IV Convention, Quatrième Convention ACP - CEE signed in Lomé on 15 December 1989, OJ No L 229 of 17.8.91 at 3.
[534] Articles 123 to 134.

Article 125 is considered by the Commission services to be a starting point for developing cooperation with the ACP countries in civil aviation, perhaps taking advantage of the mid-term review of the Lomé IV Convention.

c) Communications of the Commission to the Council on air transport relations with third countries

(1) Introduction

On 23 February 1990, the Commission put forward a proposal for a Council Decision on a consultation and authorization procedure for agreements concerning commercial aviation relations between Member States and third countries[535]. With the adoption of the third air transport package, the necessity to complement the internal market with a Community policy for relations with third countries has become more urgent. Accordingly, on 21 October 1992, the Commission adopted an additional Communication which sets out in a more detailed manner how an external aviation policy can be developed[536].

(2) Development of a Community policy

After having described the existing economic situation in air transport[537] the Communication of 21 October 1992 elaborated on the development of a Community policy.

The Commission recalled that the main consideration for developing the Community's external relations in air transport is that, with the gradual development of the internal market, the Community will also have to act externally as one, while taking into consideration the special characteristics of air transport.

According to the Commission, the objectives of a general Community policy for air transport relations with third countries must be in line with the objectives of the EEC Treaty, with the general economic policy objectives set out in the explanatory memorandum of the proposal for the third package on air transport[538], and with the objectives to promote the interests of Community air carriers and their workers, of consumers and of airports (regions).

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[535] Communication of 23 February 1990, supra note 90.
[536] Communication of 21 October 1992, ibid.
[537] Many developments of the Commission in this respect have been integrated in other parts of the work, see supra notes 367, 439 and accompanying text and infra note 592 and accompanying text.
[538] COM(91) 275 final of 18.9.1991.

The need to respect the objectives of the EEC Treaty[539] makes it necessary to address the main current legal concerns. In the area of competition rules it will be necessary to include the external aspects of such rules and to ensure the proper enforcement of competition rules in respect of air transport to and from third countries[540]. Member States will have to change the nationality clauses they have inserted in BATAs with third countries in accordance with the transitional approach of Article 234[541]. It will also be necessary to develop non-discriminatory procedures to allocate traffic rights to Community air carriers interested in operating on a route where the number of carriers to be designated is limited and/or the capacity is limited or insufficient to meet the requirements of interested Community air carriers[542].

According to the Commission, Community air carriers are, in particular, looking to be able to operate under the best possible regulatory regime, a regime which allows for more flexibility and allows them to use their full economic potential on a world-wide scale. Consumers are to be best served in a reasonably free-marked and competitive environment with safeguards. The airports are looking for more free-market access policy, with greater opportunities directly available to regional airports.

(3) Community competence

For the Community's external competence in air transport the Commission considers that, in certain cases, the Articles of the EEC Treaty on the CCP (notably Article 113) are applicable and that, in other cases, the Articles of the Transport Chapter are applicable[543]. The Commission considers that Article 113 is the legal basis for every Community action that concerns trade in services. This means that the Commission has exclusive competence for concluding BATAs dealing with commercial aspects, in particular with market access, capacity, tariffs and related matters. Therefore, Member States are no longer entitled to negotiate or conclude agreements on matters falling within the ambit of the CCP[544]. The other aspects[545] of aviation relations with third countries are governed by Article 84(2) insofar as they

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[539] This is to say to ensure the proper functioning of the internal market and implement fully the principles of the right of establishment and the free provision of services, taking into account the need to avoid predatory behaviour.

[540] For more developments on this question, see supra note 279.

[541] For more developments on this question, see supra note 411.

[542] The Commission proposes the creation of a 'Management Committee for Air Transport' to assist the Commission in the allocation of traffic rights, Communication of 21 October 1992, supra note 90 at para. 70.

[543] For the discussions on the legal basis for the Community's external relations in air transport, see supra note 96 and accompanying text.

[544] This does not mean that the Council or Member States cannot present to the Commission a proposal aiming at the conclusion of an international air transport agreement with third countries.

[545] i.e. social, environmental, technical and security problems.

are not accessory to the commercial aspects. This means that the Community competence in other aspects than commercial aspects depends on the case law of the ECJ on implicit external competence[546]. According to the jurisprudence of the ECJ, exclusive Community competence also exists in non-commercials matters for negotiating with third countries when certain requirements are met[547]. Finally, when there are negotiations on subjects, some of which are covered by national competence and some by Community competence, then a situation of mixed competence exists in which the Community and the Member States negotiate together, and agreements are concluded by both.

(4) Establishment of procedures

In this respect, the Commission considers that it is necessary and urgent to establish a framework for Community co-ordination and negotiations in air transport with third countries.

The Commission proposes a system which takes the above-mentioned aspects of the Community competence fully into consideration.

The Commission proposes that the Council, in confirmation of the Commission's views, enact a special procedure on consultation and authorization in respect of commercial air agreements with non-Member States, which will replace Council Decision 69/494/EEC in such matters[548].

Under this new procedure, Member States are to notify the Commission of all BATAs and any other commercial air agreements with third countries within a specified period of time[549]. The extension, whether express or tacit, of any such agreement[550] shall be subject to 'consultation' with or conducted by the Commission[551]. If the Commission establishes that certain provisions in such agreements, coming within the scope of the 'common commercial aviation policy', would not constitute an obstacle to the implementation of this policy, it may then authorize Member States to extend it for a specified period[552]. On the other hand, if the Commission establishes that provisions in the agreements to be extended constitute an obstacle to the implementation of the common commercial aviation

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[546] See supra note 128.
[547] See supra, ibid.
[548] Council Decision 69/494/EEC, see supra note 174.
[549] Article 1 1° of the Communication of 21 October 1992, supra note 90. The Commission proposes to the development of a data bank where all Member States' BATAs will be stored, Communication of 21 October 1992, ibid. at para. 74.
[550] Article 1, ibid.
[551] Article 2, ibid.
[552] The provisions in agreements concluded before 1 January 1993 and governing matters covered by the external aviation policy within the meaning of Article 113 may be maintained in force until 31 December 1998 if certain conditions are satisfied, see Article 5, ibid.

policy, it shall submit a detailed report to the Council, including, where appropriate, recommendations requesting the opening of Community negotiations by the Commission with the third country or countries concerned.

The Commission recognises that, for the moment, it may have neither the requisite expertise nor resources to take on the task of negotiating or re-negotiating all the bilateral agreements of all Member States with third countries[553]. Consequently, during a transitional period up to 31 December 1998, the Council acting by qualified majority, on a proposal from the Commission, may, in certain circumstances[554] authorize Member States to conduct bilateral negotiations with third countries[555], in cases where Community negotiations prove to be not yet possible. This would be without prejudice to the power of the Commission to authorize Member States to enter into bilateral negotiations with third countries concerning the modification and/or application of the annexes to existing agreements. In both instances, the consultation procedure[556] applies and should lead to guidelines for the Commission or for the Member States concerned in the negotiations. The actual agreement may, however, be concluded only if there is no objection by either the Commission or any of the other Member States, which must be all advised in advance of the results of the negotiations[557]. In all cases, the agreement may be concluded only after authorization by the Council, acting by a qualified majority on a proposal from the Commission[558].

(5) Criticisms of the Commission's two proposals

It seems to us that it might be interesting to list some of the main criticisms of the Commission's proposals on air transport relations with third countries.

It has been said that the respective roles of the Commission and the Member States are unclear, in the absence of a decision-making authority, while the third countries prepared to negotiate with the Community would, at least, like to know precisely which authorities within Europe will be responsible for what[559].

For the EEC-Norway-Sweden ATA, the Council authorized the Commission in June 1990 to begin the negotiations, and the final result of these negotiations was adopted in June 1992, two years later. Many writers have argued that this delay was too

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[553] Communication of 23 February 1990, supra note 90.
[554] Article 6(2), Communication of 21 October 1992, supra note 90.
[555] Including the conclusion, modification and/or application of BATAs.
[556] For this procedure see Articles 7 and 8 and Annex II of Communication of 21 October 1992, ibid.
[557] B. Cheng, Memorandum, House of Lords, Select Committee on the European Community's External Aviation Relations, supra note 34 at 2.
[558] Article 7 in fine, Communication of 21 October 1992, see supra note 90.
[559] House of Lords, Select Committee on the European Community's External Aviation Relations, supra note 34 at 21.

long. In fact, it seems to us that for an agreement such as the EEC-Norway-Sweden ATA, the question of the delay is not so important because the agreement remains in place for a long time and because special procedures are provided for the modification and the up-dating of the agreement. On the other hand, for typical BATAs, this delay might be too long.

The Community would never be able to construct a coherent external policy until the internal market has been completed[560].

The Commission's Communication says very little about the policy objectives the Community would pursue if charged with the conduct of negotiations on external aviation relations.

The risk is that the Community might operate on the basis of the lowest common denominator of national policies[561].

There is a risk in the Commission's proposal of the formation of retaliatory trading blocks on the part of other countries and of what might be called 'air wars' between trading blocks throughout the world, which would produce considerably less of a free-market regime than the present bilateral system[562].

The real problem, according to Naveau, is to agree on a common external policy and to define institutional competence. Before each negotiating session it will be necessary to agree at Council level on a common position. As long as the internal market is not yet an economic reality Member States' attitudes will be rigid, and consequently any Community mechanism will also be rigid. This rigidity will probably mean that negotiations at a Community level will be less efficient that at Member State level since, third countries, in particular, are likely to take advantage of these rigidities[563].

d) Problems relating to external relations in air transport

(1) Extraterritorial application of the competition rules

It seems that there is often much confusion regarding the extraterritorial application of the competition rules.

It seems to us that three hypotheses can be distinguished.

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[560] House of Lords, Select Committee on the European Community's External Aviation Relations, ibid. at 21.
[561] House of Lords, Select Committee on the European Community's External Aviation Relations, ibid. at 21.
[562] H. Wassenbergh, *Principles and Practices in Air Transport Regulation*, supra note 204.
[563] J. Naveau, *Droit Aérien Européen: les nouvelles règles du jeu*, supra note 196 at 112.

1. The first hypothesis concerns an agreement, decision or concerted practice or an abuse of a dominant position having its effect in the internal market.

The question is whether the Commission, acting under Article 89 or under existing secondary Community law, can decide that agreements, decisions or concerted practices are a violation of Article 85 when all or part of the undertakings involved are established outside the Community. Under previous case law of the ECJ, it was decided that the competition rules apply to all undertakings which took part in the anti-competitive behaviour by relying on the 'economic unit theory', i.e. by imputing the conduct of the subsidiaries inside the Community to their parent company outside the Community[564]. More recently, the ECJ has modified its previous case law and endorsed the Commission's 'effect doctrine'[565]. This has been confirmed in the recent Case 89/85[566]. In Case 89/85 the Court decided that Article 85 applies to agreements within the common market irrespective of the place where the agreement is reached or entered into or where the respective undertakings are established[567]. According to the Court in Case 89/85 and according to Advocate-General Darmon[568], for the Community to have jurisdiction the anti-competitive behaviour should be direct and immediate, reasonably foreseeable[569] and substantial.

The same reasoning seems to be applicable in the case of an abuse of a dominant position having its effect in the internal market. As mentioned previously, in Case 68/86, it was decided that Article 86 applies fully and directly to the whole air transport sector[570]. As a consequence, it seems clear that an abuse of a dominant position by one or more non-Community air carriers, provided it affects trade between Member States, is prohibited by Article 86, and a national court is empowered to decide that such undertakings have abused their dominant position.

It is important to note that, in this first hypothesis, there is no extraterritorial application of the competition rules since, in order to be prohibited, the anti-

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[564] For a Case having refused to apply the competition rules to undertakings established outside the EEC, see Joined Cases 48-57/69, Badische Anilin et al. v. EC Commission, the so-called Dyestuffs Case, Judgement of 14 July 1972, [1972] ECR 619, ECJ at 695 and 696.

[565] Case 11/71, Bugueiin Import Co. v. SAGL Import- Export, [1971] ECR 949, ECJ; Case 6/72, Europemballage and Continental Can v. Commission, [1973] ECR 215, ECJ; Joined Case 6-7/73, Commercial Solvents v. Commission, [1973] ECR 357, ECJ; Case 15/74, Centrafarm v. Sterling Drug, [1974] ECR 1147, ECJ; Case 36/74, Walgrave and Koch v. Union Cycliste Internationale, [1974] ECR 1405, ECJ; Case 22/76, United Brands v. Commission [1978] ECR 207, ECJ; Case 86/76, Hoffman-la-Roche v. Commission, [1979] ECR 461, ECJ.

[566] Case 89/85, supra note 277.

[567] P. Haanappel et al., *EEC Air Transport Policy and Regulation, and their Implications for North America*, supra note 28 at 52.

[568] See Joined Cases 48-57/69, supra note 564.

[569] In a previous Case the Commission adopted a broader approach by making its jurisdiction conditional upon the only requirement that there be a substantial effect on trade between Member States without relying on the foreseability requirement.

[570] See supra note 276 and accompanying text.

competitive behaviour must have an effect in the Community territory. Therefore The expression 'extraterritorial' must be reserved to the two other hypotheses.

2. The second hypothesis concerns agreements, decisions or concerted practices or an abuse of a dominant position having an effect on air transport between the Community and third countries. In this regard there is not yet any Community secondary legislation. As mentioned previously, the ECJ has nevertheless confirmed that Articles 85 and 86 do apply in that situation, although in a different way[571]. According to the Court, Article 85 is not directly applicable to routes between the Community and third countries. As a result, the transitional provisions of Articles 88 and 89 of the EEC Treaty and the rules laid down in Joined Cases 209 to 213/84 continue to apply[572], with the consequence that national courts can hold an agreement to be void under Article 85(2), if there has been a prior decision under Articles 88 or 89 establishing an infringement of Article 85(1) but not without prior administrative determination of the application of Article 85(1)[573]. On the contrary, as mentioned previously[574], national courts are empowered, without prior administrative determination under Articles 88 or 89, to apply Article 86[575].

3. The third hypothesis concerns agreements, decisions or concerted practices or an abuse of dominant position relating to air transport between non-Community Member States and having no effect in the Community.

It seems that such anti-competitive behaviour is not prohibited by Community competition rules even if the formation of such anti-competitive behaviour took place within the Community. Indeed, as indicated in Joined Cases 89/85, if Articles 85 and 86 of the EEC Treaty do not give clear guidance as to the jurisdictional limits of the Community's competition laws these provisions, however, indicate that a certain geographic limitation applies in that the anti-competitive effect must occur within the common market or, in case of Article 86, that the dominant position must exist within the common market or a substantial part thereof[576].

In each of these three hypotheses the application of the competition rules might lead to two different problems: (i) the conduct of air transport operators can be the result

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[571] See supra note 275 and accompanying text.
[572] K. Otto Lenz, supra note 47.
[573] B. Van Houtte, supra note 260 at 64. Contra, the more far reaching direct applicability of the prohibition on restrictive agreements advocated by Otto Lenz in the context of Joined Case 209-213/84, see supra note 263.
[574] See supra note 278.
[575] Some writers have doubts about the effectiveness of such a direct application of Article 86 to non-Community air carriers, as a decision under Article 86 requires investigations, and the Commission will only in a few cases be able to establish such abuses without the cooperation of non-Member State governments, P. Haanappel et al., *EEC Air Transport Policy and Regulation, and their Implications for North America*, supra note 28 at 53, E. E. Henrotte, supra note 41 at 220.
[576] See supra note 278.

of provisions contained in BATAs concluded between Member States and third countries or of laws and rules adopted by third countries, and (ii) the application and enforcement of the Community's competition rules might be incompatible with public international law[577].

(i) The Commission has already (partly) recognized the first problem in its proposal for the extension of the scope of application of the air transport competition rules[578]. The Commission has proposed an Article 18[579] which provides:

[w]here the application of this Regulation in a particular case is liable to lead to a conflict with provisions laid down by law, regulation or administrative action of a third country, the Commission shall, at the earliest opportunity, hold with the competent authorities of the country concerned consultations aimed at resolving the conflict, [...].

(ii) With regard to the second problem, two different types of conflict may arise: (a) a State, exercising its jurisdiction to prescribe, can adopt norms which exceed in scope its national territory, and (b) a State, exercising its jurisdiction to enforce, can adopt enforcement measures against non-nationals incompatible with public international law.

(a) It seems that nothing under public international law prohibits States from adopting measures which exceed their national territory.

(b) With regard to the second type of conflict, it seems that there is no recognized regime under public international law governing such conflict. ICAO, aware of this situation, has elaborated a catalogue of recommendations addressed to its Member States in order to avoid disputes and to harmonize the competition regime in the aviation sector[580]. The Commission, also aware of this problem, had admitted that there can be reasons of comity which militate in favour of self-restraint in the exercise of its jurisdiction to enforce. This could be the case if, for instance, the application of Community law would adversely affect 'important interests' of a non-Member State[581].

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[577] A. Lowenstein, supra note 87 at 95.
[578] See supra note 285.
[579] Article 18 of Proposal for a Council Regulation (EEC) amending Regulation (EEC) No 3975/87 of 14 December laying down the procedure for the application of the rules of competition to undertakings in the air transport sector, supra note 286.
[580] ICAO Circular No. 215-AT/85 based on ICAO Council Decision of 21 November 1988.
[581] P. Haanappel et al., *EEC Air Transport Policy and Regulation, and their Implications for North America*, supra note 28 at 53.

(2) Models of future Air transport Agreements with third countries

The ECAC agreements of 19 December 1986[582] relating to capacity and tariffs might provide the Community a useful solution to the problem of finding a models for future ATA with third countries.

The ECAC agreements are a compromise embodying a tendency toward the flexible and progressive relaxation of restrictions imposed by the bilateral system of ATAs[583].

The idea behind the ECAC agreements is essentially to combine multilateralist principles with the bilateral implementation of these principles.

The mechanism is as follows: the documents proposed for ratification by ECAC Member States are two multilateral Protocols containing general principles and supplemented by two standard forms of bilateral agreements regulating capacity and tariffs[584]. The two multilateral Protocols entered into force immediately for the ECAC Member States who signed them, while the two standard forms of bilateral agreements needed to be signed and/or ratified in a given period of time. According to Folliot, this combination of multilateralism and bilateralism appears likely to effect a regulatory harmonization without calling into question what States regard as the essence of their sovereignty[585].

Arguably this mechanism might be used at least for the conduct of what Professor Wassenbergh calls the 'interim common external air policy of the Community'[586]. Indeed, it might be possible for the Commission to propose to the Council the adoption of a 'multilateral Protocol', in the form of a Directive, containing the general principles the Commission considers suitable for future external air transport relations. This 'multilateral Protocol' might be supplemented by the standard form of BATA(s) considered appropriate by the Commission for adoption between Member States and a third country or countries, in particular in respect of the compatibility with Community law. Member States will be subsequently required, within a given period of time, to conclude individual BATA(s) with a third country or countries using the standard form of BATA(s) as a model.

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[582] A minority of ECAC Member States signed the ECAC agreements on 19 December 1986 but the reservations of the other ECAC Member States were raised at ECAC's intermediate session of 16-18 June 1987, during which the other ECAC Member States approved the agreements.

[583] M. Folliot, 'Une étape vers un modèle européen de réglementation de la concurrence dans l'aviation commerciale, les textes CEAC du 19 décembre 1986 sur la capacité et les tarifs' (1987) 41 RFDA at 97.

[584] M. Folliot, ibid. at 97.

[585] M. Folliot, ibid. at 106.

[586] H. Wassenbergh, *Principles and Practices in Air Transport Regulation*, supra note 204 at 61.

(3) The institutional problem; the single or the double pillar approach

The negotiations of the EEC-Norway-Sweden ATA and the exploratory talks with the Swiss government in the air transport sector[587] have highlighted the fact that one major difficulty in the way of the negotiations of an ATA is to find an adequate solution to the institutional problem - to choose between the single or the double pillar approach.

This problem can be considered from three sides:

- the preparatory phase of new Community legislation
- monitoring the application of the rules of the agreement
- judicial competence.

The single pillar approach differs from the double pillar approach which was adopted under the EEA Agreement, and which worked as follows.

Under the EEA Agreement the two pillars of the agreement are, on the one hand, the institutions and the existing procedures in the Community and, on the other hand, the institutions and procedures created by the EEA Agreement[588].

This approach under the EEA Agreement appears unduly cumbersome in the context of an individual sector, such as air transport, and in the context of a bilateral agreement between the Community and one or two third countries. In addition, in the context of an ATA with Switzerland, it would be less meaningful since on the Swiss side any possible pillar could only be an emanation of the Swiss State itself.

Therefore in the context of an individual sector and of a bilateral agreement the Commission tends to prefer to adopt the single pillar approach.

Under this approach, on the level of the preparatory phase of new Community legislation, the Commission services admit the possibility of consulting the third country or countries. Moreover, the Commission services admit the possibility of a Joint Committee acting as a conciliatory body. However, if this Committee does not resolve the dispute, the final decision would be taken by the institutions of the Community. On the other hand, the Commission services consider that, under the single pillar approach, the institutions of the Community would have to be responsible for monitoring the application of the rules of the agreement, and would act as the judicial authorities. Similarly, the procedures applicable in this respect would have to be those in force within the Community.

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[587] For these talks, see supra notes 513 and 528 and accompanying text.

[588] For the institutions and procedures created by the EEA Agreement, see supra note 490 and accompanying text.

The difficulty of finding an adequate solution to the institutional problem is inherent in the context of an agreement aiming at the extension of the 'acquis communautaire' to a third country or countries. For this reason, this same difficulty will reappear in the context of future ATA(s) the Commission services are willing to negotiate with Central and Eastern European countries[589].

Theoretically, at least, two solutions are conceivable.

The bilateral institutions and procedures, as provided for in the Europe Agreements[590], are gradually complemented or replaced by a multilateral framework comparable to the one created by the EEA Agreement. This double pillar approach will, however, be a far different approach from the one currently followed in the Europe Agreements, concluded on a bilateral basis with each individual Central and Eastern European country. Moreover, it will probably be more difficult to create a multilateral framework with these countries than it has been with the EFTA countries.

The second solution will be to adopt a single pillar approach comparable to the one the Community adopted in the EEC-Norway-Sweden ATA and the Commission services have proposed during the exploratory talks with the Swiss government. This might be an easier approach but in the absence of a multilateral framework, Central and Eastern European countries will not be committed to apply the 'acquis communautaire' between themselves and this might lead to discriminatory practices.

Any combinations of the single and the double pillar approach is, of course, possible. For instance, it is possible to rely essentially on Community institutions and procedures while establishing a multilateral Committee, with representatives of the Community and of all the Central and Eastern European countries, responsible for ensuring competition on equal terms within the market.

(4) Community Aviation Area

The Commission proposes the creation of a 'Community Aviation Area', which will be somewhat different from the other initiatives in international cooperation on a regional basis[591]. The 'Community Aviation Area' is also sometimes referred to as a 'Community cabotage area'. However, the terms cabotage and area are wrong. The term cabotage area refers only to the reservation of domestic services to a country's owns airlines and those of neighbouring countries, whereas the aim of the Commission is to extend this reservation to international services between and to

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[589] See supra note 530 and accompanying text.

[590] For such institutions and procedures, see supra note 490 and accompanying text.

[591] For a complete analysis of the various forms of international cooperation on a regional basis, see P. Mendes de Leon, *Cabotage in Air Transport Regulation*, supra note 348 at 124-134; H. Wassenbergh, *Principles and Practices in Air Transport Regulation*, supra note 204 at 14-31.

airlines of the same parties[592]. From a linguistic point of view, the term cabotage area is tautologous, as the term cabotage itself identifies the area within which transportation is effected, namely, the territory of a State[593].

There have been many critics of the Commission's proposal to create a 'Community Aviation Area'.

Many writers have argued that the reservation of domestic services might lead to conflict in light of Article 7 of the Chicago Convention[594].

With regard to the reservation of international services on the other hand, the Chicago Convention, at least explicitly, does not impose limitations on the reservation of international carriage between the neighbouring States to the airlines of these States[595]. However, many authors have argued that Member States, under Community law as it is at present, remain separate and independent subjects of public international law and that, unless and until they legally merge between themselves into a single political unit, traffic between Member States is and would be regarded by the 'outside world' as international traffic and not as cabotage traffic[596].

Whatever the legal imperfections of the concept of a 'Community Aviation Area' it is important to realize that the Commission services' intentions are mainly political. The Commission services wants to tell the 'outside world' that the Community considers fifth-freedom traffic rights inside the Community as a Community asset so important as to equal to cabotage rights. This is seen, according to Soerensen *as a necessary step in order to put some pressure on the United States to get them to open their markets for what would be real cabotage traffic rights*[597]. This willingness on the Commission services' side to redress the imbalance which the European carriers faced in seeking to compete with other carriers, and in particular the large United States carriers, is generally well accepted and it is generally recognized that the Community, by negotiating in one block, will be able to achieve more than the present situation[598].

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[592] P. Mendes de Leon, ibid. at 118.
[593] P. Mendes de Leon, ibid. at 119.
[594] For the question of the legality of such cabotage policy, see supra note 340 and accompanying text.
[595] P. Mendes de Leon, *Cabotage in Air Transport Regulation*, supra note 348 at 124.
[596] P. Mendes de Leon, *Cabotage in Air Transport Regulation*, supra note 348 at 124; A. Lowenstein, supra note 87 at 150; P. Haanappel et al., *EEC Air Transport Policy and Regulation, and their Implications for North America*, supra note 28 at 213.
[597] F. Soerensen, 'A Third Package: What remains to be done' (1990) 3 European Air Law Association Second Annual Conference, 87.
[598] House of Lords, Select Committee on the European Community's External Aviation Relations, supra note 34 at 89.

(5) Ownership and effective control of aircraft and air transport undertakings

Under public international law[599] as well as under national law[600] there is often a requirement that aircraft registered in a State are owned by nationals of that State and that the owners of the air transport undertakings satisfy a requirement of local nationality. As a consequence, Member States have, in most cases, included in their BATAs a clause requiring national ownership and effective control over aircraft and air transport undertakings (nationality clauses)[601].

With regard to air transport undertakings these nationality clauses are potentially[602] contrary to the EEC Treaty[603] which prohibits either discrimination between 'Community air carriers' on grounds of nationality[604] or obstacles to the freedom of establishment[605]. Moreover, they are also contrary to Community secondary legislation in air transport[606].

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[599] For these requirements under public international law, see supra note 322 and accompanying text.

[600] Before accepting aircraft for registration, national legislation often requires evidence that ownership of the aircraft is vested upon nationals, and before granting an operating license to an air transport undertaking, it is often necessary to provide evidence of the substantial ownership and effective control of such undertaking by nationals.

[601] Such nationality clauses were already contained in the Bermuda agreement signed between the United Kingdom and the United States in 1946. It is interesting to note, however, that the Bermuda Agreement contain a provision to the effect that that substantive ownership and effective control of airlines are to be vested in nationals of either contracting parties, i.e., the United Kingdom can designate United Kingdom or United States airlines, see P. Haanappel, 'Multilateralism and Economic Bloc Forming in International Air Transport', (1994) XIX Annals of Air and Space Law at 291.

[602] Arguably the conflict is only potential since Member States usually enjoy discretionary powers to refuse to grant privileges to an air transport enterprise which is not registered in the State or owned and effectively controlled by nationals of such State.

[603] See Case 213/89, R V. Secretary of State for Transport ex p Factortame, [1990] 3 CMLR 867, ECJ.

[604] The prohibition of discrimination on the ground of nationality is contained in Article 6 of the TEU. Some writers argue, however, that the transport Title of the EEC Treaty is a lex specialis which prevails over the lex generalis contained in Article 6 of the TEU, see L. Weber, 'Die Zivilluffahrt im Europäischen Gemeinsschaftsrecht', (1990) Air Law at 277; P. J. Kuyper, 'Legal Problems of a Community Transport Policy; with Special Reference to Air Transport [1985] 2 Legal Issues of European Integration at 72; P. J. Slot, P. D. Dagtoglou, supra note 26.

[605] Article 52 to 58 and Article 221 of the TEU. See also Case 49/89 Corsica Ferries France v. Direction Générale des Douanes Françaises, [1991] 2 CMLR 227, ECJ.

[606] Under Community secondary legislation in air transport an airline has the 'nationality' of the State which has licenced it to fly and to carry traffic. The carrier does not have to be owned and controlled by nationals of the licensing State, as long as the ownership and the effective control are in the hands of Member States or Community nationals, and provided that the principal place of business and the registered offices, if any, are located in the licensing Member State, see Article 4 of Council Regulation (EEC) 2407/92, supra note 249.

With regard to aircraft these nationality clauses do not seem contrary to Community law[607].

Therefore, Member States must modify their national laws and the BATAs they have concluded with other Member States and third countries insofar as they are contrary to Community law[608]. So far Member States have reacted with an extreme reluctance to this obligation. It seems that, chronologically, they have first modified their national laws containing national requirements contrary to Community law and the BATAs concluded between the Member States themselves.

With regard to the BATAs concluded with third countries it seems that currently very few Member States have even attempted to modify their BATAs in this respect[609].

Member States usually object that bilateral agreements are normally carefully balanced legal instruments taking into consideration the particular legal and economic circumstances of the two States involved. The modification of these BATAs would, in fact, enhance the number of designated airlines. Consequently, the complete re-negotiation of these bilateral agreements is almost inevitable.

Only some observations about the objections raised by Member States will be made.

Most BATAs include provisions covering their subsequent amendment by agreement. It would be possible for Member States to notify the other parties to their agreements of their wish to substitute 'Community' for 'national' within those bilateral agreements without, at least in theory, complete re-negotiation of the agreement.

Where a BATA provides for multiple designation[610], changing that agreement so that Community airlines may be designated would open up opportunities (in theory) to all the airlines so described[611]. However, where a BATA provides for single designation, changing that agreement to Community ownership provides no opportunity for other Community airlines except in substitution (unless the single designation provision is also changed). Likewise, although Member States are

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[607] A licensing Member State may require that the aircraft used by its airlines are registered in its national register, see Article 8 of Council Regulation (EEC) No 2407/92, ibid.

[608] For the Commission's attitude in this point, see supra note 201.

[609] It seems that the only country which has sought such modification is Germany.

[610] Very few bilateral agreements provide for multi-designation. Most of the United Kingdom's agreements have such provisions (although they may be qualified by confidential side documents) and some of the United Kingdom's bilateral agreements have a specified number (e.g. The United Kingdom/Republic of Korea agreement provides for two airlines from each side; The United Kingdom/United States agreement provides for one on each 'gateway route segment' with some exceptions where two may be designated).

[611] R.J.C. Ebdon, 'ICC Working Party on 'Air Law', 15 May 1990.

required under Community law to allow nationals of other Member States to own and control aircraft and airlines, they are probably not required to allow such nationals to operate them, i.e. to have access to routes, if they would be similarly restrictive toward their own nationals or undertakings owned by their own nationals[612]. According to Balfour, it is however possible that a State may be required to demonstrate that such a restrictive policy was objectively justified in the general interest[613]. Because of these complexities the Commission will, before the end of 1994, present a proposal relating to the entitlement of Community air carriers to serve third country destinations from Member States other than the State of registration.

During the EC-United States mock negotiations held in Leiden on 13 June 1991 it became clear that if States move away from national ownership and effective control of their air transport undertakings, thus allowing for cross-border equity participation and multinational ownership, this would obviate much of the need for bilateral exchange of traffic rights[614]. It seems that this would be the most efficient way to fulfil the need for a multilateral approach to air transport regulation.

e) Future prospects for external relations in air transport

(1) Future European Community Air transport Agreements

The European Community has used a particular process for the liberalization of the aviation sector within the context of the internal market. The traditional system of BATAs between Member States has been gradually replaced by a genuine system based on a set of common rules. Within the context of the Community's external relations in air transport the same process has come into use. Whether it is in the specific air transport context of the EEC-Norway-Sweden ATA or in the broader context of the EEA Agreement, the Community has replaced the existing system of bilateral air agreements between these countries and the Community by a set of common rules.

It should be mentioned that the process used by the Community is very different from the way Member States did and still do undertake their external relations in air transport, and produces very different results. Member States almost always conduct their external relations in air transport with individual countries, while the Community tends to negotiate with a group of countries. The result of negotiations on the part of Member States is a 'traditional' BATA determining the key aspects (tariffs, capacity and access) of the competition regime between the air carriers of

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[612] See Case 155/73, State v. Sacchi, Judgement of 30 April 1974, [1974] ECR 409, ECJ.
[613] J. Balfour, 'Factortame: The beginning of the end for nationalism in air transport', supra note 412 footnote 11.
[614] H. Wassenbergh, *Principles and Practices in Air Transport Regulation*, supra note 204 at 94 and 214.

the two respective countries. The result of Community negotiations is the extension of the 'acquis communautaire' in air transport to the group of countries. With this latter result air carriers operating inside the area covered by a Community ATA are in a position to relate their economic decision-making to standardized rules, but this is accompanied by measures to ensure a level playing field. Furthermore, Member States in the area need to apply new rules not only bilaterally but also in relation to other partners who have entered (or will enter in the future) into such an area.

The question is thus whether the process now used with Norway and Sweden and the EFTA countries can be used in respect of other third countries, and if so, what adaptations will be necessary.

For third countries having concluded Europe Agreements with the Community the Commission services consider that there is a clear necessity to create a large 'European Aviation Area'[615].

The Commission services foresee that an ATA will be concluded between these countries and the Community, which will extend to them the important aspect of the 'acquis communautaire'[616]. The Commission services foresee that the negotiations will cover the areas mentioned in the Europe Agreements, namely market access[617] and harmonization rules[618]. With respect to harmonization, since there is no provision on relations with third countries in the EEA Agreement, the Commission services are concerned about the need to promote the establishment of a similar and compatible regime for the whole area, in order to ensure that the EFTA countries do not discriminate between the carriers established in the Community and in Central and Eastern Europe. With respect to competition rules, according to the Commission services it will not be necessary to elaborate arrangements for the application of competition rules but it will be necessary to provide for a satisfactory regime for Community air carriers since the existing rules on competition do not apply to routes between the Community and third countries[619]. All this, according to the Commission, will be done on a gradual basis and with transitional provisions and safeguards to allow the air carriers of these countries to prepare for competition on equal terms and without the protection given to them under existing BATAs[620].

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[615] Discussion note: Europe Aviation Area,: enlarging progressively the geographical application scope of Community principles, 8.10.1993, ES/LVH at 8.

[616] Discussion note: Europe Aviation Area, ibid. The possibility that initially the agreements concluded between the Community and these countries will differ from State to State is not excluded by the Commission services.

[617] The following elements are suggested; cabotage, fifth-freedom rights, multiple designation, safeguard clauses on capacity and air fares.

[618] Such as common licensing criteria and right of establishment, on the basis, in a first step, of the first and the second air transport package.

[619] See supra note 279.

[620] Discussion note: Europe Aviation Area: enlarging progressively the geographical scope of application of Community principles, supra note 616.

Apart from the specific case of Switzerland, according to the Commission services, there is no necessity to create a large 'European Aviation Area' with countries having concluded no (or less far reaching) association or cooperation agreements with the Community. For these latter countries it is more probable that future ATAs (if any) between them and the Community will resemble, to a large extent, a 'traditional' BATA(s).

(2) General Agreement on Trade in Services

It is only recently that the idea of including trade in services in multilateral trade negotiations has materialized. This idea was officially raised in the Punta del Este Declaration in 1986[621]. Since then it has evolved and, in December 1991, the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations was completed[622]. The Final Act includes the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). The Final Act was signed in Marrakesh on 15 April 1994 by 125 contracting parties.

While there are a number of similar concepts in GATT and GATS, the architecture of the two agreements differs significantly. According to Sampson[623], GATS consists of three pillars (i) the Articles of the agreement (ii) the Sectoral Annexes (iii) the schedules outlining each Party's negotiated commitments to abolish restrictions in the trade in services.

(i) With respect to the Articles of the agreement there are two basic provisions that aim at eliminating discrimination in trade in services; (a) the principle of the most-favoured-nation treatment which prohibits discrimination among foreign countries and applies to all service sectors covered by GATS, except if a Party maintains a measure inconsistent with the most-favoured-nation treatment principle in accordance with the Annex on Article II Exemption[624] (b) the principle of national treatment which prohibits discrimination between national and foreign services and applies only in the sectors (or sub-sectors) the Parties inscribe in their schedule of commitments and is subject to the conditions and limitations set out in their schedules[625].

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[621] Ministerial Declaration on the Uruguay Round, 33d. supp. B.I.S.D.
[622] See supra note 104.
[623] G. Sampson, Director of the Group of Negotiations on Services Division, General Agreement on Tariffs and Trade, Presentation at the World-Wide Air Transport Colloquium, Montreal 6-10 April 1992 at 3.
[624] See Article II (2) of GATS. [Hereinafter MFN exemption].
[625] A. Mencik von Zebinsky, 'The General Agreement on Trade in Services: Its Implication for Air Transport' (1993) XVIII Annals of Air and Space Law at 374. [Hereinafter national treatment limitations].

(ii) With respect to the Sectoral Annexes the only Annex which relates to air transport is the Annex on Air Transport Services[626].

This Annex applies to measures affecting trade in air transport services, including ancillary services, and consists of seven paragraphs.

The first three paragraphs define the scope of the application of the GATS (the General Obligations) to measures affecting trade in air transportation services.

Paragraph 2 states:

[e]xcept as set out in paragraph 3, no provisions of the agreement shall apply to measures affecting:
(a) Traffic rights covered by the Chicago Convention, including the five freedoms of the air, and by bilateral air services agreements;
(b) Directly related activities which would limit or affect the ability of Parties to negotiate, to grant or to receive traffic rights, or which would have the effect of limiting their exercise.

Paragraph 3 establishes the scope of the measures to which the agreement shall apply and lists: *aircraft repair and maintenance services, the selling or marketing of air transport services, and computer reservation services*[627].

As is quite clear from the Annex on Air Transport Services the GATS contracting parties have only agreed to negotiate the above mentionned 'soft rights'.

(iii) With respect to the Party's negotiated commitments, since the latter part of 1990 participants in the Uruguay Round have been negotiating 'offers and requests' to remove restrictions from trade in services. The understanding between participants is that negotiations conducted after the conclusion of the Uruguay Round, on 15 December 1993, cannot lead to any backtracking on offers made before that date[628]. In the field of international trade in air transport services, it seems that the Parties have not gone very far in their commitments. The European Union has presented national treatment limitation and a most favoured nation treatment exemption for CRS and sales and marketing. Besides air transport activities the European Union offer also includes the rental/leasing of aircraft and the air insurance policies sector. The United States has presented a most favoured

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[626] The Sectoral Annexes are: the Annex on Movement of Natural Persons Providing Services under the Agreement, the Annex on Financial Services, the Annex on Telecommunications and the Annex on Air Transport Services.
[627] For a proposed modification of such list see A. Mencik von Zebinsky, 'The General Agreement on Trade in Services: Its Implication for Air Transport, ibid. at 379-380.
[628] Air Transport Within the Framework of the General Agreement on Trade in Services, Association of European Airlines document, [unpublished].

nation treatment exemption for aircraft repair and maintenance services[629], selling and marketing of air transport services and the operation and regulation of CRS services. No national treatment limitations were introduced for aircraft repair station services.

In the future, even if there is a strong willingness on the part of the major players in air transport to negotiate in the field of trade in air transport services, it seems to us that there are important outstanding issues which need to be addressed before it is conceivable to remove restrictions from such services.

The first issue is the conflict between the Articles of the GATS agreement and the basic charter of international air transport, the Chicago Convention[630].

The second issue is to determine which organisation will provide the institutional framework for the elimination of discrimination and the reduction of barriers in international trade in air transport services. Three possibilities can be envisaged:

- The Chicago Convention may be amended so as to permit ICAO itself to provide this common institutional framework[631].

- The current and the future institutions of the GATS will provide the common institutional framework.

- An intermediate solution could be found where GATS will provide the common institutional framework, but in close collaboration with ICAO.

The third issue is the need to amend existing BATAs which at present do not conform to the GATS principles and rules[632] and which often do not even refer to the activities enumerated in paragraph 3 of the GATS Annex on Air Transport Services[633]. Therefore, BATAs will need to be amended unless they contain a clause

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[629] Other than repair and maintenance of an aircraft or part thereof during which it is withdrawn from service.

[630] For such conflict, see A. Mencik von Zebinsky, 'The General Agreement on Trade in Services: Its Implication for Air Transport', supra note 627 at 379-380.

[631] This option has two major disadvantages: the problem of the difficulties in amending the Chicago Convention and the differences in number and in their status under public international law between ICAO members and GATT members.

[632] BATAs often conflict either with the general obligations of GATS (and notably the most-favoured-nation treatment clause, or with specific commitments (and especially the market access and national treatment commitments), See Trade Concepts and Principles and their Application to International Air Transport, ICAO World-Wide Air Transport Colloquium, WATC 3.3 Attachment B.

[633] Only recent BATAs imposing few restrictions include in their scope activities such as the selling or marketing of air transport services and computer reservation services whereas activities such as aircraft repair and maintenance services are not even dealt with in BATAs but are always left to the airlines.

whereby contracting States agree that the provisions of a multilateral air transport convention entering into force will prevail between them. It may also be that the public international law rules in respect to the resolution of conflicts between international Treaties will provide a solution that will avoid the need for such BATAs to be amended[634].

(3) Multilateralism in air transport

The purpose of the Chicago Conference was to design the blueprint for the world-wide regulation of post-war international civil aviation.

While the Chicago Conference resolved many problems in the technical field, it was largely unsuccessful in its attempts to reach a multilateral agreement on the economic regulation of air transport. Nearly fifty years after this failure, the question of multilateralism in air transport is again under scrutiny.

During the World-Wide Air Transport Colloquium held in Montreal, in April 1992, many interesting reflections on a multilateral approach to the economic regulation of air transport were proposed.

In particular, attention has been drawn to the fact that there exist a large number of different ways to approach air transport negotiations.

A typical bilateral air transport negotiation concerns only two States. Nevertheless it is possible to conceive that a network of liberal BATAs, by their deregulatory effect, creates a multilateral regime.

In the past, joint bilateral air transport negotiations have occurred when more than one State owns and wishes to designate the same airline[635]. The present tendency toward increasing cross-border equity participation in airlines will probably make joint bilateral air transport negotiations more frequent.

If an international organisation such as ICAO or the European Community or a group of States such as the North American Free Trade Area[636], the Andean Pact[637]

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[634] Since we are currently discussing the conflict between BATAs and GATS, such rules will be contained mainly in the Vienna Convention of 1969, supra note 6.

[635] For example in the case of Denmark, Norway and Sweden for their airline SAS.

[636] The North American Free Trade Area (NAFTA), agreed between Canada, Mexico and the United States on 12 August 1992, removed trade barriers between these countries for a period of 10 to 15 years. The NAFTA does not include aviation.

[637] The Andean Pact was founded in 1969 under the Cartagena Agreement and includes Bolivia, Colombia, Ecuador, Peru and Venezuela. These five Andean Pact States have signed a Resolution to open their skies for each other's carriers as from 31 December 1991.

or ASEAN[638] becomes directly involved in air transport negotiations, at least four possibilities are conceivable[639].

- One international organisation or group of States provides the common framework for intra-organisational consultation before, during and/or after bilateral air transport negotiations. In this situation one party is consulting with and receiving input from the international organisation or group of States[640].

- The international organisations or groups of States on both sides provide the common framework for intra-organisational consultation before, during and/or after bilateral air transport negotiations. In this situation each party is consulting with and receiving inputs from the two international organisations or groups of States[641].

- Bilateral negotiations between one international organisation or group of States and one State[642].

- Bilateral negotiations between two international organisations and/or groups of States[643].

In view of these different possibilities, different positions have been taken by countries having a major role in the field of air transport.

According to Shane, the United States will propose a multilateral ATA with Central America which would create a free aviation market of unprecedented scope between these countries and the United States. The United States also supports the idea of a multilateral ATA between the United States and the European Community.

The Commission services seems also in favour of a multilateral approach to the regulation of air transport but in a more prudent[644] and flexible manner[645]. According

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[638] The Association of South East Asian Nations (ASEAN) was founded in 1967 and includes Brunei, Malaysia, the Philippines, Thailand and Singapore. In January 1992 ASEAN Heads of State endorsed a plan to establish a free trade area within 15 years.

[639] For a list of such international organisations or groups of States having responsibilities in air transport, see WATC-2 9/4/92, World-Wide Air Transport Colloquium held in Montreal in April 1992.

[640] For instance negotiations between one EC Member State and a non-Community State.

[641] For instance negotiations between one EC Member State and Mexico, a non-Community Member State member of another organisation of State (NAFTA) with which it is in consultation.

[642] For instance negotiations between the European Community and the United States.

[643] For instance negotiations between the European Community and NAFTA.

[644] The Commission services insist on the importance of adequate safeguard clauses, see F. Soerensen, Presentation during the World-Wide Air Transport Colloquium held in Montreal in April 1992, WATC-2.11, 7/4/92.

to such services it might be possible to envisage the signature by ICAO Member States of a multilateral agreement including the following elements.

- Technical and economic harmonisation (e.g. CRS rules);
- Relaxation of ownership restrictions;
- Rules against anti-competitive behaviour;
- Effective enforcement;
- Respect for the principle of non-discrimination in any international regulation of the above issues.

These interesting suggestions will be discussed during the World-Wide ICAO Air Transport Conference on the 23 November 1994.

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[645] The possibility that Member States conclude more liberal BATA(s) on a bilateral or multilateral basis seems not excluded by the services of the Commission.

PART B: EUROPEAN COMMUNITIES EXTERNAL RELATIONS WITH INTERNATIONAL ORGANISATIONS

a) Introduction

All the three founding Treaties contain provisions for the establishment of relations with international organisations[646].

The EEC Treaty provides that the Commission is to ensure the maintenance of all appropriate relations with the organs of the United Nations, of its specialized agencies, and of GATT (Article 229) and to maintain appropriate relations with all international organisations. There is also a provision for the Community to establish all appropriate forms of cooperation with the Council of Europe (Article 230) and close cooperation with the Organisation for Economic Cooperation and Development (Article 231).

By virtue of these provisions, the European Communities have entered into relations with intergovernmental and non-governmental international organisations[647].

The Community has been able to secure five different forms of Community participation or representation in intergovernmental and non-governmental international organisations.

These five forms are:

- Observer status
- Non pure observer status
- Full participation short of membership
- Dual membership
- Single membership

Usually the Community has been able to secure the most advanced form of participation or representation in bodies which were set up by agreements to which the Community are party, mainly for the purpose of supervising and implementing those agreements; as opposed to international organisations which already existed when the Community was established.

As regard pre-existing international organisations, the Community has encountered obstacles similar to those which have arisen in the field of its external relations with

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[646] We will, however, not examine the external relations of the European Coal and Steel Community and of the European Atomic Energy Community with international organisations.
[647] Lord Hailsham of St. Marylebone, supra note 1 at 483.

non-Member States[648]. The constitutions of these organisations admit only sovereign State to full membership. Since the Community is not a State, and since it would have been extremely difficult or even impossible to amend those constitutions it is only recently that the Community has been able to participate on (almost) equal footing with Member States[649].

Firstly the five forms of Community participation or representation will be examined from a theoretical point a view. Then the actual and the future participation of the European Community in civil aviation organisations will be examined[650].

b) Observer status

In many cases the Community participates only as an observer[651]. This includes the right to participate in the meetings and the work of the deliberative organs without the right to vote and, in most cases, without the right to table proposals or amendments[652]. Observer status may be permanent or based on ad hoc invitations.

With regard to intergovernmental organisations, the Community has observer status in the United Nations whether it is in its principals organs[653], in its subsidiary organs[654], or its technical organs[655].

It has also observer status in the United Nations specialized agencies[656] and autonomous agencies, as well as in many other universal or regional international organisations[657].

With regard to non-governmental organisations, the standard format of participation as an observer seems to be the indicated solution[658]. The Community participates

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[648] For these obstacles, see Part I, Chapter C.
[649] P. Haanappel et al., *EEC Air Transport Policy and Regulation, and their Implications for North America*, supra note 28 at 122.
[650] For the question of the competence of the European Community to enter into international agreement, see Part I, Chapter B.
[651] P. Haanappel et al., *EEC Air Transport Policy and Regulation, and their Implications for North America*, ibid.
[652] D. Lasok, J.W. Bridge, supra note 143 at 260.
[653] General Assembly, Economic and Social Council.
[654] An example of a regional Commission dealing with transport is the United Nations Economic Commission for Europe (UN/ECE).
[655] Such as for example the United Nation Conference on Trade (UNCTAD) which deals in particular with transport.
[656] Of particular importance in the field of transport is the International Maritime Association (IMO) and the International Civil Aviation Organisation (ICAO).
[657] For a complete list of organisations with which arrangements have been made and the text of the arrangements, see the relations between the European Community and International Organisations (1989).

either as an observer invited by the non-governmental organisation, or as a 'self-invited' observer, when it can impose such arrangement[659].

c) Non pure observer status

A distinction can be made between observer status pure and simple, and an internal arrangement between the Community and the Member State in question, whereby there are consultations on and possibly harmonization of the Member States' positions in the international organisations. In the latter case, after consultation and harmonization, the delegation of one Member State, usually the one of the country holding the Presidency of the European Union at the time, may be designated to speak on behalf of all delegations, and all these delegations may then follow a common voting pattern.

The Community has secured a non pure observer status with the Organisation of Economic Cooperation and Development which entitles it to play a full part in the work of the organisation[660]. It has also such status in the Council of Europe[661] which deals with air transport matters through its Committee on Economic Affairs and Development.

d) Full participation short of membership

Through liaison agreements[662] between intergovernmental organisations and the Commission, arrangements can be made for the Community's participation in the work of such an organisation which goes beyond the non pure observer status in the sense that the Community is participating by way of a Community delegation. A distinction can be made between dual representation (in most cases) whereby the Community is represented by both the Commission and the Member States (holding the Presidency of the European Union at the time) and single representation.

In the context of GATT, the European Community has been fully recognized as competent to exercise many powers. Indeed, the Community delegation to GATT is essentially a single Commission delegation, assisted by the advice of the 113 Committee[663] composed of experts from the Member States. The Community

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[658] Among the main non-governmental organisations in the field of air transport is the International Air Transport Association (IATA), , the Association of European Airlines (AEA), the European Regional Airlines Association (ERA), the European Association of Charter Airlines (EURACA), the Airports Association Council International (AACI).

[659] See infra note 672.

[660] P. Haanappel, 'The future relations between the EEC institutions and international organisations in the field of civil aviation' (1990) 5-6 Air Law 15.

[661] Exchange of letters 87/476/EEC.

[662] Theses 'liaison agreements', also called 'working arrangements', usually take the form of an exchange of letters providing for consultations, exchange of documents and information, participation in meetings and, in some cases, even of joint working parties.

[663] See supra note 155.

delegation has the right to speak and to table proposals and amendments in its own name. However, the Community has never gone through the formal step of accession, nor has there ever been explicit formal recognition within the GATT of its succession to the powers previously belonging to Member States[664]. Moreover, Member States still retain the following rights:

- the right to sit in the organisation.
- the right to admit new members.
- rights related to the budget of the organisation.
- voting rights.

e) Dual membership

European Community formal membership in intergovernmental organisations is only possible where (i) the Community has external competence (ii) the organisation concerned is willing to admit as member(s) other international organisations, in addition to the traditional nation state members. International organisations which admit only nation States as members are still much more numerous than those which admit both nation states and international organisations. For instance, the Community is not eligible for membership of the United Nations, a status which is confined to sovereign states[665].
When both the Member States and the European Community might be admitted as parties to an organisation, there are invariably three questions to resolve: (i) the composition of the delegation (ii) the exercise of voting powers and (iii) the signature of the Convention.

For the composition of the delegation there is usually[666] one Community delegation, composed of the Member States and the Commission. Delegation spokesmen are normally the Commission representative and/or the representative from the Member State holding the Presidency of the European Union at the time.
For the exercise of voting powers, the usual practice is that either the Community or the Member States, but not both, is/are entitled to vote, as determined in each case in accordance with the internal law of the Community. Where it is the Community which exercises the right to vote, it may be allocated a number of votes equal to the total number of votes available to the participating Member States[667].

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[664] C. Stephanou, supra note 469 at 19-20; Lord Hailsham of St. Marylebone, supra note 1 at 486.
[665] D. Lasok, J.W. Bridge, supra note 143 at 261.
[666] For the international commodity agreements model, see P. Haanappel, 'The future relations between the EEC institutions and international organisations in the field of civil aviation' (1990) 5-6 Air Law 15.
[667] Article 18 of Council Decision of 2 December 1993 provides:
1. *[e]ach of the parties to the Convention shall have one vote, except as provided for in paragraph 2 below.*

For the signature of the Convention the general practice is to insert a special participation or accession clause in the (multi) agreement enabling the Community to sign the convention. The main reason for such clauses is that if the international agreement relates to an area of Community competence, only the Community is competent to conclude the agreement, and it is necessary to provide third countries with the guaranty that their partners will be able to implement all the obligations provided for in the agreement. This clause may take a number of different forms. It may be general[668] or it may be specific, either expressly allowing the Community to participate, or assimilating it to participating Governments.
The clause may be a integral part of the agreement, or may be incorporated in an additional protocol[669].

f) Single membership

Although there are some bodies[670] set up to supervise the implementation of bilateral trade, association, and cooperation agreements to which the Community is party without the Member States there is no model yet for the European Community as such being a Member of an intergovernmental organisation, without concurrent membership of all or some Member States.

g) Actual participation in civil aviation organisations

With regard to intergovernmental civil aviation organisations the Community has observer status in ICAO[671]. The Commission went as observer to the Assembly of ICAO in 1989 and will be invited to the ICAO World-Wide Air Transport Conference in December 1994.

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2. *Regional economic integration organisation, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their Member States that are parties to the Convention [...]*, see Council Decision of 2 December 1993 concerning the conclusion of the amendment to the Montreal Protocol on substances that deplete the ozone layer, OJ No L 33 of 7.2.94 at 1.

[668] For instance, Article 305 (f) of the United Nation Law of the Sea Convention of 1982 was adopted, allowing international organisations to sign the Convention, but in accordance with the very detailed provisions of Annex IX to the Convention. In fact, much of Annex IX was drafted with the European Community in mind. Essentially, an international organisation can only become Party to the Law of the Sea Treaty, if and to the extent that there has been a transfer of competence from the Member States of the international organisation to the international organisation itself. Elaborate declarations, communications and notifications are provided for, so as to determine which rights and obligations under the Convention shall be exercised and performed by Member States, and which by the international organisation in question. For more information see C. Stephanou, supra note 469.

[669] D. Lasok, J.W. Bridge, supra note 143 at 257.

[670] Joint Committees, Council of Association, Co-operation Councils, etc.

[671] Coreper Decision of 11 November 1988 on the right of the Community to participate in ICAO as an observer.

Working relations between ECAC and the Community are good. ECAC, due to it wider membership and its focus on specific elements of aviation has provided a very useful forum for debate on a wide range of aviation matters. ECAC has been helpful in preparing for a common air transport policy, especially in technical areas and the promotion and the adoption of legislation similar to Community legislation in non-EC ECAC Member States. This requires an open exchange of information between the Commission and ECAC but the informal basis of cooperation agreed in 1980 providing for the exchange of letters and observer status for the European Community at ECAC meetings seems not to have created problems, to the satisfaction of both parties.

With regard to civil aviation non-governmental organisations the Commission has stated its entitlement to send observers to the IATA Tariff Co-ordination Conference[672]. Since then the Community has participated as an observer at the Annual General Meeting of the IATA[673]. The Commission also participates in the annual Presidents' Assembly of the AEA.

Working relations between the Community and other non-governmental organisations are good[674].

h) Future participation in civil aviation organisations

A distinction is to be drawn between intergovernmental organisations and non-governmental organisations in Europe having civil aviation in their attribution, where a single European Community voice might become stronger and stronger as a CATP is being accomplished, and world-wide or regional civil aviation organisations outside Europe where it remains a moot point to what extent powers will be transferred from Member States to Community institutions[675].
With respect to civil aviation organisations in Europe, since the Community is planning on developing close relations in the area of air transport[676] with Central and

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[672] In Council Regulation (EEC) No 2671/88 of 26 July 1988 (Article 4) it is mentioned that an exemption by category will not be granted to IATA tariff consultations if the Commission cannot attend the Tariff Coordination Conference as an observer, see Council Regulation 2671/88 of 26 July 1988 on the application of Article 85(3) to certain categories of agreements between undertakings, decisions of associations of undertakings and concerned practices concerning joint planning and coordination on tariffs on scheduled air services and slot allocation at airports, OJ No L 239 at 9 (superseded by Commission Regulation 84/91).

[673] For more information on the question of the relations between the European Community and IATA see A. Lowenstein, supra note 87 at 180-198.

[674] See Commission Decision of 4 July 1990 on the observer status of the Community at the Comité de Gestion of Eurocontrol and as member of PHARE, COM(90) 1385 [unpublished].

[675] P. Haanappel, 'The future relations between the EEC institutions and international organisations in the field of civil aviation' supra note 666 at 15.

[676] A good example of such areas is the navigation by satellite concept which is developed by ECAC and supported by the European Community as well as the EATCHIP Strategy developed by ECAC and which the European Community is planning to use as a guideline for the establishment of the trans-European ATM Network.

Eastern European countries, it will need the help of ECAC and of non-governmental organisations[677]. In ECAC air transport matters can be discussed freely and therefore it can help to integrate these matters in a coherent national policy. However, if such relationships turn into formal negotiations with the aim of reaching an agreement, the role of ECAC and non-governmental organisations will be less important not only because of the nature of Community competence but also because ECAC and non-governmental organisations are only technical forums. In such a case, ECAC and other non-governmental organisations could play an important supportive role by developing model clauses on various technical issues to be included in agreements negotiated by the European Community

Where it comes to world-wide civil aviation organisation, the main problem is the following. Formal membership of the European Union often would require an amendment to the Convention constituting these organisations. With regard to ICAO, pursuant to Article 94 of the Chicago Convention, this amendment must be approved by at least two-thirds of the total number of contracting States, and the amendment would come into force only in respect of States which have ratified such amendments. This could lead to a situation where, the European Union for some States is a member of ICAO while for others it is not.

There are two possible solutions to this problem.

The first is to ensure, under a pragmatic approach, that the European Union became a member of ICAO. Indeed, under a pragmatic approach, the Plenary Assembly of ICAO could accept (without vote) a recommendation of the Executive Committee that an amendment of the Convention shall come into force with erga omnes effect for all States whether or not they have ratified the appropriate amending instrument. Nevertheless, the willingness of EC Member States and third countries to admit international organisations as a member of ICAO, in addition to nation States must still be taken into consideration. Since EC Member States will retain in the future certain competences which are within ICAO's sphere of authority[678] they will probably never allow the European Union to became a member of ICAO without the Member States.

The second solution would be to rely on the previous arrangements which have take place in the context of GATT[679].

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[677] Such as Eurocontrol and the JAA for instance.

[678] For instance only Member States contribute to the ICAO budget. As long as Community legislative measures air transport do not cover all aspects of civil aviation, Member States will retain competence in this field.

[679] House of Lords, Select Committee on the European Community's External Aviation Relations, supra note 34 at 89.

PART C: EUROPEAN UNION EXTERNAL RELATIONS

It seems that there are at least three areas where the CFSP as provided for by the TEU might have some implications in air transport[680].

CHAPTER 1: NEGOTIATIONS WITH STATES WISHING TO JOIN THE EUROPEAN UNION

The first area is the negotiations with States wishing to join the European Union. Since States may not adhere to the European Communities without adhering to the European Union, the procedure applicable for such accession is provided in Article O of the TEU located in the Final provisions applicable to the three pillars of the Union.

As is mentioned in Article O:

[a]ny European State may apply to become a Member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.
The conditions of admission and the adjustments of the Treaties on which the Union is founded which such admission entails shall be subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the Contracting States in accordance with their respective constitutional requirements.

Malta, Cyprus and Turkey have already applied to become Members of the European Union. The European Council of Corfu, in June 1994, took the view that significant progress had been made regarding the application by Malta and Cyprus and that an essential stage in the preparation process could be regarded as completed. Consequently, the European Council took the view that, provided certain conditions are satisfied, the next phase of enlargement of the European Union will involve Cyprus and Malta.

Hungary and Poland have applied to become Members of the European Union respectively on 31 March 1994 and 4 April 1994. It is likely that other countries having concluded Europe Agreement with the Community will apply for membership soon.

The European Union is currently developing a strategy to prepare countries wishing to acced to the European Union[681]. This preparation will involve a considerable amount of work and time.

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[680] For the provisions of the TEU on CFSP, see supra note 297 and accompanying text.

With respect to (air) transport it seems possible to distinguish four areas in which negotiations with countries wishing to accede to the European Union are likely to develop.

The European Union will cooperate economically with these countries particularly in order to enable them to restructure and to modernize (air) transport and, to improve the free movement of passengers and goods as well as to gain access to the (air) transport market.

The European Union will ensure that future legislation in these countries is compatible with Community legislation as far as possible.

The European Union will assist these countries in implementing competition and state aid policies which are compatible with those of the Community.

The European Union will conclude special (air) transport agreements with these countries coupled with the wider process of the trans-European transport networks.

Most of this work will be undertaken within the framework of the European Communities' external competence and external relations, as examined previously. However, it might be appropriate to ensure that Member States act in a co-ordinated manner vis-à-vis prospective members. To this end, the Commission might use its competence in the field of the CFSP, as provided by the TEU, to propose to the Council the definition of a common position or the adoption of joint action vis-à-vis prospective members in (air) transport matters[682].

CHAPTER 2: MEMBER STATES' ATTITUDES IN INTERNATIONAL ORGANISATIONS

Another area concerns the attitudes of Member States' toward intergovernmental organisations and non-governmental international organisations. As mentioned earlier, Article 116 has been deleted by the TEU[683]. According to Erdmenger this seems to indicate that the observer status, which the Community has in many international organisations will no longer suffice[684]. Likewise, there is a need to increase the coherence of Member States' attitudes in international organisations having (air) transport within their attributions. In order to do so, the Commission might propose to the Council to define a common position for Member States in the

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[681] Communication from the Commission to the Council, The Europe Agreements and Beyond: a strategy to prepare the countries of Central and Eastern Europe for accession, COM(94) 320 final of 13.7.1994; Communication from the Commission to the Council, Follow up to Commission Communication on 'The Europe Agreements and Beyond: a strategy to prepare the countries of Central and Eastern Europe for accession', COM(94) 361 final of 27.7.1994.

[682] For these competence, see infra note 297 and accompanying text.

[683] See supra note 297.

[684] J. Erdmenger, supra note 116.

conduct of external air transport policy, or even to adopt joint action in the areas in which the Member States have important interests in common.

CHAPTER 3: ECONOMIC SANCTIONS AGAINST THIRD COUNTRIES

A third area is in the field of economic sanctions against third countries.

Article 228a provides:

[w]here it is provided, in a common position or in a joint action [...] relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.

It is important to note that the decision to impose economic sanctions against a third country is taken within the framework of the European Union's external relations but the implementation of such a decision is undertaken within the framework of the European Communities' external competence and relations[685].

Before the adoption of the TEU, the European Communities had already decided, by way of economic sanctions against Libya, to deny permission to any aircraft to take off from, land in or overfly the territory of the Community if it is destined to land or has taken off from the territory of Libya[686]. Similar measures have been taken recently against Sudan[687] and Haiti[688]. There is no doubt that the new Article 2228a of the TEU will reinforce the possibility of undertaking economic sanctions against third countries, in particular by providing a specific procedure.

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[685] J. Cloos, supra note 101.

[686] COM(94) 91 final of 25.03.1994.

[687] Council Decision 94/165 of 15 March 1994 on the common position defined on the basis of Article J.2. of the Treaty on European Union concerning the imposition of an embargo on arms, munitions and military equipment on Sudan, OJ L 75 of 17.3.94.

[688] Council Regulation (EC) No 1263/94 of 30 May 1994 introducing a discontinuation of certain economic and financial relations with Haiti, OJ No L 139 of 2.6.94.

CONCLUSION

The purpose of Section I, entitled 'European Union External Competence in Air Transport', was to examine the external competence conferred upon the three European Communities.

In Part A, the European Communities' internal competence was examined first as it is not only a matter of law but also of practice that external competence grows with the development of internal competence.

It has been seen that the ECSC Treaty and the EEC Treaty make more comprehensive provisions for the three inland transport modes than for sea and air transport. However, this difference in treatment and its implications in terms of the development of Community secondary legislation has been reduced by decisions of the ECJ and subsequently by the SEA and the TEU.

In Part B, the European Union's external competence in air transport was examined. With the entry into force of the TEU it is necessary to distinguish between the European Communities' external competence and the European Union's external competence in the context of the CFSP.

Therefore these two questions were examined separately.

When examining the European Communities' external competence it was found that no provision of the EEC Treaty (as opposed to the Euratom Treaty) is directed at external relations in (air) transport. On the other hand, the EEC Treaty contains many provisions directed explicitly at external relations in fields other than (air) transport.

In these circumstances it was conceivable that Community external competence in (air) transport would be possible only if the Community manages to attach the matter of (air) transport to a matter benefiting from an explicit grant of external competence or on the basis of a decision of the Council under Article 235.

However, the ECJ has rapidly provided a third possibility upon which to found the Community's external competence in (air) transport by ruling that there exists not only explicit but also implicit external competence. Subsequently, the TEU has granted explicitly to the Communities external competence in the field of trans-European transport networks.

When exploring these three different possibilities, under Treaties provisions, upon which to found external competence in (air) transport it was found that the Community had been successful in including the matter of air transport in

cooperation or association agreements concluded with a number of third countries. On the other hand, the Commission's claim that the scope of application of the CCP includes trade in (transport) services is still strongly opposed by other Community institutions as well as by the majority of writers. The two cases pending before the ECJ will be useful in order to determine whether the matter of trade in (transport) services is covered by the CCP, and if so, which different aspects of (air) transport are included in the notion of CCP in Article 113. This exploration also showed that the choice between the different possibilities upon which to found the Community's external competence in (air) transport has important consequences for the nature of Community competence and on the procedure required to conduct external relations in (air) transport.

When examining the various projects and initiatives which had an impact on the Community's present external competence in air transport it was noted that what was initially envisaged was the simultaneous integration of the internal and external aspects of air transport. With the Civil Aviation Memorandum N° 2 the idea of first integrating the internal aspects of air transport was first launched with the consequence that today still very few aspects of extra-Community air transport are integrated at a Community level. An examination of the recent discussions at the level of the Transport Council has revealed that the Council is not ready to transfer to the Community full external competence in air transport matters. On the other hand, the Council had decided that in their negotiations with third countries Member States must take account of obligations arising from the Treaty and secondary legislation adopted by the Council.

In these circumstances, it seemed particularly interesting to examine what are the different possibilities, under existing Community secondary legislation, for the Community to acquire external competence in air transport.

First the Community, by relying on the ECJ theory of implicit external competence, can assume external competence indirectly and take over the negotiation and conclusion of international agreements in air transport matters or in the matters including air transport within their scope which are covered by internal Community rules already adopted by the Council.

Secondly, the Commission can propose to the Council, acting under Articles 75-84(2), the adoption of a legislative measure confirming explicitly the Community's external competence in air transport. The Community can then take over directly the negotiation and conclusion of international agreements in all air transport matters.

The next question was thus to determine which internal Community rules the Community can rely upon to assume its external competence. It was observed that all legislative measures in air transport or including air transport within their scope have an external effect but that this external effect varies from one measure to

another. It was found, however, that it was possible to provide for a new classification of each of these measures into four categories depending on whether this external effect is horizontal, negative, positive or direct.

This classification is instructive.

A large number of legislative measures of harmonization of the internal market include air transport within their scope and have an horizontal external effect.

It seems that the legislative measures (de)regulating the most sensitive areas of air transport (routes, capacity, licensing criteria, frequencies) tend to have a negative external effect. This is the case for the first legislative measure which removed the restrictions in Community air transport and, with a few exceptions, it is also the case for the three air transport packages as well as the Community competition rules. However, if the Community's secondary competition rules do not apply to extra-Community air transport the ECJ has decided that Article 85 applies indirectly to extra-Community air transport and that Article 86 applies directly to such transport.

On the other hand, the legislative measures organizing the internal air transport market in less sensitive areas such as the investigation and prevention of air accidents or the denied-bording compensation system have a positive external effect. This is also the case for the recent legislative measure on a CRS code of conduct and on slot allocation. Nevertheless, a shift has occurred with these last two legislative measures. In the CRS code of conduct a reciprocity clause was introduced and the measures on slot allocation contain also a national treatment and a most favoured nation clause. Undoubtedly this marks a new tendency closer to the creation of a Fortress Europe in air transport and it is highly probable that future Community legislative measures will also contain similar clauses.

The only pieces of Community secondary legislation having a direct external effect was Council Decision 80/50/EEC, adopted in 1979, which does not grant to the Community important external competence in air transport.

In these circumstances, it is clear that the Community is better positioned to assume its external competence in air transport indirectly rather than directly. It is clear that at least all the Community secondary legislation having an horizontal external effect or a positive external effect external effect confer implicit external competence to the Community and thus can be used by the Community to assume its external competence. In order to do so it is important for the Commission, when proposing internal rules on air transport, to ensure that these rules have such external effects.

When looking at the Community practice during these last years it appears that the Community has made little use of the possibilities provided by Community

secondary legislation to assume its external competence indirectly. There are signs in new Community secondary legislation in air transport that the Community might assume more often its external competence implicitly. Moreover, the recent ECJ ruling that international (air) transport agreements are excluded from the scope of the CCP will certainly encourage the Community to do so. It is also clear that it is the progress in the development of the internal air transport market which will be determinant for the Commission possibility to assume its external competence.

An examination of the European Union's external relations has revealed that new provisions of the TEU on the CFSP might have important implications for air transport and that new modes of action such as systematic cooperation or joint action can be used for dealing with air transport matters.

In Part C, the obstacles to the European Communities' competence in air transport and the obstacles to the European Union's external competence in air transport were examined separately while considering that the obstacles to the former are also obstacles to the latter.

In all cases, it was possible to distinguish between the political obstacles, the legal obstacles and other obstacles (mainly economic).

The most important obstacles seem to be the political ones. It is clear that the acquisition by the Communities of competence in air transport impinges on the sovereignty of Member States and interferes with their involvement in air transport. Moreover, when it comes to the obstacles to the acquisition by the Community of external competence it is not only Member States that are opposed to any transfer of such competence to the Community but also, to a large extent, airlines and Community institutions other than the Commission.

Legal obstacles are also important. It seems necessary to secure a high degree of harmony between national law, Community law and public international law before transferring competence in air transport to the Community. This is even more important for the transfer to the Community of external competence rather than internal competence.

The economic obstacles are less important. If on the one hand the economic characteristics of air transport make it difficult for the Communities to undertake any harmonization at Community level, on the other hand such characteristics encourage States and airlines to request the Communities to make changes in the current situation. A more important obstacle is to be the question of the economic disadvantage of the European air transport industry when compared with the Asian and American air transport industry and whether there is likely to be an increase in this economic disadvantage following the increase in free trade and in competition likely to result from the transfer to the Community of external competence in air

transport. In this respect, it is striking to note that Member states having concluded liberal-type BATAs with the United States have experienced a decrease in the market power of their flag carriers airlines on the North Atlantic market.

The purpose of Section II, entitled 'European Union External Relations in Air Transport' was essentially to examine, from a practical point of view, the use the European Union had made of its external competence as examined in Section I.

When examining, in Part A, the European Communities' external relations with non-Member States it was found that the most important measures regarding external relations in air transport have not been undertaken in the field of air transport as such but in other fields including air transport within their scope, such as the trans-European transport networks, the EEA Agreement and the Europe Agreements.

In the field of the trans-European transport network the Commission and the European Parliament at a very early stage devised means to extend such networks to the EFTA countries and to the countries of Central and Eastern Europe. Work in this area is well advanced although at the present stage more for the inland transport modes than for sea and air transport.

The EEA Agreement, which covers almost every field of Community competence, has tremendous importance for air transport, in particular by extending the 'acquis communautaire' in air transport to the EFTA countries and by providing for a new institutional framework.

The long series of Europe Agreements which the Communities have concluded with Central and Eastern European countries not only contain important provisions for air transport but also envisage the conclusion of special transport agreements between the contracting parties.

With regard to the European Community's external relations in air transport as such, these relations are less developed. The Community has succeeded in concluding the EEC-Norway-Sweden ATA but the negotiations for an ATA between the Community and Switzerland are blocked for a number of reasons. Moreover, the prospect of the conclusion by the Community of ATAs with countries such as Malta, Cyprus, Turkey, the United States and the ACP countries is still far distant.

This is not to say that the Commission has not proposed to the Council the adoption of measures having a direct external effect, thus capable of conferring upon the European Union the capacity to enter into external relations in air transport. In this respect the Commission has adopted two Communications on air transport relations with third countries which have not yet been fully examined by the Council and have been the subject of a great deal of criticism. In view of this somewhat difficult

situation it seemed useful to examine the various problems relating to external relations in air transport. It became clear that the problem of the extraterritorial application of the competition rules was on the way to being resolved and that there were means of resolving the problem of finding a model for future ATAs with third countries. Other problems seem still to confront the Community such as the creation of a 'Community Aviation Area' or the finding of solutions to the ownership and effective control of aircraft and air transport undertakings and to the institutional problem.

In view of these developments the future prospects for Community external relations in air transport were examined.

It seems that the Community's external relations are likely to develop in two different ways.

On the one hand the Commission, which has already succeeded in extending the 'acquis communautaire' in air transport to third countries, will push for the creation of a 'European Aviation Area' including the Community and countries which have concluded far reaching association or cooperation agreements with the Community. It is likely that the Commission will succeed in this enterprise because it has the advantage of a strong political impetus and because the economic advantage of creating a larger air transport market is confirmed by a number of interested parties.

On the other hand the Commission is trying to conclude more traditional-types BATAs with third countries and supports the introduction of greater free-trade in air transport either in the context of the General Agreement on Trade in Services or by way of introducing multilateralism in air transport.

It is likely to be more difficult for the Community to succeed in this later enterprise.

The question of the future prospects for the Community's external relations is also dependent on the relations between the European Communities and international organisations as well as on the European Union's external relations.

Although there is an important choice of means for the Community to participate or be represented in international organisations dealing with civil aviation, it is not always possible for the Community to secure the most advanced form of participation or representation especially with regard to pre-existing international organisations and world-wide or regional international organisations outside Europe. It does seem, however, that there are some possibilities for increasing the participation of the Community within these organisations, particularly ICAO.

With regard to the European Union's external relations it is to be expected that in the future there will be negotiations with States wishing to join the European Union,

during which air transport questions will need to be addressed. It is also likely that the new procedures laid down by the TEU will be used by the Community to increase the coherence of Member States' attitudes to international organisations dealing with civil aviation and for deciding to impose economic sanctions upon third countries through the suspension of air transport links between them and the Community.

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