CURRENT DEVELOPMENTS

EUROPEAN UNION LAW

Edited by Joe McMahon

I. The Community's External Competence: Air Transport Services
II. The Lamfalussy Legislative Model: A New Era for the EC Securities and Investment Services Regime

I. THE COMMUNITY'S EXTERNAL COMPETENCE: AIR TRANSPORT SERVICES

A. Introduction

In 2001 the European Commission ('the Commission') published a long-expected White Paper entitled '*European Transport Policy for 2010: Time to Decide*'[1] where it set out its vision for the transport industry for the immediate future. In the section dealing with the enlarged Europe and the globalisation of transport the Commission noted that:

> [I]t is paradoxical that the European Union, which is the world's leading commercial power and conducts a large part of its trade outside its own borders, has so little say in the adoption of the international rules which govern much of transport. This is because the Union as such is excluded from most intergovernmental organisations, where it has no more than observer status.

The Commission then went on to observe that '[T]he need for Europe to speak with a single voice in defence of its industrial and environmental interests is particularly urgent in the field of air transport.'

The Commission's position is not new but its arguments for an increased and *exclusive* role in the external aspects of the air transport industry have gained some legitimacy since 1 April 1997 when the third civil air transport package of legislative measures came into force and the liberalisation of air transport within the Community became a reality. Nevertheless the Member States have granted the Community only limited external competence and strongly resist any Community claim to *exclusive* competence in this area. The situation reached a critical stage at the end of the 1990s when the Commission initiated Article 226 actions[2] against the UK, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, and Germany.[3] The Commission sought a declaration from the European Court of Justice (ECJ) that these Member States had infringed Community law by concluding 'open sky' agreements with the United States of America (USA).

The Commission's case against the Member States rested on three alleged breaches

[1] COM (2001) 378.

[2] Art 226 enables the Commission to bring before the ECJ any Member State which it considers to have failed to fulfil a Treaty obligation and failed to correct it when asked by the Commission to do so.

[3] Cases C-466 to C-469/98, C-471/98, C-472/98, C-475/98, and C-476/98, judgment delivered on 5 Nov 2002, nyr.

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of Community Law. First, that the Member States concerned (except the UK since its agreement with the USA is not regarded as an 'open sky' agreement) have failed to respect the division of external powers between the Community and the Member States. Secondly, that the Member States have infringed Article 43 EC (freedom of establishment) by accepting a clause in the agreements known as the 'nationality clause'. In practice this clause allows the contracting Member State or the USA to refuse the rights provided for under the agreements to air carriers designated by the other contracting State but not owned or controlled by nationals of that State. Thirdly (in the alternative) that the Member States (does not apply to the UK) have infringed Article 307(2) EC by having failed to do everything in their power to bring fully into line with Community law agreements concluded with the USA before the entry into force of the EC Treaty or before the adoption of the Community rules on air transport (the third civil air transport legislative package).

The ECJ endorsed the Opinion of Advocate General Tizzano that had been delivered 10 months earlier. The Court ruled that all the defendant Member States (excluding the UK) have infringed the rules on the division of powers between the Community and the Member States. Furthermore, all the defendant Member States have failed to fulfil their obligations under Article 43 EC by including the 'nationality clause' in their agreements.

This paper focuses solely on the issue of the division of powers between the Community and the Member States in the field of civil air transport. The aim of the paper is as follows: first, to set out the historical background to the Commission's claim that the Community has exclusive competence to conclude civil air transport agreements with non-Community countries; secondly, to present the Commission's arguments in support of such competence in the 'open sky' agreements cases and how the ECJ and the Advocate General responded to them; thirdly, to consider the role of Article 80 EC and to discuss what the future holds for the development of a common external aviation policy.

B. Historical Background

One of the distinctive features of the transport industry is its international nature, particularly in respect of maritime and air transport. Although international transport services were historically regulated by bilateral and multilateral agreements (ensuring access and unhindered transit through States), measures adopted to liberalise the industry within the Community[4] have replaced the bilateral agreements between Member States.[5] However, the EC Treaty is silent on matters relating to the external relations of this industry.[6] Thus, transport services between Member States and non-Community

[4] Three civil air transport packages of legislative measures were adopted in 1987, 1989, and 1992.

[5] The bilateral agreements were modelled on the 'Bermuda II' agreements between the USA and the UK. These agreements, based on the universally recognized right of a State to control its air space (Art 1 of the Chicago Convention on International Civil Aviation, 1944), contained provisions on: landing rights and routes that may be flown by carriers from both parties; the number of flights that may operate on these routes; capacities that may be employed; and how they may be shared. The fares charged by each of the carriers were also agreed, and the revenue of both airlines shared on a percentage.

[6] The Treaty of Nice (OJ 2001 C80), however, which is likely to enter into force in the near future, amends Art 133 EC (the provision granting the Community exclusive external competence in respect of tariff and trade agreements) expressly stating that '[T]he negotiation and conclusion

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countries remain largely bilateral even though in some modes of transport, for example inland waterways, the Community has replaced the Member States and negotiates on behalf of the Community.

As far as inland transport is concerned external Community competence was established early. The ECJ ruled in the *Re the European Road Transport Agreement: EC Commission v EC Council ('ERTA')*[7] that the Community has implied external competence where it is necessary to negotiate with non-Community countries in order to achieve an objective of the EC Treaty. The facts of the case were as follows: an agreement concerning the work of the crew of vehicles engaged in international transport had been signed in 1962 but negotiations for its revision were initiated in 1967 under the supervision of the UN Economic Commission for Europe. At the same time the Community itself adopted a legislative measure harmonising the driving and rest periods of drivers of road transport vehicles.[8] The EU Council (then known as the Council of Ministers) discussed the negotiations at a meeting in 1969 and agreed on a common view to be adopted by the Member States at a forthcoming meeting. The negotiations were concluded by the Member States in accordance with discussions that took place at a meeting of the Council. The Commission, however, objected to the manner in which the agreement had been reached and sought an annulment of the Council's discussions. The ECJ ruled that the Community has competence to conclude international agreements in this field. Article 71(1)(d) EC can be used as the legal basis for the conclusion of agreements between the Community and third countries even where a specific Treaty provision, giving the Community treaty-making powers in the area, is lacking. Article 71(1)(a) requires the Council to adopt common measures applicable to transport between or across Member States or between Member States and a non-Community country. Since it is often difficult to distinguish clearly between national and international transport, specific measures have had to be based not only on Article 71(1)(a) but also on Article 71(1)(d). This latter provision contains the residual power to enact 'any other appropriate provisions' for the implementation of Article 70. As the Community had adopted measures on the same subject matter as the one being negotiated at international level (ie, the Community had occupied the field), the *exclusive* authority to negotiate and conclude agreements belonged to the Community from the moment the Community measures had been adopted.[9]

This was followed by *Opinion 1/76 (Rhine Navigation Case)* which concerned a draft international agreement that established a European Laying-up Fund for inland waterways vessels that navigated the Rhine and Moselle rivers.[10] The agreement sought to eliminate over-capacity on these rivers. It was clear that not only some Member States but also Switzerland had to be involved in these negotiations as its vessels use these rivers. Although the Community had internal competence to adopt an internal measure, the latter would have no application to Switzerland and none had

of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.'

[7] Case 22/70 [1971] ECR 263. [8] Regulation 543/69 OJ 1969 L77/49.

[9] However, the facts in this particular case were such that the ECJ had no difficulty in declaring that, since the negotiations had been carried out before the Community had adopted the internal measure, the Council had been correct in proceeding in the manner they had done. The negotiations were at a critical stage, where it would have been unwise to have to inform the non-Community countries that there had been a new distribution of powers within the Community.

[10] [1977] ECR 741.

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been adopted. The ECJ ruled that the Community was competent to conclude such an agreement even in the absence of any internal measure having been adopted. The wording used by the Court suggests that this is so only when it is 'necessary' to enter an international agreement in order to achieve one of the objectives of the Community. This situation arose in the Rhine Navigation Case since it was necessary to include Switzerland in order to achieve the Community objective of reducing over-capacity on these two rivers. Furthermore, in later Opinions, the ECJ has made it clear that the Community objective must be specifically identified. The Community cannot rely on general objectives in order to gain external competence.[11]

As far as air and maritime transport services are concerned, the situation is significantly different and Member States have been reluctant to transfer competence of any sort to the Community.[12] Article 80(1) expressly states that the transport chapter (Title V, Articles 70 to 80) applies to inland transport only. Article 80(2) however confers discretionary power on the Council to adopt measures that may affect the air and/or maritime sectors. At the time of the establishment of the EC, Member States were not prepared to hand over to the Community competence over these two very important sectors of their national economy.

As far as intra-Community air transport is concerned, significant legislative action to liberalise this sector started in the mid-1980s. Prior to that date only a few measures had been adopted even though the ECJ ruled in *Commission v France* that the general rules of the EC Treaty apply to maritime and air transport.[13] France argued that the transport provisions of the EC Treaty (Articles 70–80) represented the final rules on the transport industry and therefore they excluded the application of other parts of the EC Treaty to the transport industry. The alternative submission, which found favour with the ECJ, was that the general rules of the EC Treaty apply to transport in the same way that they apply to other economic fields and that Articles 70–80 are merely modifications of the general rules. The ECJ made it clear that the general rules of the EC Treaty applied in the field of transport (including air and maritime) except where the transport industry was expressly excluded. This is clearly so in respect of the rules concerning the freedom to provide services (Articles 49–55) where Article 51(1) specifically states that services in the transport industry are governed by the Treaty rules on transport (Title V).

The Commission is keen for the Community to obtain *exclusive* competence to

[11] *Opinion 2/91 (ILO Convention)* [1993] ECR I-1061, *Opinion 2/92 (Third Revised Decision of the Council of the OECD)* [1995] ECR I-521 and *Opinion 1/94 (WTO Agreement)* [1994] ECR I-5267.

[12] There have been occasions when the Community alone concluded air transport agreements with non-Community countries. For example, in 1992, such an agreement was concluded with Norway and Sweden. The mandate was based on the first, second, and third civil air transport packages (excluding cabotage). Recently the Commission has been authorised on behalf of the Community to open negotiations on the Community's membership of Eurocontrol. The ECJ has also delivered a favourable Opinion (*Opinion 1/00*, OJ 2002 L156/1) on the compatibility with Community law of a proposed agreement (between the Community and non-Community countries) on the establishment of a European Common Aviation Area.

[13] Case 167/73 [1974] ECR 359, also known as the *Code Maritime Case*. This ruling has been confirmed in Cases 209–213/84, *Nouvelles Frontieres* [1986] ECR 1435, where the ECJ ruled that the EC Competition Rules apply to the air transport sector. The general principles include, *inter alia*, the rule against discrimination on the grounds of nationality, the right of establishment, free movement of workers and capital, and also the general principles established by ECJ case law.

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negotiate agreements with non-Community countries on the provision of civil air transport services. In 1990 the Commission published a Communication claiming *exclusive* competence on the basis of the *ERTA* judgment.[14] The Commission claimed that a logical consequence of the creation of the internal market is that the Community should be considered as one entity and therefore as a single cabotage area.[15] Another Communication in 1992 argued the case in a less aggressive manner.[16] The Commission no longer claimed *exclusive* competence but argued strongly that it would be more fruitful for the Community to negotiate with the USA en bloc rather than for each Member State to negotiate and sign a separate bilateral agreement. Community objectives would be safeguarded by Community action. The Council responded by setting up a Council Aviation Group to advance discussion on external relations. Unfortunately, this was followed by a period of controversy over the 'open sky' bilateral agreements with the USA entered into by several Member States. The Commission was concerned that USA air carriers obtain under these agreements the so-called 'fifth freedom rights'. These rights permit USA air carriers to fly between Community airports, while Community air carriers are not permitted to fly on USA domestic routes. As far as the Commission is concerned flights between airports within the Community are inland flights (equivalent to domestic flights in the USA) so from 1995 onwards the Commission began to threaten legal action against the Member States who had signed bilateral agreements with the USA.

In June 1996 the Council finally gave a mandate to the Commission (assisted by a committee made up of Member States' representatives in accordance with the normal procedure) to begin exploratory talks with the USA in order to create a common civil aviation area. The matters to be discussed were limited to so-called 'soft rights'[17] and regulatory issues with the view to reaching the application of equivalent rules on competition.[18] The mandate explicitly stated that Member States could continue to conduct bilateral negotiations with the USA.[19] It was made very clear by the Council that only after evaluating this first phase of the negotiations would it consider extending the mandate to a second phase which would include traffic rights. These negotiations were not likely to succeed since the USA was only interested in negotiating traffic rights and market access. Within a year the Commission asked the Council to extend the mandate but too many Member States were against such an extension and therefore the mandate was not extended.

The Council's response was to ask the Commission to submit a report defining the

[14] COM (90) 17 *Community Relations with Third Countries in Aviation Matters*. In this Communication the Commission endorsed the view that the Community must be considered as one market internally and externally and emphasized the so-called 'fifth freedom rights' (ie, rights to fly between Community airports wherever they may be situated) as a valuable Community asset. Fifth freedom operations by non-Community air carriers are not governed by Community legislative measures. All that is required is for these carriers to obtain the approval of the two Member States concerned.

[15] In this context, cabotage is the right of a non-Community air carrier to operate between Member State A and Member State B.

[16] COM (92) 434 (OJ 1993 C216/15) *Air Transport Relations with Third Countries*.

[17] eg, ownership and shareholding in air companies and code-sharing under which airlines sell seats on each other's flights.

[18] eg, state aids; computer reservations systems; safety.

[19] Furthermore, the Commissioner responsible for transport matters at the time, Neil Kinnock, publicly stated that existing bilateral agreements or those in the negotiating stage would not be called in question (Agence Europe, No 6750, 17/18 June 1996).

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'common interest' and explaining why and to what extent the Community's approach would be economically more advantageous than the 'open sky' bilateral agreements negotiated by the Member States.

C. The Commission's Submissions

The Commission asserted in these cases that the Community has exclusive external competence on two separate grounds. First, the Commission claimed that an agreement between the Community and the USA is 'necessary' in order to attain an objective of the EC Treaty as contemplated in *Opinion 1/76*. Secondly, that, in adopting the third civil air transport package of legislative measures, the Community has 'occupied the field' in the sense contemplated in the *ERTA* judgment. Both the ECJ and Advocate General Tizzano concluded that the Community has exclusive external competence over some of the matters negotiated by the Member States but disagreed with the Commission's interpretation of the ECJ's case law.

The Commission interpreted *Opinion 1/76* as meaning that the Community's external competence arises regardless of whether specific provisions have been adopted internally at Community level where the Community's participation at international level is 'necessary' for the attainment of one of the objectives of the EC Treaty. The Commission claimed that the rights granted under the disputed agreements to USA air carriers on intra-Community routes gives rise to serious discrimination and distortions of the internal market and therefore it is 'necessary' for the Community to act. Furthermore, the Commission claimed that when the Community's external competence arises in this manner, that competence is automatically *exclusive*.

Both the ECJ and Advocate General Tizzano regarded *Opinion 1/76* as doing no more than providing the Community with external competence where it is not expressly granted in the EC Treaty.[20] *Opinion 1/76* therefore allows the Council to create an external competence for the Community where no such competence has been provided for in the Treaty. The Advocate General re-examined the text of *Opinion1/76* together with other relevant Opinions[21] and concluded that the Commission was wrong to contend that the ECJ has ruled that where external competence arises in situations contemplated in *Opinion 1/76*, the competence will automatically be *exclusive*. In his opinion, it is in the exercise of the external competence itself that exclusivity arises. Thus once the Community acts, from that moment onwards, the competence becomes exclusive since any action by the Member States could risk the attainment of the Community objective for which the agreement in question was considered necessary.

However, in the context of the 'open sky' agreements, the Community has not been empowered to act since the Council, the competent institution, has not recognised the necessity for an agreement between the Community and the USA.

The ECJ confirmed the approach of the Advocate General and concluded that this was not 'a situation in which internal competence could effectively be exercised only at the same time as external competence'.[22] The internal competence could effectively

[20] The Advocate General considers that the ECJ transposed the logic of Art 308 EC to the sphere of the Community's external competence. Art 308 enables the EU Council, under specific criteria, to take appropriate measures where such action is necessary to attain an objective of the Treaty, irrespective of the fact that no such power is provided for in the Treaty.

[21] eg, Opinions 2/92 (OECD) and 1/94 (WTO), above n 11.

[22] Above n 3, para 62 of the judgment in Case C-467/98 (Denmark).

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be exercised to attain the objectives of the EC Treaty without needing, at the same time, to conclude agreements with non-Community countries. The adoption of the third civil air transport package was achieved without requiring negotiations to be concluded with the USA. The 'necessity' claimed by the Commission does not therefore arise in this case. Furthermore, any discrimination or distortion of competition which might result from the 'open sky' agreements can be prevented by the Community adopting common rules prescribing the approach to be taken by the Member States in their external dealings.[23]

The Commission's interpretation of the *ERTA* principle was also convincingly questioned by the Advocate General and rejected by the ECJ. The Commission's position was that since common rules governing the air transport market have been adopted, the Member States have lost the right to undertake obligations with non-Community countries concerning that market. In other words, the Community has 'occupied the field' and therefore Member States no longer have competence to act internally or externally in matters concerning this industry. As far as the Commission is concerned the Community's competence is *exclusive*. Therefore, any suggestion from the Member States that the agreements they signed with the USA did not adversely breach any specific provision of Community law is irrelevant since the Member States have lost the right to act.

Advocate General Tizzano, however, placed particular emphasis on the language used by the ECJ in the *ERTA* judgment and in *Opinion 1/94 (WTO Agreement)* which confirmed and clarified the *ERTA* judgment. The Court stated in *ERTA* that following the adoption of common rules, the Member States lose their right to assume obligations 'which might affect those rules or their scope'. The position therefore is not as absolute as the Commission suggested and any obligation assumed by Member States with non-Community countries must be tested against the relevant common rules adopted by the Community. This conclusion is fully endorsed by the ECJ that ruled that it must be determined

> under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue, and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence.[24]

Thus, where the internal adopted measures include matters relating to the treatment of nationals of non-Community countries or expressly confers on its institutions powers to negotiate with such countries, the Community acquires an *exclusive* external competence in those areas.[25] Where no express provision conferring external powers on the Community is found, the Community may have exclusive competence once complete harmonisation in a given area has been achieved. This is an obvious consequence since the common rules thus adopted could be affected within the meaning of the *ERTA* judgment if Member States retained the freedom to negotiate with non-Community countries.[26]

The Member States contended also that only international obligations that may conflict with the common rules are prohibited. Relying on its reasoning in *Opinions 2/91 (ILO Convention), 2/92 (OECD), 1/94 (WTO Agreement)* and the ECJ confirmed the Advocate General's conclusion that Member States have lost their competence to

[23] Ibid, para 59.
[24] Ibid, para 81.
[25] Ibid, para 83.
[26] Ibid, para 84.

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enter such agreements even if there is no contradiction between the obligations and the common rules.[27]

Thus the exercise that was then carried out by the Advocate General and the ECJ was to determine whether the 'open sky' agreements concern matters covered by the common rules adopted in the field of air transport. The ECJ endorsed the conclusions of the Advocate General that were as follows. First, that the right of Member States to grant access to routes within the Community to non-Community air carriers is not curtailed by Community legislation.[28] There is nothing in the relevant legislation from which it may be inferred that it also aims to regulate the granting of traffic rights within the Community to non-Community air carriers. These legislative measures are only concerned with requirements in relation to air carriers established in the Community. This is further evidence that the Community in adopting the 'third civil air transport package' has not fully occupied the field.

Secondly, that the Commission failed to show that the obligations assumed by the Member States in respect of the grant of this access 'affect' the Community legislation in the sense that it impinges on their correct application or alters its scope. Thirdly, the Commission failed to prove that the normal functioning of the common market is affected by the agreements. The Commission's arguments are very general and are no different from those that they submitted to the ECJ (and had rejected) in *Opinion 1/94*. Fourthly, the Commission is right in its submissions that the agreements, which include provisions on fares and rates that may be charged on intra-Community routes by non-Community air carriers, fall within the scope of Community legislation.[29] Non-Community air carriers are indirectly prohibited by Community legislation from introducing lower fares.[30] Such legislation gives rise to *exclusive* Community competence in setting fares and rates for intra-Community routes and, therefore, the Member States can no longer assume international obligations in relation to these matters. In fact, Member States cannot unilaterally amend existing agreements on fares and rates since now this whole matter has been brought within the Community's external competence by the adoption of the common rules.[31] The same argument applies in respect of matters concerning computerised reservation systems and rules for the allocation of slots at Community airports where Community legislation applies also to non-Community carriers.[32] Thus the ECJ declared that the defendant Member States (except for the UK) are in breach of obligations under Article 10 EC[33] and secondary

[27] Ibid, paras 81–2. An interesting corollary mentioned by the Advocate General in para 73 of his Opinion is that, since the Member States are unable to adopt any international obligation in matters covered by the common rules, they will also be unable to enter agreements with non-Community countries in order to eliminate conflicts between those rules and agreements concluded by them before the common rules were adopted. Action would have to be taken by the Community itself to resolve the conflict.

[28] Regulation 2407/92, OJ 1992 L240/1 on licensing of air carriers and Regulation 2408/92, OJ 1992 L240/8 on access of Community air carriers to intra-Community air routes.

[29] Regulation 2409/92, OJ 1992 L240/15 on procedures for the establishment of fares and rates wholly within the Community.

[30] Ibid, Art 1(3) which states that *only* Community air carriers are entitled to introduce new products or fares lower than the ones existing for identical products.

[31] See text in n 27.

[32] Regulation 2299/89, OJ 1989 L220/1 and Regulation 95/93, OJ 1993 L14/1.

[33] Art 10 imposes a duty on Member States to ensure they fulfil obligations arising out of the EC Treaty and to facilitate the achievement of the Community's tasks. Member States are also to refrain from any measure 'which could jeopardize the attainment of the objectives of this Treaty'.

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legislation. They breached their Treaty obligations by inserting in the disputed agreements specific provisions concerning fares that air carriers designated by the USA are allowed to charge on intra-Community routes and other provisions on CRSs offered for use or used in their territories.

D. The Role of Article 80 EC and the Future of a Common External Aviation Policy

It is surprising that the Commission and the Advocate General discussed the *ERTA* principle and *Opinion 1/76* in the context of air transport without any significant discussion on the scope of Article 80 EC.[34]

Article 80(1) restricts the application of the Treaty transport provisions to inland transport. Article 80(2) however confers on the Council the power to grant the Community specific competence to act in the area of air transport. Article 80(2) states that '[T]he Council, may, acting by qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.' There is nothing in this Article to restrict the scope of the competence that may be exercised by the Community. Whatever competence (internal or external) the Council decides to confer on the Community it will be *expressed* competence. The *ERTA* principle was devised to deal with fields of economic activity where the EC Treaty confers on the Community internal but not external competence. This is not the situation in the 'open sky' agreements dispute. As for *Opinion 1/76*, it concerns situations where the Community has internal competence but finds it 'necessary' to exercise an external competence in order to achieve a specific objective of the EC Treaty. Again, this is not the situation contemplated in this dispute.

Article 80(1) expressly restricts the Title V to inland transport and Article 80(2) provides the means to confer Community competence in the field of air transport. The essence of Article 80(2) is to ensure that the Community cannot act either internally or externally without the consent of the Council or, in other words, to ensure the Member States do not inadvertently give up control of the air and sea transport sectors. The situation, in relation to the air transport sector, is not similar to the one present in *ERTA* or in *Opinion 1/76*. However, in the 'open-sky' cases the ECJ took the view that once the Council has acted and conferred competence on the Community to legislate internally in the area of air transport, the situation becomes similar to that in *ERTA* and therefore the principles developed in that case in relation to external competence apply equally to air transport. Thus, the question of exclusivity of the Community's external competence depends on the scope of the adopted internal measures. Nevertheless, it is surprising that the application of the case law on the division of powers that was developed in the context of inland transport has been so easily applied to air transport without any attempt to explain its relationship with Article 80.

What about the future? The Commissioner in charge of Transport hopes that a mandate from the Council will be received before the end of 2002, which will enable

[34] The Member States relied on Art 80(2) in their response to the Commission's arguments stressing that the appropriateness of a Community agreement on air transport is a matter for the Council to decide. The findings of the ECJ also started with Art 80(2). Above n 3, paras 54–5 and 75–80.

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an agreement to be reached between the Community, the Member States, and the USA establishing a common trans-Atlantic airspace. In terms of achieving this particular agreement the 'open sky' judgments have been useful in declaring emphatically that the Community has *exclusive* external competence in areas that are important to the USA air carriers. However, in matters concerning access to intra-Community routes (including fifth-freedom rights) and the granting of operating licences to non-Community air carriers, the competence remains in the hands of the Member States until the Council, acting under Article 80(2), permits the Community to adopt appropriate legislative measures. Exclusive external competence in this area would then be granted to the Community. Meanwhile, any agreements negotiated with non-Community countries that cover these aspects of air transport will have to be either bilateral agreements or mixed agreements where the Council decides to mandate the Commission to negotiate such agreements with non-Community countries on behalf of the Community.

As stated in the introduction, the reality of global markets and the strength of the Community as a commercial power strongly support the case for the conferment of exclusive external competence as far as air (and maritime) transport is concerned. The world of the 1950s when the EC Treaty provisions on Transport were devised no longer exists; the days when the provision of international transport services was closely connected to statehood and national security have gone. More and more often the European Community is called upon to adopt safety measures and support infrastructure developments that have external dimensions. State provision of international (and even national) transport services is a thing of the past. The Member States' wish to hold on to a competence, which they are no longer able to exercise effectively, is damaging to the Community's role in international economic relations.

In commercial terms, the services industry, including air transport services, is playing a more dominant role in national and international economies requiring 'trade in services' agreements to be negotiated at international level in order to ensure that fair competition prevails and that consumers are protected. This has been recognised by the inclusion of GATS within the WTO. Yet at EC level the competence conferred on the Community under Article 133 concerning the Common Commercial Policy is confined to 'trade' that has been narrowly interpreted by the ECJ.[35]

In the Treaty of Nice the Member States recognised the importance of the services market by widening the scope of Article 133, although not unconditionally, to include 'trade in services'. The Member States, however, have failed the Community by expressly excluding transport from the scope of the Common Commercial Policy. Instead, they confirmed the position taken by the ECJ in Opinion 1/94[36] that transport services are governed by Title V and not by Article 133. This is an unfortunate decision. Globally, the air transport sector is a very important service industry and it no longer makes economic sense to exclude it from the external commercial activities of the Community. It is naive and short sighted for the Member States to continue to cling to past glories and prevent the Community from playing a much more constructive role in the global market that has emerged for air transport services.

Although the ECJ's declaration in the 'open sky' agreements cases does not confer *exclusive* external competence on the Community in respect of air transport agreements, it denies the Member States' competence to enter into international commitments in

[35] Opinion 1/94, above n 11, para 53. [36] Ibid, paras 48–53.

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areas already regulated by the Community. It remains to be seen whether such a declaration will be sufficient to motivate the Council to grant the Commission the exclusive mandate it seeks.

ROSA GREAVES*

II. THE LAMFALUSSY LEGISLATIVE MODEL: A NEW ERA FOR THE EC SECURITIES AND INVESTMENT SERVICES REGIME

A. Introduction

The worldwide repercussions of the Enron collapse have placed the effectiveness of the EC's system of securities and investment services market regulation, particularly with respect to disclosure, market transparency, and auditor independence, under a harsh spotlight.[1] But the regime was already undergoing a sea change that may have long-standing repercussions for how EC securities and investment services markets are regulated. In particular, sweeping changes have been made to the way in which EC securities and investment services measures are adopted. These changes have set the stage for a dramatic change in the detail, regulatory sophistication, and degree of intervention in Member States' systems of the EC securities and investment services regime. They have not, however, required a Treaty revision but are based on the comitology process for delegated law making.

The new legislative model has its roots in the current efforts to complete the integration of the EC securities and investment services market. Since 1979, the EC has attempted to construct a single market in securities and investment services *via* the twin pillars of:

- mutual recognition by the Member States of their respective regulatory systems and
- home Member State control of pan-EC market activity, with all Member States subject to minimum standards in the interests of investor protection, systemic stability, and effective mutual-recognition.

In essence, the system was designed to provide a regulatory passport under which issuers, collective investment schemes, and investment firms could operate across the EC free of obstructive and costly host Member State rules.[2] A by-product of this process was the construction of an embryonic system of market regulation covering the risks of the integrated marketplace and based on the minimum standards required to support the regulatory passport. It became clear by 1998, however, that the legal structure which constructed and regulated the EC securities and investment services market was failing.[3] Large areas of regulation remained largely unharmonised (eg, control of market manipulation; conduct of business regulation; and securities trading market

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[1] For the initial EC response to the Enron collapse see *A First Response to Enron Related Policy Issues*, Note by the Commission for the Informal ECOFIN Council, Oviedo 12 and 13 Apr 2002, IP/02/584.

[2] See generally N Moloney, *EC Securities Regulation* (Oxford: Oxford University Press, 2002).

[3] COM (1998) 625 final, *Building a Framework for Action*.

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