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**EU's EXTERNAL AVIATION RELATIONS  
The question of competence**

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## 1. Introduction

The European Union's ("hereinafter the EU") gradual development of a comprehensive *internal* regulatory framework that applies to all aspects of air transport has had profound impact on the development of aviation business for the benefit of all the stakeholders and the consumers. Being highly successful in liberalising the aviation sector in Member States, the EU has taken the opportunity to pursue its action further that is, so to say, far beyond the Union borders.

Behind every EU's regulatory achievement, however, be it of *internal* or *external* nature, lies the question of legal competence. Unlike its Member States who possess a general competence as subjects of international law, international organizations, such as the EU, are governed by the principle of speciality, so that as the International Court of Justice ("hereinafter the ICJ") has noted, "*they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.*"<sup>1</sup>

Whereas it is beyond doubt that the EU has become an important force in advancing the transformation of international aviation system on a global scale, within it, however, institutional questions relating to the division of external competences among the Member States and the EU remain disputed. According to the Court of Justice of the European Union ("hereinafter the CJEU"), the EU has to a large extent acquired *exclusive* competence to engage in and to determine Member States' aviation relations with third countries.

It is the intent of this paper to analyse, from the perspective of international (air) law and EU (air) law, afore-mentioned and myriad of other problems, relating in particular to the question of EU's competence in the field of external aviation relations. In order to properly disentangle on the one hand legal foundations of EU's alleged *exclusive* competence and on the other inquire into its limits and assess possible future problems arising therefrom, the paper initially

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<sup>1</sup> ICJ, *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Rep., 1996, pp.66, 78-9, citing the PCIJ, *Advisory Opinion in the Jurisdiction of the European Commission of the Danube*, PCIJ, Series B, No. 14, p. 64 which noted; "*As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise those functions to their full extent, in so far as the Statute does not impose restrictions upon it.*"

addresses the pivotal precondition – the attainment by the EU of *internal* competence in air transport.

## 2. EU's competence in air transport

The question of competence of international organisations, such as the EU, is a question of legal powers that the organization with recognised international legal personality<sup>2</sup> is invested with.<sup>3</sup> In this sense it is necessary to distinguish between the organization's *internal* and *external* competence.

*Internal* competence consists of the competence of the international organization to lay down *internal* rules which are binding on the Member States and on individual persons and undertakings. Conversely, *external* competence relates to the organization's capacity to enter into international agreements and foreign relations with other subjects of international law.

## 3. EU's *internal* competence in air transport

Though creation of a European common internal market has been a goal since the conclusion of the Treaty of Rome in 1957, movement toward a single market in commercial air transport has proven to be a difficult challenge.<sup>4</sup> Unsurprisingly however since aviation has been traditionally conducted on the basis that each country has sovereignty over the airspace above its territory, as confirmed by Article 1 of the 1944 Chicago Convention.<sup>5</sup> Moreover States' past and present practice as well as their perception shows again the rationales for the "sovereignty sensitive"<sup>6</sup> character of international air transport. As either cause or effect, or a mixture of both, airspace has been seen as a valuable national asset, access to which can be

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<sup>2</sup> ICJ, *Reparation case*, I.C.J. Reports (1949), 174; The criteria of legal personality in international organizations derived from the *Reparation case* may be summarized as follows:

- 1) A permanent association of States, with lawful objects, equipped with organs;
- 2) A distinction, in terms of legal powers and purposes, between the organization and its member States;
- 3) The existence of legal powers exercisable on the international plane and not solely within the national system of one or more States.

<sup>3</sup> Shaw, *INTERNATIONAL LAW*, 6<sup>th</sup> Ed., Cambridge University Press, p. 1306.

<sup>4</sup> P S Dempsey, *EUROPEAN AVIATION LAW*, Kluwer Law, 2004, p. 1.

<sup>5</sup> J Balfour, *EC External Aviation Relations: The Community's increasing role, and the new EC/US Agreement*, *Common Market Law Rev.* 45, 2008, p. 443-463.

<sup>6</sup> *The dynamics of sovereignty and jurisdiction in international aviation law*, p. 9, on file with the author.

traded for similar reciprocal benefits or even benefits in areas outside aviation.<sup>7</sup> Among others air transport has also important social and economic functions, in providing links both within a State and between a State and the rest of the world.<sup>8</sup> Against this background, it is not surprising that traditionally there had been a close identification between most States and their flag airlines and that nationality clause in air services agreements have been vigorously kept, as elsewhere also in Europe.<sup>9</sup> States were and even today continue being keen in keeping the conduct of air transport affairs and their economic regulation as a “crown jewel” in their national realm.<sup>10</sup>

For the above-mentioned reasons, from the outset of the European Communities,<sup>11</sup> today the EU<sup>12</sup>, Member States wished to defer the development of *internal*, let alone *external* common EU air transport policy.<sup>13</sup> Furthermore, in the context of the establishment of the EU, national competence in the economic field can be distinguished from national competence in the political field.<sup>14</sup> The latter is reasonably even more “sovereignty sensitive” than the former, as it is related to the power to make decisions in such matters as the national public interest, the establishment of political and administrative structures, recognition of States, defence and the conduct of diplomatic relations and foreign policy<sup>15</sup>, i.e. external aviation relations with non-EU Member States.<sup>16</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> P.P.C. Haanappel, *Bilateral Air Transport Agreements - 1913-1980*, 5 Int'l Trade L.J. 241 1979-1980, p. 241.

<sup>9</sup> See Balfour, *id* Note 8, p. 443 “[...] the principal airlines of each of the six original Member States were all State-owned at the time of the conclusion of the Treaty in 1957.” See also B. F. Havel & G. S. Sanchez, *The Emerging Lex Aviatica*, 42 Geo. J. Int'l L. 639 2010-2011.

<sup>10</sup> *Supra*, Note 6.

<sup>11</sup> ECSC Treaty; Euratom Treaty; EC Treaty.

<sup>12</sup> The 2009 Treaty of Lisbon.

<sup>13</sup> See C Woll, *The road to external representation: the European Commission's activism in international air transport*, Journal of European Public Policy, 13:1, p. 52-69.

<sup>14</sup> *The dynamics of sovereignty and jurisdiction in international aviation law*, p. 9, on file with the author.

<sup>15</sup> Notwithstanding internal affairs of the EU Member States' where there has been increasing transfer of national competences to the Union, external affairs of individual Member States' have traditionally been perceived as falling within the reserved domain of their domestic jurisdiction. See generally Pescatore, 103 Hague Recueil (1961, II) in I Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 7<sup>th</sup> Ed., (Oxford University Press), 2008, p. 292.

<sup>16</sup> *Id.* See further below Point 4.

Title VI of the Treaty on the functioning of the European Union (“hereinafter TFEU or the Treaty”)<sup>17</sup> sets out provisions on EU Common Transport Policy and Article 100 makes it clear that these provisions apply only to transport by *rail, road and inland waterway*, but that with regard to *sea and air transport*, “*the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may decide whether, to what extent and by what procedure appropriate provisions may be laid down*”.<sup>18</sup> During negotiations on the exact same provision in the former EEC Treaty, now the abovementioned TFEU, 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.<sup>19</sup> This compromise essentially aimed at permitting further action on behalf of the EU<sup>20</sup>, then EEC, in these two modes of transport but had left a large number of questions unresolved.<sup>21</sup> In particular, as long as the Council had not adopted any secondary legislation in the field of sea and air transport it was doubtful whether general rules of the Treaty applied to these modes of transport, as they were pursuant to the wording of the provision effectively excluded from the Treaties’ scope.<sup>22</sup>

Considering the great importance of air transport for the unification of Member States’ national economies<sup>23</sup> and for the efficiency and maximization of the common market at large<sup>24</sup>, it is not surprising that during the 1970s and 1980s, the then European Court of Justice (“hereinafter ECJ”), today CJEU, delivered a series of decisions that mapped out the

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<sup>17</sup> Former, Title IV, TEC.

<sup>18</sup> TFEU, Article 100(2) (ex TEC, Article 80(2)).

<sup>19</sup> A A Menick von Zebinsky, *EUROPEAN UNION, EXTERNAL COMPETENCE AND EXTERNAL RELATIONS IN AIR TRANSPORT*, (Kluwer Law International), 1996, p. 9.

<sup>20</sup> Note that this is one of the rare provisions in the EU Treaties that allow the Council to undertake legislative action without a proposal from the Commission.

<sup>21</sup> Menick von Zebinsky, *Supra*, Note 19, p. 9 -11.

<sup>22</sup> TFEU, Article 100(1) ; (ex TEC, Article 80(1)).

<sup>23</sup> See Anastassopoulos, Report drawn up on behalf of the Committee of Transport on the Judgment of the Court of Justice on the Common Transport Policy and the Council’s obligation in relation thereto, 1985-1986, EUR. PARL. DOC (A 2-84/85/B) 15 (1985); The Treaty of Rome was enacted with the presumption that “*national economies can be unified only if there is an efficient system for moving people and goods*”.

<sup>24</sup> See F Sørensen, W van Weert & A Cheng-Jui Lu, *ECJ Ruling on Open Skies Agreements v. Future International Air Transport*, *Air & Space Law*, Vol. XXVIII/1 (February 2003).

fundamental underpinnings of what was to become the EU regulation of air transport and constructed a framework in which the Commission could proceed with the desired *internal* liberalization of the aviation market.<sup>25</sup>

In this respect the first landmark decision rendered by the CJEU, then ECJ, was the *French Seamen's* case in 1974, in which the Court pronounced that the general rules of the EC Treaty – such as *non-discrimination on national grounds*, *right of establishment*, *competition*, *mobility of labour*, and *equal pay* – apply to air transport, even though no regulation had been adopted to enforce those laws.<sup>26</sup> This holding, indeed,<sup>27</sup> could be argued went against the very wording of the then Article 84(2) of the Treaty of Rome<sup>28</sup>, today TFEU Article 100(2), as amended by the Single European Act,<sup>29</sup> which provided that the Treaties' provisions be applicable to air transport only after the Council has adopted rules making them so. On the other hand the Court creatively, yet authoritatively argued that for the achievement of the Community's objectives the abovementioned general rules must apply to the whole complex of economic activities, including air transport. Furthermore, the CJEU made clear that the general rules of the Treaty automatically apply in the field of air transport as long as the Council, acting under Article 84(2),<sup>30</sup> has not decided otherwise. This also meant, according to the Court, that the Commission is under legal and political duty to ensure that general rules of the Treaty are applied in sea and air transport as well.<sup>31</sup> All of the afore-mentioned coupled with the change in Member States attitudes,<sup>32</sup> gave the necessary support to the Commission's

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<sup>25</sup> See generally P S Dempsey, *supra*, Note 4.

<sup>26</sup> CJEU, *Commission v. France*, Case 167/73 [1974], 1974 E.C.R. 359; Menick von Zebinsky, *supra*, Note 19, p. 9.

<sup>27</sup> Dempsey, *supra* Note 4, p. 29.

<sup>28</sup> “The Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down.”

<sup>29</sup> “The Council may, acting by qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down.”

<sup>30</sup> Today, TFEU Article 100(2).

<sup>31</sup> Menick von Zebinsky, *supra*, Note 19, p.11.

<sup>32</sup> The deregulation of domestic air transport in the USA, with effect from 1978 had significant indirect effects on the mindsets of the EEC member States, both by reason of the changes in the structure of the US air transport industry and its direct effects there and by influencing the general climate of opinion in the EEC and elsewhere. See C Woll, *supra*, Note 13, p. 52-69.

attempts to introduce liberalization, leading eventually to what has come to be known as the “first package” of air transport liberalization legislation at the end of 1987.<sup>33</sup>

Although the 1974 judgment of the Court of Justice mentioned above had important implications for air transport, they were only implications, and it was in 1986 in the case of *Nouvelles Frontières*<sup>34</sup> that the Court confirmed that the competition rules did indeed apply to air transport as to other sectors.<sup>35</sup> The substantive issue addressed by *Nouvelles Frontières* involved the French law requiring approval of tariffs from public authorities. The Court held that the tariff filing procedure was not contrary to the EEC Treaty unless the tariffs themselves run afoul of the competition rules.<sup>36</sup> “*In essence, the Court ruled that it is contrary to the Treaty to approve air tariffs where these tariffs are the result of an agreement, a decision of an association of undertakings [trade association] or a concerted practice itself contrary to Article 85*”.<sup>37</sup> Whereas, the Court did confirm that, absent specific language in the EEC Treaty, air transport was ‘*subject to the general rules of the Treaty, including the competition rules*’,<sup>38</sup> it then concluded that absent specific regulations governing air transport adopted by the Council, it was in effect up to ‘competent authorities in Member States’ to apply the competition rules of the Treaty to agreements concerning the air transport industry, or, alternatively, the Commission could issue a ‘reasoned decision’.<sup>39</sup> In other words, Member States retained the power to rule on lawfulness of agreements, decisions or concerted practices and on abuses of dominant positions according to their national law, until the Council (acting on proposal from the Commission) promulgates regulations implementing the competition rules.

Next decision rendered by the CJEU and importantly contributing to further liberalization of the *internal* EU aviation market, namely the adoption of the so called “second liberalization

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<sup>33</sup> Balfour, *supra*, Note 5, p. 444.

<sup>34</sup> CJEU, *Ministere Public v. Asjes (Nouvelles Frontières)*, 1986 EUR. COMM. CT. J. REP. 65, 72 [1985-1986 Transfer Binder] COMMON MKT. REP., (CCH).

<sup>35</sup> Balfour, *supra*, Note 5, p. 444.

<sup>36</sup> Dempsey, *supra* Note 4, p. 33.

<sup>37</sup> P.P.C. Haanappel in Dempsey, *supra* Note 4, p. 33; TFEU, Article 101.

<sup>38</sup> CJEU, *Nouvelles Frontières*, *supra* Note 34, at §14, 287, at 16,772, 16,778 (1986).

<sup>39</sup> *Id.*, at 16,778-780.



package” in 1990, was the *Ahmed Saeed* case of 1989.<sup>40</sup> The Court found that Article 85, now TFEU Article 101<sup>41</sup>, was ‘directly applicable’ to inter-Community air tariff agreements, even in the absence of implementing legislation promulgated by the Member States or the Commission, a conclusion that went beyond the above-mentioned holding in *Nouvelles Frontieres*.<sup>42</sup> In addition, the Court declared Article 86, now TFEU Article 102,<sup>43</sup> as being ‘directly applicable’ to air transport even in the absence of implementing regulations, and that infringement thereof could be invoked by any person directly.<sup>44</sup> Moreover, the Court confirmed its previous judgement in the *Wood Pulp* case<sup>45</sup> that held the EU competition laws were extraterritorially applicable to acts done by foreigners abroad (agreements entered into outside the EU, then EEC) if those acts had direct, substantial and foreseeable effects within the Member State concerned.<sup>46</sup>

Whereas deregulation of aviation market on a bilateral level had already initiated between two important European States, UK and the Netherlands in between the abovementioned *Nouvelles Frontieres* and *Ahmed Saeed* rulings, already in 1984,<sup>47</sup> in most other European States protectionist policies were still deeply rooted.<sup>48</sup> Nonetheless, the change in Member States behaviour which ultimately, by 1993, led to acceptance of further liberalization measures, the adoption of “third package”, and into completion of *internal* aviation market

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<sup>40</sup> CJEU, *Ahmed Saeed Fluereisen and Silver Line Reiseburo v. Zentrale zur Bekämpfung unlauteren Wettbewerbs EV*, Case 66/86, (1989).

<sup>41</sup> Anticompetitive agreements; ‘*Prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.*’

<sup>42</sup> Dempsey, *supra* Note 4, p. 35.

<sup>43</sup> Abuse of dominant position; ‘*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*’

<sup>44</sup> M Wouters in Dempsey, *supra* Note 4, p. 35.

<sup>45</sup> CJEU, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlstrom Osakeyhtiö and Others v. Commission of the EC*, (1988).

<sup>46</sup> M Shaw, *supra*, Note 46, p. 695.

<sup>47</sup> See P. Mendes de Leon, *Before and After the Tenth Anniversary of the Open Skies Agreement Netherlands-US of 1992*, Air & Space Law, vol. xxviii/4/5 (September 2002).

<sup>48</sup> Although the specific models varied, most of them had very protectionist policies, most often even a public service sector monopoly. Throughout Europe, the government held a majority stake or had total control of their national ‘flag carrier’ airline.

may be attributed to the following factors. First, the Commission's continued pursuit towards an EU-wide liberalization approach and the concentration of its efforts on the United States, in particular by using the threat of American competition to construct a pan-European compromise on aviation matters.<sup>49</sup> Moreover, Commission's reliance on the abovementioned CJEU's judgments to put pressure on governments, which successfully augmented political weight of pro-liberalization forces, even in States that were traditionally against it, i.e. France, Germany.<sup>50</sup>

The initial objective of the EU air transport policy was the creation of the *internal* aviation market. However, beyond market opening, the EU was able to gradually push for action in manifold areas regulating air transport, e.g., competition, airspace management, safety and security standards, passenger rights, environmental matters, and last but certainly not least into far reaching extension of regulating EU Member States' external aviation relations with third countries.

#### **4. EU's *external* competence in air transport**

The legal basis of the EU's *external* competence in air transport may be derived from one of the following sources of international law<sup>51</sup>: (4.1.) directly from the provisions of the EU founding treaties, that is provisions of the EU primary sources – *explicit* external competence; (4.2.) from the public international law doctrine of 'implied powers', as interpreted by judgments and opinions of the CJEU – *implicit* external competence; (4.4.) from the EU's secondary legislation adopted by the Council – *ad hoc explicit* external competence.

##### **4.1. Lisbon Treaty – EU's *explicit* external competence?**

The Lisbon Treaty for the first time introduced a provision on EU's competence for the conclusion of international agreements, as confirmed in TFEU Article 216. This provision concerns the *external* representation of the EU with respect to the conclusion of international instruments, i.e. international agreements, administrative agreements and political

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<sup>49</sup> C Woll, *supra*, Note 13, p. 52-69.

<sup>50</sup> *Id.*

<sup>51</sup> Here the term international law is used, so as to include both EU law and public international law.

commitments such as memoranda of understanding.<sup>52</sup> Nevertheless, these general provisions<sup>53</sup> dealing with EU's external representation are far from being straightforward,<sup>54</sup> and more importantly they do not deal explicitly with the issue of external transport, let alone external aviation relations, which as will be explained further below continue to enjoy a separate status, even under the Lisbon Treaty. In addition, Article 216 recognizes that the EU “*may conclude an agreement with one or more third countries or international organisations*”, however, it is confined in acting within the limits conferred upon it by the Treaty,<sup>55</sup> and it does not have free choice of the means for the fulfilment of the purposes of the Treaty.<sup>56</sup> Therefore no *explicit general* competence of the EU for conclusion of international agreements in the field of air transport may be derived from these provisions.

To the contrary, in the field of Common Transport Policy, TFEU Title VI, no provisions in the Lisbon Treaty are directed at international relations with non-Member States or international organizations. Likewise, it is for the Council acting jointly with the EU Parliament<sup>57</sup> to decide whether appropriate provisions may be laid down for *sea* and *air* transport.<sup>58</sup> For this reason, same as it was under the old doctrine based on the theory of ‘*compétence d’attribution*’,<sup>59</sup> it is possible to conclude today, that according to the primary sources of the EU, the Union's external relations in the field of air transport would only be possible on the basis of a *priory* decision made by the Council under Article 100(2).<sup>60</sup>

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<sup>52</sup> M Gatti, P Manzini, *External representation of the European Union in the conclusion of international agreements*, Common Market Law Review 49: 1703–1734, Kluwer Law International, 2012, p. 1703.

<sup>53</sup> TFEU, Arts. 216-219.

<sup>54</sup> See M Gatti, P Manzini, *supra*, Note 52; “[...] *combination of political sensitivity and legal uncertainty renders the EU's representation very contentious: in the recent past, this area has seen not-so-hidden “turf wars” that damaged the image and effectiveness of the EU's external action.*”

<sup>55</sup> See TFEU, Article 216; “[...] *where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*”.

<sup>56</sup> See TFEU, Article 216; “[...] *or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope*”.

<sup>57</sup> TFEU, Article 100(2). See *supra* Point 4.1.

<sup>58</sup> TFEU, Article 100(2).

<sup>59</sup> Menick von Zebinsky, *supra*, Note 19, p. 20-21.

<sup>60</sup> In conjunction with TFEU, Article 352; See also: H. Wassenbergh, Annotation to J. Balfour, *European Community External Aviation Relations – The Question of Competence*, Air & Space Law, Vol. XXI, Number 1, 1996, p. 8.

Unlike States as subjects of international law who possess a general competence to conclude treaties without restrictions as to subject, form or procedure, the powers of international organizations to enter into foreign relations is not unlimited, but restricted to what is necessary for the exercise of their functions and the fulfilment of their purposes.<sup>61</sup> Such powers in the case of EU's external aviation relations, however, are not as was described above, provided in the Union's constituent instruments. Precisely for this reason have the EU and the Commission as its external negotiator, similarly as it was with the creation of *internal* aviation market, found other innovative ways towards gradually obtaining an external air transport negotiation mandate to which, as seen from the constituent instruments and State practice,<sup>62</sup> Member States were originally opposed.<sup>63</sup>

From the very beginning of the 1980s<sup>64</sup> up to the CJEU's decision in the '*Open Skies case*' in 2002, Member States have witnessed important political and eventually legal changes taking place in the EU that have all crucially contributed to what has come to be known nowadays as the 'EU's external aviation policy'.<sup>65</sup>

First of all, the CJEU evolved a body of jurisprudence concluding that there is not only *explicit* external competence but also *implicit* external competence and that the EU has implicit external competence in the field of transport, including sea and air transport (4.1.1.). Second, there has been rapid progress on an *ad hoc* basis in the field of EU's external competence in aviation relations found in the adoption of secondary legislation by the Council (4.1.2.). Furthermore and as will be addressed more in detail below, one must not neglect two additional pivotal factors in the creation of 'EU's external aviation policy'. Firstly, the

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<sup>61</sup> ICJ, *Legality of the Use by a State of Nuclear Weapons* case, ICJ Rep., 1996, pp. 66, 78-9; Menick von Zebinsky, *supra*, Note 19, p. 1.

<sup>62</sup> C Woll, *supra*, Note 13, p. 52-69.

<sup>63</sup> See *supra* Point 4.1., on the explanation for such behaviour stemming essentially from the highly "sovereignty sensitive" character of international aviation relations.

<sup>64</sup> Council Decision 80/50 on consultations between EU States and the Commission on external aviation relations, Council Decision (EEC) 80/50, O.J. 1980, L 18/24; Being the very first legislative initiative in the field of air transport, preceding even the creation of *internal* aviation market, see Balfour *supra* Note 5.

<sup>65</sup> The latest - Council conclusions on the EU's External Aviation Policy - Addressing Future Challenges (20 December 2012), available at: [http://ec.europa.eu/transport/modes/air/international\\_aviation/external\\_aviation\\_policy/](http://ec.europa.eu/transport/modes/air/international_aviation/external_aviation_policy/).

Commission's continuous legislative and political initiatives and strategies towards attaining external negotiating mandate in the field of air transport and secondly, Commission's protracted and highly ambitious claims of having *exclusive* competence in respect of EU's external aviation relations.

#### 4.2. EU's *implicit* external competence

The Commission's quest for an *external* negotiation mandate in air transport dates to the very beginning of *internal* aviation integration<sup>66</sup> and had repeatedly been denied by the Member States.<sup>67</sup> As early as 1984, the Commission identified external aviation relations as a major aspect of a potential wider EU air transport policy.<sup>68</sup> Thus in 1990 Commission published a Memorandum and a proposal for legislation on the subject.<sup>69</sup> This Memorandum claimed that the Community, today the EU, was *exclusively* entitled to conduct negotiations on air transport relations with third countries on behalf of the Member States, and put forward a proposal for a Council decision authorizing the Commission to undertake such negotiations.<sup>70</sup> Two years later, in 1992, Commission issued a further communication to the Council on the subject,<sup>71</sup> which although adopting a more pragmatic approach, still claimed *exclusive* competence in the field of external aviation relations. Both proposals were refused on behalf of the Member States.

With respect to the aforementioned Commission's initial claims of *exclusive* competence in terms of substance two points may be distinguished. First, the Commission asserted that the legal basis of its *exclusive* external competence in air transport is derived from the provision dealing with Common Commercial Policy ("hereinafter CCP") of the, at that time in force EEC Treaty, as replaced today by the TFEU. Therefore Commission here argued that it bares

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<sup>66</sup> Council Decision (EEC) 80/50, O.J. 1980, L 18/24; COM Memorandum (90)17; COM Memorandum (92)434; Council Decision (EEC) 92/384, O.J. 1992, L 200/20.

<sup>67</sup> See *supra* Point 3. on explanation why were the Member States unwilling to transfer internal and external mandate in international air transport matters to the EU.

<sup>68</sup> C Woll, *supra*, Note 13, p. 52-69.

<sup>69</sup> COM Memorandum (90)17.

<sup>70</sup> Balfour, *supra* Note 5, p. 445.

<sup>71</sup> COM Memorandum (92)434.

*explicit*<sup>72</sup> external competence that is *exclusive* competence<sup>73</sup> steaming directly from the EU's primary sources.<sup>74</sup> Second, the Commission in addition argued it had *exclusive* competence even in respect of non-commercial aviation matters where they were covered by the EU legislation or the conclusion of agreements with third countries were likely to affect common rules adopted. Here, the Commission contrary to its first argument, relied on a subsidiary source of public international law,<sup>75</sup> namely on the so called 'implied powers' doctrine, as developed initially in the jurisprudence of the ICJ and later in the framework of EU law also by the CJEU.

The first argument has, with the adoption of TFEU lost its legal value, as the Treaty in Title III, section on CCP, explicitly excludes "*negotiation and conclusion of international agreements in the field of transport*", which, "*shall be subject to Title VI of Part Three [section on Common Transport Policy] and to Article 218 [Conclusion of International Agreements].*" Moreover, it had already been argued prior to this provision, that the CJEU itself in *Opinion 1/94* excluded the possibility of attaching the matter of (air) transport to the CCP<sup>76</sup> and indeed Member States had never intended for transport to fall within its scope.<sup>77</sup> As already discussed above, the Union's constituent instruments do not provide for *explicit* EU's external competence in air transport<sup>78</sup> and since there is also no legal foundation of claiming this competence by attaching air transport to the issue of CCP, the only remaining

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<sup>72</sup> The same term with the exact same meaning is used also by Menick von Zebinsky in EUROPEAN UNION, EXTERNAL COMPETENCE AND EXTERNAL RELATIONS IN AIR TRANSPORT, *supra*, Note 19.

<sup>73</sup> TFEU, Article 3(1)(e); (Part of EU's *exclusive* competences).

<sup>74</sup> See *supra* Points 4., and 4.1.

<sup>75</sup> ICJ Statute, Article 38(1)(d).

<sup>76</sup> For further explanation see: J. Balfour, *European Community External Aviation Relations – The Question of Competence*, Air & Space Law, Vol. XXI, Number 1, 1996.

<sup>77</sup> During negotiations for the TEU, the Commission proposed the replacement of the term *CCP* with the term *External Economic Policy* and the inclusion within the *EEP* of all economic measures relating to trade in goods and services, including trade in air transport services. However the proposal was sharply rejected by the majority of the delegations mainly because they feared that (air) transport would fall within the scope of CCP; Working Paper of the Commission dated 27<sup>th</sup> February 1991 [unpublished] in Menick von Zebinsky, *supra*, Note 19, p. 23.

<sup>78</sup> See *supra* Point 4.1.

legal basis for EU's external powers in air transport that the Commission could rely on, at least *ab initio*,<sup>79</sup> is the so called doctrine of *implicit* external competence.

According to international law, international organizations, such as the EU, possess those powers that the States which create them entrust to them.<sup>80</sup> Such powers may be expressly laid down in the constituent instruments or may arise subsidiarily as implied powers,<sup>81</sup> being those deemed necessary for fulfilment of the functions of the particular organization.<sup>82</sup> The ICJ already in 1949 noted in the *Reparation* case that: “*under international law the organization must be deemed to have those powers which, though not expressly provided in the Charter [constituent instrument], are conferred upon it by necessary implication as being essential to the performance of its duties.*”<sup>83</sup> In the framework of EU law, the first time the CJEU introduced the *implied* powers doctrine was in its *ERTA* judgment.<sup>84</sup> The Court through a purposive interpretation of the EEC Treaty<sup>85</sup> declared that the competence of the EU to enter into international agreements arises not only from *express* conferment by the Treaty, 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 EU.<sup>86</sup> According to the Court therefore, when the EU adopts *internal* rules on a particular subject, it automatically acquires the competence to enter into *external* relations in respect of the same subject.<sup>87</sup> In other

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<sup>79</sup> See *infra* Point 4.4.

<sup>80</sup> See *supra* Note 1.

<sup>81</sup> See Schermers and Blokker, INTERNATIONAL INSTITUTIONAL LAW, pp. 158 ff.

<sup>82</sup> Shaw, *supra*, Note 46, pp. 1307.

<sup>83</sup> ICJ, *Reparation case*, I.C.J. Reports (1949), 174, at p. 182; Confirmed later in various other ICJ judgments, e.g.; *International Status of South West Africa* case, ICJ Reports (1950), 128 at 136-8; *The Voting Procedure case*, *ibid.* (1955), 67; *The Petitioners case*, *ibid.* (1956), 23; *South West Africa* cases (Prelim. Objections), *ibid.* (1962), 319 at 328-9, 331 ff; *Namibia case*, ICJ Rep., 1971, pp. 16, 47-9; *Legality of the Use by a State of Nuclear Weapons* case, ICJ Rep., 1996, pp.66, 78-9.

<sup>84</sup> CJEU, *ERTA*, Commission v. Council, Judgement of 31<sup>st</sup> March 1971, [1971], ECR 263, Case 22/70.

<sup>85</sup> It has been argued that to rule in favour of EU's *implicit* external competence is because of the need to preserve the integrity of the EU and to ensure a uniform application of the objectives of the EU law; M Cremona, EXTERNAL RELATIONS OF THE EU AND THE MEMBER STATES: COMPETENCE, MIXED AGREEMENTS, INTERNATIONAL RESPONSIBILITY, AND EFFECTS OF INTERNATIONAL LAW, 2006, European University Institute.

<sup>86</sup> See: C. Hillion, *ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations*, Leiden University, available at: [http://www.academia.edu/1767658/ERTA\\_ECHR\\_and\\_Open\\_Skies](http://www.academia.edu/1767658/ERTA_ECHR_and_Open_Skies).

<sup>87</sup> ‘*ERTA*’ Decision, CJEU, §27, “[...]each time the Community ... adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even

words, if the adoption of an international agreement falls into the scope of EU's internal rules, i.e. these rules may be affected by the agreement,<sup>88</sup> the EU holds the external competence for its conclusion. Under EU law this is called the doctrine of parallelism of competence or *ERTA* doctrine.<sup>89</sup> In the post *ERTA* decisions the CJEU developed even more liberal approach towards determining EU's *implicit* external competence. In these cases the CJEU did not find the foundation of EU's powers to act externally in the need to preserve the integrity of EU's internal competence, but was derived from an assumed fact that an external action on the part of EU is '*necessary*' for the attainment of one of the objectives of the EU.<sup>90</sup>

In 2002 CJEU rendered its decision in the '*Open Skies*' cases,<sup>91</sup> which is a landmark decision *inter alia* for the reason of laying down the rules of EU's *implicit* external competence allocation in the field of air transport and because it marked the beginning of 'EU's external aviation policy'. The Commission's complaint was that by concluding the '*Open Skies*' air services agreements ("hereinafter ASA's"), the defendant States infringed the *exclusive* external competence of the EU. In support of that complaint it put forward two separate lines of argument: one based on the assertion that it was '*necessary*',<sup>92</sup> in the sense contemplated in *Opinion 1/76*, for such agreements to be concluded at EU level; the other based on the assertion that the ASA's in question '*affect*',<sup>93</sup> in the sense contemplated in the *ERTA* judgment, the common rules adopted by the EU in that field.

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*collectively, to undertake obligations with third countries which affect those rules.*" Menick von Zebinsky, *supra*, Note 19, p. 28.

<sup>88</sup> J. Balfour, *supra*, Note 76, p. 4.

<sup>89</sup> *Id.*; See also Hillion, *supra* Note 86, p. 225; "[...] the *ERTA* decision catalyses the on-going emergence of the EU as a law making actor on the global stage, particularly in the *GATT* context."

<sup>90</sup> CJEU, Joined cases 3, 4, 6/76, *Officier van Justitie v. Kramer*, Preliminary Ruling of 14<sup>th</sup> July 1976, [1976] 2 CMLR 440 and 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. See also Commission's arguments in the 2002 '*Open Skies*' cases, *infra* Note 99.

<sup>91</sup> '*Open Skies*' Cases C-466–469, 471, 472, 475, 476/98, *Commission v. United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany*, [2002] ECR I-9427. The Commission subsequently brought similar actions against other Member States. See case note by Slot and Dutheil de la Rochère, 40 CML Rev. 697–713.

<sup>92</sup> *Supra* Note 90.

<sup>93</sup> *Supra* Note 87.



The Court rejected Commission's first argument of '*necessity*' for EU *exclusive* external action, essentially stating that in order for the EU to affirm its own external competence on this basis, it will always have to obtain first in accordance with the Treaties' procedures specific institutional recognition of such '*necessity*', i.e. prior Council authorization.<sup>94</sup> To the contrary, however, in respect of the second argument the Court found that the *ERTA* findings are indeed in principle applicable to air transport and stated: "*even in the field of transport, the Community's exclusive external competence does not 'automatically' flow from its power to lay down rules at internal level.*" To the contrary, "*the Member States, whether acting individually or collectively, only lose their right to assume obligations with non-member countries as and when common rules which could be 'affected' by those obligations come into being.*"<sup>95</sup> Hence, the Court undertook to resolve the central disagreement among the Commission and Member States, namely to determine *which*<sup>96</sup> are these rules of EU air law and in *what way*<sup>97</sup> can they be affected by ASA's, in order to find the areas of law where EU's *exclusive* external competence in air transport does exist. Firstly, in circumstances where common rules are *exhaustive* and *apply to non-EU nationals*, the EU alone is entitled to assume obligations *vis-à-vis* third countries,<sup>98</sup> even if the assumed international obligations are not in direct conflict with EU law, but "*may merely 'affect' the common rules*".<sup>99</sup> Secondly, the Court stated that in order to ascertain if the provisions of ASA's could "*impinge on the correct application of the common rules*" or "*alter their scope*" or even

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<sup>94</sup> §§49-53, Opinion of the Advocate-General; Procedures laid down in TFEU, Article 352.

<sup>95</sup> *Ibid*, at §65.

<sup>96</sup> According to the Court there are 3 Options:

- 1) EU rules that are in clear conflict with the international agreement.
- 2) EU rules that cover the same subject matter as the international agreement.
- 3) EU rules that are liable of being 'affected' by the international agreement, although they do not fall in either of the above stated categories.

<sup>97</sup> See below Note 101 and accompanying text.

<sup>98</sup> F Sørensen, W van Weert & A Cheng-Jui Lu, *ECJ Ruling on Open Skies Agreements v. Future International Air Transport*, Air & Space Law, Vol. XXVIII/1 (February 2003), p. 4.

<sup>99</sup> At §67, Tizzano, Opinion on Open Skies Agreement cases, *ibid*, citing also prior decisions, See Opinion 2/91 where the Court affirmed that the Community had exclusive competence to assume the obligations contained in certain provisions of an ILO Convention, (32) for the simple reason that those provisions concerned an area which was already covered to a large extent by Community directives, although '*there [was] no contradiction between these provisions of the Convention and those of the directives*'.

“*conflict with them*” a careful analysis on a case by case basis must be undertaken.<sup>100</sup> “*In order to establish that the common rules are ‘affected’ it is not enough to cite general effects of an economic nature which the agreements could have on the functioning of the internal market; what is required instead is to specify in detail the aspects of the Community legislation which could be prejudiced by the agreements*”.<sup>101</sup>

Following essentially the steps described in the table below<sup>102</sup> the Court held that in the following areas, which are capable of being affected by the ASA’s, EU’s *exclusive* competence applies:<sup>103</sup> (a.) the establishment of fares and rates on intra-Community routes, (b.) slot allocation and (c.) computerized reservation systems. Member States, as a result, do not have any sovereign power whatsoever to engage in international aviation negotiations in these areas.

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<sup>100</sup> *Ibid*, at §§76, 77.

<sup>101</sup> *Ibid*, at § 77.

<sup>102</sup> The approximation of the Court’s steps and reasoning thereby necessary for determining areas of EU’s *exclusive* competence described in the table below is the sole interpretation of this Author.

<sup>103</sup> Note that the CJEU only took into account the legislation which the Commission claimed the disputed ‘*Open Skies*’ agreements ‘*affected*’ at that time.

**Assessment of the question whether disputed international air services agreements ‘affect’ the EU legislation, in the sense contemplated by the *ERTA* doctrine, as upheld by the CJEU in its later decisions, including the ‘*Open Skies*’ cases:**

Steps	Assessment	Side notes
(1.)	<p>Are the provisions covered by the ASA already the subject matter of internal EU legislation? → <i>Common rules could be ‘affected’ by ASA.</i></p> <p>a) Assumed international obligations fall ‘<i>within the scope of the EU rules</i>’, and/or are ‘<i>concerned with an area which is already covered to a large extent by EU rules</i>’, and/or they are ‘<i>in the spheres covered by those acts</i>’.</p> <p>b) Internal legislation capable of being ‘<i>affected</i>’ applies (also) to the conduct of non-EU nationals.</p> <p>c) Claimant must provide detailed &amp; precise specification of the alleged ‘<i>affect</i>’ on internal EU legislation. General assumptions of distortion of internal market/competition – not sufficient.</p>	<ul style="list-style-type: none"> <li>➤ According to the CJEU such provisions would be <u>unlawful per se</u> on the basis of <i>ERTA</i> principle.</li> <li>➤ EU enjoys <i>exclusive</i> external competence.</li> <li>➤ Result: Member States are obliged to dully co-operate with the EU Institutions, in order to “<i>preserve the unity of the common market and the uniform application of EU law</i>”.</li> </ul>
(2.)	<p>Are the provisions in the ASA in conflict with internal EU legislation? → <i>Common rules are ‘breached’* by assuming obligations under ASA.</i></p> <p>* Note: EU internal rules have been breached from the perspective of EU (air) law (violation directed towards EU, Member States &amp; the common market), <i>not</i>, however, from the perspective of international (air) law.</p>	<ul style="list-style-type: none"> <li>➤ According to the CJEU such ASA’s are (under EU law*) <u>unlawful in any case</u> → no need for <i>ERTA</i> test.</li> <li>➤ EU enjoys <i>exclusive</i> external competence.</li> </ul>
(3.)	<p>ASA’s which do not fall in either of the (1.) or (2.) category, but are liable to ‘<i>affect</i>’ the common rules.</p> <p>a) Examples: “<i>Agreements which concern aspects which are contiguous to those governed by the common rules</i>”, or “<i>agreements which, while they concern a matter which is to a large extent covered by common rules, relate however to aspects not (or not yet) regulated by those rules.</i>”</p> <p>b) Specific assessment in light of the particular circumstances of each case.</p>	<ul style="list-style-type: none"> <li>➤ According to the CJEU, Member States under such ASA’s <u>might ‘affect’ the common rules</u>, by <i>impinging on their correct application</i> or <i>altering their scope</i>.</li> <li>➤ EU enjoys <i>exclusive</i> external competence.</li> <li>➤ Result: Obligation of loyalty and sincere co-operation incumbent upon the Member States.</li> </ul>

### 4.3. The nature of EU's *external* competence in air transport

Once the question of the legal basis of the EU's external competence has been determined it is necessary to examine the *nature* of such competence and its effect on the rights of Member States. The first question that arises in this respect is whether Member States still have external competence in relation to a particular subject.

First, with regard to Common Transport Policy as envisaged by the TFEU, Title VI, the norm is that the *internal* competence of the EU must be shared with Member States.<sup>104</sup> This means that the EU is *not* immediately and definitively competent, that is to say unless the EU has exercised its competence in a particular area by means of secondary legislation, the Member States remain free to act.<sup>105</sup>

Second, as elaborated above, in the absence of a Treaty provision establishing EU's explicit *external* competence in air transport,<sup>106</sup> legal basis was found in the doctrine of *implicit* external competence.<sup>107</sup> In principle therefore, EU's *implicit* external competence in air transport is likewise shared, which also complies with the conferment under the TFEU, Article 100(2) of the wide discretion in this field given to the Council.<sup>108</sup> Nevertheless, as has been discussed above, the consistent evolution of CJEU's case law has now rather firmly established that even in air transport issues EU's *implicit* external competence may in certain

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<sup>104</sup> According to the TFEU there are 3 categories of EU's – *internal*– competence;

- 1) Exclusive competence (TFEU, art. 3) comprised of following areas: *customs union, the establishing of the competition rules necessary for the functioning of the internal market, the monetary policy of the euro States, the common commercial policy and parts of the common fisheries policy.*
- 2) Shared competence (TFEU, art. 4) comprised of following areas: *internal market rules, economic, social and territorial cohesion, agriculture and fisheries, environment, transport, trans-European networks, energy supply and the area of freedom, security and justice, and also for common safety concerns in public health matters, research and technological development, space, development cooperation and humanitarian aid.*
- 3) Competence to carry out supporting action (TFEU, art. 6). Limited to *coordinating or providing complementary action for the action of the Member States*; the EU cannot harmonise national law in the areas concerned (TFEU, art. 2(5)).

<sup>105</sup> Menick von Zebinsky *supra*, Note 19, p. 30-31.

<sup>106</sup> See *supra* Point 4.1.

<sup>107</sup> One may challenge the *legal* value of such doctrine, although it must be said that it is an accepted theory both among most highly qualified publicists in international law doctrine as well as in the judicial practice of a number of international tribunals.

<sup>108</sup> Council with Parliament shall decide '*whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport*'.

particular matters work so as to exclude, in entirety, the competence of Member States. When common rules, including rules governing air transport, could be '*affected*' within the meaning of the *ERTA* judgment, according to the Court's judicial practice, Member States lose their freedom to negotiate with non-member countries, and that is to say, irrespective of the content of the agreements to be negotiated and of any conflicts that might ensue as between them and the common rules. This means, according to the CJEU, that the EU is in such external matters exclusively, that is immediately and definitively competent. The Court in the '*Open Skies*' cases found that three out of five areas of EU air law submitted on behalf of the Commission were capable of being '*affected*' by the disputed ASA's.<sup>109</sup>

Since the '*Open Skies*' cases, however, the EU has been in the process of adopting an increasing set of common rules applicable to *non-EU carriers* as well, which for example regulate, not only: mechanisms for preventing impairment of fair competition and matters relating to aviation commercial opportunities (including ground-handling), but also other issues such as passenger rights, data protection, environmental concerns, safety and security standards, allocation of slots, customs duties, taxes, user charges and other. According to the CJEU, as soon as Member States would attempt to enter into ASA's with non-EU countries, which would include for example the above mentioned issues, the EU would regarding these subject matters by *implication*, and to the detriment of Member States' sovereignty, acquire *exclusive* competence for their negotiation.

Notwithstanding internal procedural and practical questions that may arise from this scenario,<sup>110</sup> what is more, from an *international* air law point of view, it is the Member States' who, regardless of this internal *implicit* delegation of national competences, retain the status of being the subjects of all relevant international air law conventions and air services agreements, and thereby the only addressees of sovereign rights deriving therefrom. Although, according to the CJEU, Member States have *implicitly* transferred several aspects of their regulatory powers in the field of external aviation relations to the EU pursuant to the conditions explained above,<sup>111</sup> it is nonetheless them - Member States - who are the only ones

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<sup>109</sup> See *supra* Note 103 and accompanying text.

<sup>110</sup> For example do the Member States' need prior authorisation from the Commission when initiating such negotiations or is notification sufficient? Pursuant to Regulation 847/2004 Member States are obliged to allow Commission to participate as an observer in the negotiations.

<sup>111</sup> See *supra* Point 4.2. and accompanying table.

having the core sovereign title to granting or disallowing international air traffic rights to other non-EU countries. Moreover, the EU would, according to the Court, acquire exclusive competence over subject matters, which are proven to ‘*affect*’ the common rules, only on a case-by-case basis, rather than on an industry-sector basis.<sup>112</sup>

In conclusion it is important to note the complexity of the problem and to emphasise that the notion of EU’s *exclusive* external competence in air transport, as developed in the jurisprudence of the CJEU, does not mean exclusive *general* competence, but competence that, under certain conditions, arises only with respect to specified matters.<sup>113</sup> As a practical result – at least for the time being – Member States may “freely” enter into external aviation relations, however, they are in their rights no longer independent actors, as they have clear and unambiguous obligations under EU law<sup>114</sup>, that must be followed when undertaking aviation relations *vis-à-vis* 3<sup>rd</sup> countries.

#### **4.4. EU’s secondary legislation - EU’s *ad hoc explicit* external competence**

The rapid progress in the EU’s external competence is represented by measures of secondary legislation adopted by the Council in air transport matters or in matters having air transport within their scope. Doctrine speaks of two possible ways for the EU to acquire external competence under secondary legislation.<sup>115</sup> Firstly, the EU could by relying on the international law theory of ‘implied powers’, assume *implicit* external competence in air transport matters covered by *internal* rules adopted by the Council. Secondly, and this is precisely what was the immediate effect of the ‘*Open Skies*’ cases in 2002, the Council could acting under TFEU, Article 100(2) on an *ad hoc* basis adopt legislative measures confirming *explicitly* the EU’s external competence.

In the ‘*Open Skies*’ cases Commission did not win on its claims of *general* exclusive competence in external aviation relations; it did, however, importantly succeed in attaining full judicial recognition of the existence of its *implicit* exclusive external competence over

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<sup>112</sup> Dempsey, *supra*, Note 4, p. 88.

<sup>113</sup> *Ibid*, *supra* Note 4.

<sup>114</sup> *Ibid*, *supra* Note 4.

<sup>115</sup> Menick von Zebinsky, *supra*, Note 19, p. 41.

matters covered by *internal* EU air transport legislation.<sup>116</sup> This in light of ever increasing comprehensive set of internal EU air transport legislation applicable also to non-EU nationals, nevertheless effectively amounts to a very close approximation of general exclusive competence. Thereto and legally armed with its success on other claim as well,<sup>117</sup> Commission shortly after the judgment issued a communication among other things calling on all Member States to exercise their rights to terminate their ASA's with the US, and recommending that the Council give the Commission a mandate to negotiate with the US as soon as possible.<sup>118</sup> In 2003 Commission and the Council reached an agreement on the matter which resulted in the adoption of a Regulation<sup>119</sup> setting out the conditions on how Member States could continue to negotiate bilateral ASA's without infringing their obligations under EU law and in the birth of the so called 'EU's External Aviation Policy', based on three pillars.<sup>120</sup>

Under the first pillar, based on Council's authorisation to the Commission, the latter was to negotiate EU level agreements (so called horizontal agreements)<sup>121</sup> with third countries, in order to bring Member States' existing bilateral ASA's with those countries in line with EU law.<sup>122</sup> Under the second pillar, pursuant to Council's authorization, the Commission was to negotiate a comprehensive agreement with the US, aimed at creating an 'open aviation area' to replace the so-called 'open skies' agreements, and other more restrictive agreements,

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<sup>116</sup> See COM (2002) 649, 31-32 and *supra* Point 4.2.

<sup>117</sup> Traditional nationality clauses in disputed Air Services Agreements' were held to be illegal because they were inconsistent with EU rules on the Right of establishment.

<sup>118</sup> Balfour, *supra* Note 5.

<sup>119</sup> Regulation (EC) No 847/2004 of the European Parliament and the Council of 29 April.2004 on the negotiation and implementation of air service agreements between Member States and third countries. OJ 30 April 2004, L157, p. 7.

<sup>120</sup> See for further explanation: P. Bombay, M. Gergely, *The 2006 ECAA Agreement: Centrepiece of the European Community's Aviation Policy Towards its Neighbours*, Air & Space Law, vol. xxxiii/3 (June 2008), p. 214.

<sup>121</sup> See for further explanation: P. Van Fenema, *EU Horizontal Agreements: Community Designation and the 'Free Rider' Clause*, Air & Space Law, vol. xxxi/3 (June 2006).

<sup>122</sup> The main purpose of horizontal agreements was to replace traditional nationality clauses with EU-clause. However, the agreements include in manifold cases also other provisions (e.g. *fuel clause*, *tariffs clause*, *fair competition clause*), for which it has been argued, go beyond EU's external competence, see: Balfour, *supra* Note 5 and Van Fenema, *supra* Note 121. It is the opinion of this author, however, that relying on CJEU's doctrine of *implicit* external competence, as contemplated by the *ERTA* doctrine and upheld in the '*Open Skies*' cases, the Commission could firmly argue it does have the competence to agree on the aforementioned matters, which are all covered by internal EU legislation.

agreed bilaterally by the Member States.<sup>123</sup> Under the third pillar, the principle was agreed to create a Common Aviation Area, comprising the EU and potentially all of the countries located along its southern and eastern borders, with the aim to achieve an as high as possible degree of economic and regulatory integration of the aviation markets concerned.<sup>124</sup>

In the latest Council conclusions on the issue of EU's external aviation relations reached on December 20, 2012, three pursued objectives may be distinguished. First, Council is in favour for the Commission to reach further comprehensive agreements with all neighbouring States and welcomes Commission's intent to request a mandate to negotiate other far reaching comprehensive agreements with important aviation partners.<sup>125</sup> Second, Council supports the Commission's measures for strengthening fair competition<sup>126</sup> and third, Council encourages Commission's efforts in tackling the ownership and control restrictions.

The EU and the Commission as its external negotiator have, as may be discerned from the above-mentioned trends, attained some far reaching external negotiation mandates pursuant to prior Council's authorizations in each specific case. Therefore, EU's external air transport competence – at least for the time being – is *explicit*, being expressly based on EU's secondary legislation. It is important to note, however, the tremendous significance of all the legal, political and strategic steps undertaken by the Commission beforehand and the judicial backup provided by the CJEU, which jointly augmented the favourable political will among the Member States and eventually led to *express* delegation of national competences in the otherwise highly 'sovereignty sensitive' field of external aviation relations. Moreover, until Member States fully denounce from undertaking further aviation relations with non-EU countries, individual ASA's will very likely, in this highly multi-level jurisdictional environment, continue causing discrepancies as to the questions of *who* has *what* kind of competence and in respect of *which* exact air law matters.

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<sup>123</sup> EU/US Air Transport Agreement was signed on 30<sup>th</sup> April 2007 and provisionally applied from 30<sup>th</sup> March 2008.

<sup>124</sup> See for excellent explanation, P. Bombay, M. Gergely, *supra* Note 120.

<sup>125</sup> E.g., China, Russia, the Gulf States, Japan, Turkey, India and ASEAN States.

<sup>126</sup> [...] including Commission's intent to engage in dialogue with Gulf States, with the objective of negotiating comprehensive agreement and particularly enhancing transparency and fair competition. Likewise it supports Revision of Reg 868/2004 and the development of a 'fair competition' template.



## 5. Conclusion

Albeit external affairs of individual States' have traditionally been perceived as falling within the reserved domain of their domestic jurisdiction, and even more so in respect of external *aviation* relations, where sovereignty has traditionally played central role, it has now become firmly acknowledged that the powers to enter into foreign relations are the inherent and necessary attributes of international legal personality and are therefore enjoyed in addition to States also by international organizations.

The CJEU judgments have, in accordance with the international law doctrine of 'implied powers', now clearly established that the EU has *exclusive* competence for external relations in a number of areas dealing with aviation. Since, however, negotiation of traffic rights remains exclusively in the realm of Member States' sovereignty; the CJEU's jurisprudence effectively establishes a situation of "shared exclusive competence" in order to deal with all matters typically contained in a bilateral air services agreement. This as a result entails the obligation of close co-operation between the Member States and the EU.

The CJEU's standing with regard to the question of EU's *implicit exclusive* external competence is unambiguous, nevertheless the fact that the Commission –at least for the time being– rather exercises its external powers in air transport through *explicit* delegation of external competences based on EU's secondary legislation, i.e. Council authorizations, demonstrates that in terms of international law and international relations, competence based on "mere" jurisprudential sources would most likely be perceived as highly disputable, whereas express conferment via internal legislative means is clearly not. Moreover, it creates the perception of greater negotiation power endowed in the EU acting as one entity. In this sense, comparison may be drawn with the creation of *internal* aviation market, whereby Commission's reliance on CJEU's judgments proved to be pivotal for its completion, likewise as it was with the attainment of *explicit* external competence following the '*Open Skies*' cases.

In conclusion, it may be said, on the one hand, that the EU Member States are still *independent subjects* of international law, but that, on the other hand, they are no longer *independent actors*. With their involvement in the EU and more specifically in the creation of *internal* air transport market, they have, *explicitly* or *implicitly*, conferred to the EU the exclusive powers to enter on their behalf into external (aviation) relations with third countries.