Case C-467/98

Commission of the European Communities v Kingdom of Denmark

(Failure of a Member State to fulfil obligations — Conclusion and application by a Member State of a bilateral 'open skies' agreement with the United States of America — Secondary legislation governing the internal air transport market (Regulations (EEC) Nos 2299/89, 2407/92, 2408/92, 2409/92 and 95/93) — External competence of the Community — Article 52 of the EC Treaty (now, after amendment, Article 43 EC) — Article 5 of the EC Treaty (now Article 10 EC))

Summary of the Judgment

1. International agreements — Agreements concluded by Member States — Agreements pre-dating the EC Treaty — Article 234 of the Treaty (now, after amendment, Article 307 EC) — Scope — Maintenance in force of previous commitments on the occasion of renegotiation — Excluded (EC Treaty, Art. 234 (now, after amendment, Art. 307 EC))
2. International agreements — Competence of the Community — Air transport — Express or implied conferment — Criteria for assessment
(EC Treaty, Art. 84(2) (now, after amendment, Art. 80(2) EC))

3. International agreements — Competence of the Community — Creation of an exclusive competence on the part of the Community by the adoption of a complete system of internal rules — Air transport — Community legislation not sufficient to transfer external competence to the Community
(EC Treaty, Art. 84(2) (now, after amendment, Art. 80(2) EC))

4. Transport — Air transport — Scope of Regulations Nos 2407/92 and 2408/92 — Community air carriers alone operating on intra-Community air routes — No impact on a bilateral agreement concluded by a Member State with a non-member State concerning, in the context of relations between those two States, the possibility for operators of the non-member State to make commercial stopovers in other Member States
(Council Regulations No 2407/92, Arts 1(1) and 4, and No 2408/92, Arts 3(1) and 2(b))

5. Transport — Air transport — Conclusion by a Member State of a bilateral agreement with a non-member State concerning air fares and rates on intra-Community routes and the reservation system used in that Member State — Not permissible
(EC Treaty, Art. 5 (now Art. 10 EC))

6. Freedom of movement for persons — Freedom of establishment — Bilateral air transport agreement between a Member State and a non-member State not guaranteeing to companies of other Member States using the freedom of establishment equal treatment with national companies of that Member State — Not permissible — Public policy reservation not applicable
(EC Treaty, Arts 52 and 56 (now, after amendment, Arts 43 EC and 46 EC) and Art. 58 (now Art. 48 EC))

1. The amendments made, following the accession of a Member State to the European Communities, to a bilateral air transport agreement concluded between that Member State and a non-member State provide proof of a renegotiation of the agreement in its entirety. It follows that, while some provisions of the agreement were not formally modified by those amendments or were subject only to marginal changes in drafting, the commitments arising from those provisions were none the less confirmed during the renegotiation. In such a case, the Member States are prevented not only from contracting new international commitments but also from maintain-
ing such commitments in force if they infringe Community law.

(see para. 39)

2. Although Article 84(2) of the Treaty (now, after amendment, Article 80(2) EC) may be used by the Council as a legal basis for conferring on the Community the power to conclude an international agreement in the field of air transport in a given case, it cannot be regarded as in itself establishing an external Community competence in that field.

The Community's competence to enter into international commitments may arise not only from express conferment by the Treaty but also by implication from provisions of the Treaty. Such implied external competence exists not only whenever the internal competence has already been used in order to adopt measures for implementing common policies, but also if the internal Community measures are adopted only on the occasion of the conclusion and implementation of the international agreement. Thus, the competence to bind the Community in relation to non-member States may arise by implication from the Treaty provisions establishing internal competence, provided that participation of the Community in the international agreement is necessary for attaining one of the Community's objectives.

That hypothesis is that where the internal competence may be effectively exercised only at the same time as the external competence, the conclusion of the international agreement thus being necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules.

There is nothing in the Treaty to prevent the institutions arranging, in the common rules laid down by them, concerted action in relation to a non-member State, or to prevent them prescribing the approach to be taken by the Member States in their external dealings, so as to mitigate any discrimination or distortions of competition which might result from the implementation of the commitments entered into by certain Member States with non-member States under 'open skies' agreements. It has therefore not been established that, by reason of such discrimination or distortions of competition, the aims of the Treaty in the area of air transport cannot be achieved by establishing autonomous rules.
That finding cannot be called into question by the fact that the measures adopted by the Council in relation to the internal market in air transport contain a number of provisions concerning nationals of non-member States. The relatively limited character of those provisions precludes inferring from them that the realisation of the freedom to provide services in the field of air transport in favour of nationals of the Member States is inextricably linked to the treatment to be accorded in the Community to nationals of non-member States, or in non-member States to nationals of the Member States.

(see paras 55-57, 59, 61)

3. Each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations towards non-member States which affect those rules or distort their scope; as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member States affecting the whole sphere of application of the Community legal system.

If the Member States were free to enter into international commitments affecting the common rules adopted on the basis of Article 84(2) of the Treaty (now, after amendment, Article 80(2) EC), that would jeopardise the attainment of the objective pursued by those rules and would thus prevent the Community from fulfilling its task in the defence of the common interest.

The Community acquires an external competence by reason of the exercise of its internal competence where the international commitments fall within the scope of the common rules or in any event within an area which is already largely covered by such rules. In the latter case, Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules.

Thus, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member States or expressly conferred on its institutions powers to negotiate with non-member States, it acquires an exclusive external competence in the spheres covered by those acts.
The same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member States, where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected within the meaning of the judgment in Case 22/70 Commission v Council [1971] ECR 263 (the 'AETR' judgment) if the Member States retained freedom to negotiate with non-member States.

On the other hand, any distortions in the flow of services in the internal market which might arise from bilateral 'open skies' agreements concluded by Member States with non-member States do not in themselves affect the common rules adopted in that area and are thus not capable of establishing an external competence of the Community.

There is nothing in the Treaty to prevent the institutions arranging, in the common rules laid down by them, concerted action in relation to non-member States or to prevent them prescribing the approach to be taken by the Member States in their external dealings.

4. As is clear from the title and Article 3(1) of Regulation No 2408/92 on access for Community air carriers to intra-Community air routes, that regulation is concerned with access to intra-Community air routes for Community air carriers alone, these being defined by Article 2(b) of that regulation as air carriers with a valid operating licence granted by a Member State in accordance with Regulation No 2407/92 on licensing of air carriers.

That latter regulation, as may be seen from Articles 1(1) and 4 thereof, defines the criteria for the granting by Member States of operating licences to air carriers established in the Community which, without prejudice to agreements and conventions to which the Community is a contracting party, are owned directly or through majority ownership by Member States and/or nationals of Member States and are at all times effectively controlled by such States or such nationals, and also the criteria for the maintenance in force of those licences.

It follows that Regulation No 2408/92 does not govern the granting of traffic rights on intra-Community routes to non-Community carriers. Similarly, Regulation No 2407/92 does not gov-
ern operating licences of non-Community air carriers which operate within the Community.

A bilateral air transport agreement concluded between a Member State and a non-member State therefore cannot be regarded as affecting those regulations since it enables an airline designated by that non-member State to transport passengers between that Member State and another Member State of the European Union on flights the origin or destination of which is in the non-member State.

(see paras 88, 90-92)

5. Article 5 of the Treaty (now Article 10 EC) requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

(see paras 110-112)

6. Article 52 of the Treaty (now, after amendment, Article 43 EC) is in particular properly applicable to airline companies established in a Member State which supply air transport services between a Member State and a non-member State. All companies established in a Member State within the meaning of Article 52 of the Treaty
are covered by that provision, even if their business in that State consists of services directed to non-member States.

Article 52 of the Treaty and Article 58 of the Treaty (now Article 48 EC) guarantee nationals of Member States of the Community who have exercised their freedom of establishment and companies or firms which are assimilated to them the same treatment in the host Member State as that accorded to nationals of that Member State, both as regards access to an occupational activity on first establishment and as regards the exercise of that activity by the person established in the host Member State.

In particular, the principle of national treatment requires a Member State which is a party to a bilateral international treaty with a non-member State to grant to permanent establishments of companies resident in another Member State the advantages provided for by that treaty on the same conditions as those which apply to companies resident in the Member State that is party to the treaty.

Those 'Community' airlines may always be excluded from the benefit of that bilateral agreement, while that benefit is assured to national airlines of which a substantial part of the ownership and effective control is vested either in the Member State or in its nationals. Consequently, Community airlines suffer discrimination which prevents them from benefiting from the treatment which the host Member State accords to its own nationals.

In an 'open skies' agreement concluded by a Member State and a non-member State in the field of air transport, the clause on the ownership and control of airlines which, amongst other things, permits the non-member State to refuse or withdraw the licences or authorisations in respect of an airline designated by the Member State but of which a substantial part of the ownership and effective control is not vested in that Member State or in its nationals indisputably affects airlines established in the Member State of which a substantial part of the ownership and effective control is vested either in a Member State other than the host State or in nationals of such a Member State.

The direct source of that discrimination is not the possible conduct of the non-member State but the clause on the ownership and control of airlines, which specifically acknowledges the right of that State to act in that way.
In order to justify such discrimination, the Member State concerned cannot rely on Article 56 of the Treaty (now, after amendment, Article 46 EC) since that clause does not limit the power to refuse or withdraw licences or authorisations in respect of an airline designated by the other party solely to the case where that airline represents a threat to the public policy or public security of the party granting those licences and authorisations and since, in any event, there is no direct link between such (purely hypothetical) threat to the public policy or public security of the Member State as might be represented by the designation of an airline by the non-member State and generalised discrimination against Community airlines.

(see paras 124, 126-129, 131-132, 135-137)