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Abstract: This article argues that the role the Commission plays in European foreign policies goes beyond the execution of the competences delegated by the member states. The Commission is not just the external negotiator of the EU, it can also use its powers as the guardian of the Treaties to expand its foreign policy competences. The case study of international air transport illustrates how the Commission has been able to obtain an external negotiation mandate in June 2003 that member states were originally opposed to. The analysis draws particular attention to the Commission's reliance on the European Court of Justice and to a cognitive strategy centered on the United States. By means of these two tools, the Commission was able to affect the default condition of member state preferences and reorient the focal point of intergovernmental negotiations.

Keywords: European Commission, European foreign policies, external negotiation mandate, international air transport, open aviation area, transatlantic relations

Introduction

What kind of international actor is the European Union (EU)? Much of the literature on European foreign policy has revolved around this question, and there is a trend now to acknowledge that the EU has an international presence that one can analyze either by looking at the particular institutional set-up of the EU's foreign policies or by studying the effects of the EU on the international scene (cf. Carlnaes 2004). Yet, speaking about EU foreign policy as more than just coordinated actions of the member states requires specifying the different elements of this compound international actor (cf. Smith 2004). In particular, what is the role of the supranational institutions in the making and implementation of European foreign policies?[1]

This article examines this question by looking at the European Commission. In EU foreign policy, accounts have most often analyzed how the Commission has acted as an external negotiator (Nuttall 1996; Bruter 1999; Nugent 2001: 297-323). However, focusing on the role as an external negotiator only is misleading if one wants to understand the contribution of the Commission to European foreign policy development. It comforts the vision of an unproblematic principal-agent relationship between the Commission and the member states: member states decide to delegate certain competences to the Commission which then simply executes their will on the international scene.[2] Through a case study of external aviation relations, this article shows that one also needs to consider how the Commission is able to use its role as the guardian of the Treaties for obtaining external competences that member states have traditionally denied.[3] Extending Susanne Schmidt's (2000) analysis of Commission activism in the integration of the internal market, the case study shows how the defense of the EU's internal aviation market has given the Commission a

margin to affect the default condition and the member states preferences on external relations. As the guardian of the Treaties, the Commission was able to use the European Court of Justice (ECJ) to put into question the existing framework. Parallel to a judicial strategy, the Commission pursued a cognitive and rhetorical strategy: by concentrating its efforts on the United States (US), it used the threat of American competition to construct a pan-European issue identity on aviation matters. Thus, the Commission not only executes the member states will on the international scene, it also works independently towards increasing its external competences.

The article begins by discussing the competences of the European Commission and spelling out the argument in brief. It then turns to the case of international air transport. An examination of the traditional aviation regime clarifies how important nation-states are in international air transport, even after the integration of the internal aviation market in the EU. In order to preserve this national logic, member states were quite opposed to transferring external negotiation rights to the European Commission. After presenting the particular stakes of transatlantic liberalization, the analysis of the Commission's strategy for overcoming member state opposition concentrates on the Commission's legal and rhetorical toolbox, showing how it relied on ECJ rulings and refocused its activism on US relations only. The conclusion looks beyond the case study and discusses its implications.

The Commission in European foreign policies

The European Commission has a multitude of functions – from policy formulation, to administration, monitoring, mediation and external representation (see

Nugent 2001: 10-15; Cini 1996: 18-33) – which Dimitrakopoulos (2004: 1) divides into systemic and sub-systemic roles. Systemic roles contribute to the maintenance of the EU as a system of government and include the Commission's powers as (a) the defender of the legal order and (b) external negotiator. Sub-systemic role relate to policy-making and include drafting directives or managing their implementation.

In the context of studying the EU as an international actor, the Commission's power to represent the EU externally has been of particular interest (e.g. Nuttall 1988; 1996), all the more since the portfolio of its competences has been rapidly expanding in recent years (Nugent and Saurugger 2002). While the Treaty of Rome merely provided for the Commission to negotiate on behalf of the European Community in the Common Commercial Policy, the Commission now acts not only on an expanding portfolio of trade issues, but also on cooperation and association agreements; it is involved in the enlargement process at different stages; manages various parts of the EU's development and humanitarian aid programs; and negotiates on behalf of the member states on new community policies such as return of illegal migrants (see MacLeod, Hendry and Hyett 1996).

Many accounts of the Commission's role in European foreign policy remain fairly descriptive and concentrate on the way in which it executes the growing number of external competences. Increasingly, however, analysts have drawn attention to the fact that the role of the Commission is much more complex that simply translating the member states will in foreign affairs (Cameron 2002; Cameron and Spence 2004). Informal rules reinforced by national diplomats and formal legal arrangements have gained in importance over the years and have seemingly moved parts of European foreign policy beyond pure intergovernmental decision-making (Smith 1998; Smith 2001). Indeed, looking at external competences only is insufficient for understanding

the part the European Commission plays in the making of foreign policies, because it obstructs an analysis of how the EU administration obtained these competences.

While most accounts of such Commission activism concentrate on intra-European policy domains, the Commission's behavior is comparable in external policies. Routinely, the Commission submits comments on issues outside of its competence, tries to establish links between such issues and trade relations, which are within its competence, or takes external actions on internal policies (Nugent 2001: 298; Nugent and Saurugger 2002).[4] In the search to expand its external competences, the Commission has to rely on ECJ rulings. Of particular importance has been the increasingly expansive interpretation given by the ECJ to the principle of parallelism, whereby the existence of internal policy competences justifies parallel external powers (Nugent 2001: 298; MacLeod, Hendry and Hyett 1996).

In order to think more systematically about these attempts to expand its external competences, it is helpful to turn to Schmidt's (2000; 2004) analysis of the Commission's room for maneuver vis-à-vis the member states. According to Schmidt, the Commission has two particular resources for building up pressure on the Council negotiations. First, as the guardian of the Treaties, the Commission is responsible for defending the legal order of the EU. Whenever member states do not meet their obligations under European law, the Commission can start an infringement procedure (Art. 227). If the government concerned does not respond to the requests and adapt its behavior, such a procedure leads to an ECJ ruling. Secondly, the Commission administers competition law in the EU (see Title VI, Chapter 1). In this function, it can confront both firms and national regulations that are not in conformity with principles of EU competition law: it can break up cartels, challenge the abuse of dominant positions and prevent national treatment or subsidies.

Combined with the right to initiate legislation, these capacities allow the Commission to play two different strategies to affect outcomes of Council negotiations: either it tries to change the preferences of individual member states through a *divide-and-conquer* strategy, or it tries to affect the default condition on which member states have to decide through a *lesser evil* strategy.

In a divide and conquer strategy, the Commission uses its legal obligations to single out member states that might vote against the Commission's interests in a Council negotiation and requests them to adapt parts of their national situation. This mechanism can be useful to achieve the liberalization of sectors where some countries had national monopolies. With reference to competition law or the different freedoms, the Commission challenged parts of the existing arrangements, making the national situation incrementally less hostile to more thorough liberalization in the sector as a whole. The Commission thus affects the preferences of individual member states in preparation for a liberalization proposal: "once targeted countries have responded to Commission requests and incurred the costs of domestic reform, they are themselves interested in comparable community wide-changes," (Schmidt 2000: 47).

In the lesser evil strategy, the Commission works towards change by proposing a comprehensive reform that puts pressure on unwilling member states to propose alternatives. In the case of electricity liberalization, the Commission was able to threaten an unbalanced liberalization of the European market through its legal resources in the preparation of a more comprehensive liberalization. France, which would have preferred maintaining national monopolies, was forced to propose a counter-plan towards liberalization that was less comprehensive than the Commission would have suggested but steered clear of the unbalanced liberalization the Commission threatened. The Commission thus defined the default condition, which

member states had to weigh against potential changes: it was not the status quo of traditional electricity provision, but a disadvantageous form of liberalization.

In addition to the mechanisms Schmidt defines, the Commission is also an arena where ideas are exchanged (Muller 1995; Dimitrakopoulos 2004:1). As such, it can employ a third less aggressive but useful strategy: rhetoric and cognitive framing. Through the framing of policy-stakes in terms of pan-European goals, the Commission can work towards unity among member states objectives.[5] The tendency of the Commission to work towards consensus-building has been noted by many observers (e.g. Cini 1996: 28-32). However, achieving consensus is a quite difficult task when the interests of member states diverge, and if they already converge, it is more helpful to speak of common interests rather than consensus-building. In the realm of foreign policy, the stakes are different. Member states might have divergent interest among each other, but they also have interests vis-à-vis countries outside the EU, which co-exist with their internal preferences. Studying the construction of a consensus within Europe is thus a way of asking how the focal point of member state negotiation got moved from internal differences to a common external interest (see Goldstein and Keohane 1993). The rhetoric employed by the Commission can provide some useful insights into this question.

Indeed, the ability to behave as an international actor depends crucially on a collective identity or at least a collective issue identity, all the more in the European context (see Wendt 1994; Sedelmeier 2004). As White points out (1999: 55), "the key question […] is how the new Europe as international actor might develop a strong identity […]." To be sure, political action with reference to identity can be purely instrumental or strategic, but it can nonetheless affect future actions either because it forces certain member states to act in the continuation of previously declared

commitments or because it creates focal points for future negotiations (Schimmelfenig 2001; Sedelmeier 2003). Put more concretely, in a foreign policy context, the Commission can gain additional support for its goals if it can play off another international actor, against which it would be beneficial for EU member states to unite. Constructing opposition is therefore an important cognitive strategy for the EU in international affairs.

To summarize, this article draws attention to the particular tools that are available to the European Commission to affect and put pressure on decisions that the Council can take on foreign policy proposals: legal proceedings and rhetorical strategies. The following case study will highlight how the combined use of these elements has enabled the Commission to obtain limited external aviation negotiation rights, even though member states had repeatedly denied the transfer of such competences prior to June 2003.

The national logic of the bilateral system of international aviation

Understanding the position of EU member states on international air transport negotiations requires understanding the bilateral system that governs aviation. The present regime of international air transport was put into place in 1944 at the International Civil Aviation Conference in Chicago. Bilaterally negotiated air service agreements constitute its foundation and represent a tight and heavy network of regulation. For the airline business, the tight network of air service agreements is decisive. To date, over 2 000 bilateral agreements have been registered; counting all informal exchanges, additions and writing, one observer has even estimated the total

number of bilateral agreements to be as high as 10 000.[6] The traffic rights negotiated between governments in the bilateral air service agreements cover a large number of details, including points to be served, routes to be operated, types of traffic to be carried, capacity, tariff conditions, designation of airlines as well as their ownership and control. This last item is one of the most important ones, because it requires an airline designated by a country to be effectively owned or controlled by it. In other words, the US government can only designate US carriers and the German government only German carriers.[7] Within the current framework, no airline can make seemingly simple business decisions of increasing its flight offer, targeting a new destination, soliciting foreign investment or relocating its headquarters.

This extensive international regime used to rest on the state-controlled national air transport regimes as well. Most countries maintained one or several national airlines, which were either subsidized or state-owned. Economic regulation was the rule. In the US, the Civil Aeronautics Board (CAB) controlled entry, exit, tariffs and subsidies of airlines in the domestic markets. Since air services were thus under the exclusive control of a governmental agency, even general competition policy – i.e. antitrust law – did not apply to the sector. Similar regulation was the standard throughout the world.

During the late1960s and early 1970s, critiques concerning the inefficiency of the regulatory system began to grow in the US. In 1978, the Airline Deregulation Act provided for a phasing out of all of the CAB's activities by 1984. The quick domestic deregulation has led to virulent re-organization of the American airline service industry. At the time, it was the first thorough dismantling of an entire system of government control.

Eager to apply the new solutions to its own air service industry, the United Kingdom (UK) deregulated the sector in a similar manner under the Thatcher government in 1979. Both the UK and the Netherlands had always had a somewhat less restrictive air transport policy than the rest of Europe (see Kassim 1996: 112). In most other European countries, by contrast, national control over the airlines was deeply rooted. Although the specific models varied, most of them had very protectionist policies of what was considered a public service sector monopoly. Throughout Europe, the government held a majority stake or had total control of their national "flag carrier" airline.

The US experience did little to change this, even though European carriers were operating at a loss. However, it did spark the interest of EU officials and of several national officials from the more liberal member states, who wanted to apply the principles of a common market to intra-European aviation as well. The first two Commission memoranda on aviation in 1979 and 1984 received a frosty reception from most national governments and airline alike. Despite this lack of interest in an EU wide solution, a 1984 agreement between the UK and the Netherlands allowed any airline in either country to operate between the two without the need to seek further government approval. With the two countries in favor of further liberalization, the Commission continued pursuing the idea of an EU-wide approach through what has been called a "stick and carrot approach" (O'Reilly and Stone Sweet 1998).

On the one hand, the Commission exploited an ECJ ruling, the *Nouvelles Frontières* decision to act against national price fixing in the air transport sector by means of EU competition law.[8] Based on the decision, the Commission called upon all European airlines following similar procedures to abandon their activities. Even though this would have been impossible, the pressure that was put onto governments

augmented the political weight of pro-liberalization forces in France and Germany. On the other hand, positive incentives were necessary as well, as the firm opposition of Italy, Greece, Denmark and Spain threatened to block a unanimous Council decision. While the Southern countries argued that they did not have the capacities to adjust to the increased regional air traffic proposed by the Commission package, Denmark feared that the changes would unbalance its regional development policies. Brokered by the Commission, the governments in favor of the proposal suggested a compromise. The regional airports in question in the four countries were to be excluded from liberalization during a first stage on liberalization, but further measure could not be retarded after the mid-1990. On the basis of this compromise, EU-wide agreement on the air transport package was reached in late 1987 (for further discussion see Kassim 1996; Holmes and McGowan 1997; O'Reilly and Stone Sweet 1998; Staniland 2003).

The 1987 package began the transfer of EC authority over EU-wide air transport service trade and set off a gradual liberalization. Under qualified majority voting introduced by the Single European Act, two further packages were adopted in July 1990 and July 1992. By April 1, 1997, the internal air transport market among the 17 states of the European Economic Area (EEA) was completed. By far the most important one, the third package transformed national carriers into “community airlines” (Mawson 1997). It opened up all traffic rights to Community airlines, including the freedom to provide cabotage: the right to carry passengers or cargo between two points of a country which is not the home country of the airline. The system created by the EU was based on the idea of a Community license. Any airlines whose capital is held mostly by a member state or its nationals can obtain this license and has automatic access to the Community market. Within the EEA market, traffic

on all international routes is unrestricted and fares are no longer submitted to the national authorities for approval, although some control mechanisms persist in special instances and some public service obligations remain. Originally an international market, the EEA market resembled the US market from 1997 on. The member states did, however, retain the authority over external air service negotiations with non-EEA governments.

Member state resistance to a transfer of external competences

The European set-up after 1997 is quite paradoxical. Internally, airlines are community-licensed carriers with the right to operate out of any European country they like. Externally, however, they have to abide by the bilateral agreements that constituted part of the international regime. A British airline can offer flights between Paris and Nice, but could not fly out of France to serve an international point beyond Europe. International flight agreements continued to be negotiated by national delegations and contained the traditional ownership and control clause, which specified that they had to be national carriers. While this arrangement annoys integration-minded observers who see the limits of internal aviation integration if it was not followed by external reforms, most member state representatives felt comfortable with it and insisted on the necessity to keep external negotiation rights in the hands of the individual European states.

In fact, the Commission's quest for an external negotiation mandate in air transport dates to the beginning of internal aviation integration and had repeatedly been denied by the member states. As early as 1984, the European Commission

identified external aviation relations as a major aspect of a potential Community air transport policy (European Commission 1984). The first Commission proposals on external competences date back to February 1990 and March 1992, which the Council refused in 1993. In April 1995, the Commission raised the matter once more and gained a very limited negotiation mandate under which it has been able to negotiate agreements with countries such as Norway, Sweden, and Switzerland only. Once the internal aviation market had been liberalized, the Commission pointed to constraining impact of bilateral agreements and argued that such agreements could be carried out effectively, and in a legally valid manner, only at the Community level. A Commission official remembers that these attempts encountered a frosty reception from the member states. Since the Council had refused all direct requests, the Commission tried to seize Article 133, which grants the Commission the right to negotiate on trade matters. This door was closed by the Intergovernmental Conference in Nice: the Nice Treaty specifies that service trade competences do not apply to bilateral transport negotiations (Article 133 (6)). However, the Council of Transport Ministers eventually granted the Commission a limited mandate for the negotiation of soft rights on the basis of Article 80.[9]

Throughout the 1990s, there was little movement towards transferring hard traffic rights. EU member states were quite resistant to such proposals, feeling that the Commission was understaffed and not well experienced in this domain.[10] National administrations had large units in charge of bilateral negotiations: each government had an experienced staff of external negotiators, which have dealt with the issue for a very long time. Of the 2 054 bilateral air service agreements in place world-wide in 2002, almost 1 500 were operated by EU Member States (House of Lords 2003). The maintenance of most of these agreements required regular meetings with the partner

governments to re-evaluate frequencies, designations and other issues of concern. Their long experience and their legal expertise seemed much more valuable than the Commissions' integration ambitions, seemingly an attempt "to grab competences that they are not ready to fill, neither with content nor with staff."[11] In response to receiving the soft mandate the Commission's DG Transport and Energy (TREN) established an office that would handle bilateral negotiations called "air service agreements and economic regulation". In 2000, only about 6 people worked in this unit.[12] Furthermore, there was little interaction between the traditional national air transport units and the European Commissions, which did not help to increase member state confidence.

Hence, member state resistance to a transfer of external competences was quite strong in the beginning of 2000, despite the integration of the internal market. After 15 years of trying, the Commission's attempts to gain external competences were still unsuccessful. But the Commission had worked on several fronts and had yet another card to play: opposition to US competition. For understanding how US competition became a useful focal point for Commission activism, it is necessary to examine the recent evolution of transatlantic aviation.

A European perspective on US-led liberalization of international air transport

During the 1990s, the EU hadn't been the only one to liberalize its regional market for international aviation. The US also sought to overcome the constraints of the highly regulated international air transport regime by single-handedly reducing the complexity of bilateral agreements. The US-led strategy of bilateral liberalization was

called “open skies” and it started in 1992. Previously, troubled US carriers had asked to be allowed financial support from foreign carriers (see Tarry 2000). Yet the early alliances between carriers such as Northwest and KLM Royal Dutch Airlines had to be granted anti-trust immunity in order to be able to operate. The fact that cross-border alliances were tolerated by the US government was part of its larger policy project. It started negotiating with foreign countries to liberate bilateral agreements and the granting of anti-trust immunity for an alliance came at the price of opening the market of the airline’s country (see Yergin, Vietor and Evans 2000). Since early alliances were made in countries that had only one international airline, the calculation worked out: what was good for KLM was good for the Netherlands, and so the government considered the trade-off a fair one. The first open-sky agreement was signed between the US and the Netherlands in September 1992. After a package of open sky agreements with smaller European countries, the next important step was an open sky agreement with Germany in 1996, with antitrust immunity being granted to an alliance between United Airlines and Lufthansa. By the end of the year 2002, 86 open sky agreement had been signed, 59 of them with the United States. Under an open sky agreement, airlines can operate more like normal businesses without needing governmental negotiations if they want to change frequencies or capacities. The only restrictions that remain are (1) the right to operate domestic services in the partner country and (2) foreign ownership. In other words, only Dutch airlines can operate under the Dutch-American open sky agreement.

While European airlines benefited considerably from their alliances with US airlines and the new business opportunities under open skies agreements, European observers were critical of a perceived US-bias of these arrangements. The fragmentation of the European market is perceived to create an advantage for US

carriers.[13] While European carriers can only fly to the US from their home country, US carriers can fly from any "open skies" EU country to any US point. US carriers have also been ceded the right to fly from one open skies country in the EU to another, which is effectively a form of cabotage.[14] Most importantly, carriers within the EU can only merge if the US doesn't refuse to grant the same traffic rights to the new company. Over the past decades, for example, British Airways and KLM have talked repeatedly about merging. Since British Airways is considerably larger than KLM, the merger would have been primarily British. The open-sky agreement with the US, however, specified that the Netherlands could only designate a company that was 51% Dutch. The necessary renegotiation of these agreements would then mean that the merger would take place if the US approves it, which often involves other concessions.[15]

These imbalances have led industry within Europe to start thinking about new approaches to liberalization. To European airlines, "open skies" seemed fundamentally biased towards the US, which has the political clout to negotiate anything they want.[16] In an effort to find a Europe-wide solution, the Association of European Airlines (AEA) proposed a plan for a common aviation area between the US and Europe that would go well beyond open skies. The European Commission was quite enthusiastic about the proposal and quickly integrated it into its policy goals for international aviation. After some initial discussion within the EU, the Commission proposed the plan for a so-called Transatlantic Common Aviation Area (TCAA) to the US in 1999 (Association of European Airlines 1995; 1999). The US only took note of the idea, but was unwilling to enter into more serious discussion about the ambitious project as long as the Commission did not have external negotiations rights.

Overcoming opposition: the Commission's legal and rhetorical toolbox

In the late 1990s, the discussion over external negotiation rights between the Commission and the member states was nowhere close to being resolved. The intra-European aviation market was successfully integrated and the member states did not seem to be particularly bothered by the incomplete integration imposed by their continuing bilateral agreements. US-led bilateral liberalization created some asymmetries in favor of the US, but open skies had also considerable benefits. Member states had a competent staff working on bilateral air transport agreements and felt that granting external negotiation rights to the Commission would bring no added value and contained many risks.[17] So what happened between then and June 2003, when the member states agreed to grant limited external air transport competences to the European Commission?

The strategy of the Commission was twofold.[18] First, it seized its obligation as the guardian of the Treaties to bring infringement procedures against the bilateral agreements of several member states. Second, acknowledging that member states were opposed to granting a comprehensive external mandate, it used opposition to the US to create a focal point for a European consensus.

As the defender of the EU law, the Commission argued that the old bilateral agreements, and most importantly the nationality clause, were in conflict with the concept of a Community carrier established through the third liberalization package voted by the Council of Ministers. In December 1998, the European Commission brought seven cases against the open sky agreements of the Austria, Belgium, Denmark, Finland, Germany, Luxembourg and Sweden and an eighth against the

bilateral “Bermuda II” agreement between the UK and the US in December 1998. In October 1999, the Netherlands decided to join the Court cases in support of the other member states. A second batch was later brought to the ECJ against countries that had concluded open sky agreements with the US after that date. In particular, the Commission argued that elements of the bilateral agreements were already covered by Community legislation. Since the body of law applying to aviation has evolved so substantially, the Commission should have exclusive competence over external aviation.

Parallel to this legal strategy, the Commission concentrated its demands on transatlantic relations only. When the Commission first demanded a mandate for external negotiations for the US, “everybody was very much against it [and] quite shocked.”[19] The proposal gained legitimacy, however, through the draft response of the Association of European Airlines, which eventually led to the TCAA proposal. The rational behind the airlines’ proposal was the need for consolidation within Europe.[20] For the Commission, the demands of AEA highlighted the incompleteness of the internal aviation market. Even though the AEA statement underlined that the EU had yet to prove the “added value” of an EC solution, the project corresponded to the interests of the European Commission and was quickly adopted as a transport policy objective. Promoting the proposal, the Commission argued publicly that the US open sky policy created an unleveled playing field (Van Miert 1995). Only if European countries spoke up with one voice could this disequilibrium be overcome. The idea of a TCAA permitted the Commission furthermore to argue the need for a “new” solution, not just a multilateral open-sky agreement that would still have member states at the negotiation table. During the years that the ECJ decision was pending, the Commission continued to work up a consensus on an EU-US agreement

within the EU member states. They traveled to Washington D.C. to meet with their US counterpart to discuss the existing proposals, only to find that the US was quite unimpressed by the ambitious European proposal. Faced with the doubts of their member states and the resistance of the US, DG TREN commissioned a study on the benefits of an open aviation area between the EU and the US from an American consultancy, the Brattle Group.

On November 5, 2002, the ECJ finally issued the ruling on the first batch of air service agreements, ruling that the nationality clause and several other areas covered by the open sky agreements were issues of exclusive competence of the European Commission, but underlining that the negotiation of traffic rights with third countries remained in the hands of the member states. The Commission was nonetheless able to employ the ruling to create a real urgency on the question. In a first communication dated November 19, 2002, it called upon the member states to denounce existing operations under the agreements in question (European Commission 2002a). The request was clearly too radical to be put into practice, but the European Commission sought to underline that it would necessarily have to be part of a new solution.

The question immediately arose how the articles in question should be brought into conformity with Community law. The Commission declared that it was ready to play its part (European Commission 2002b), but the US government did not necessarily see why this would be the case (Shane 2002). To them, the ECJ ruling had underlined that the Commission was *not* competent for external aviation negotiations. If the nationality clause of the open sky agreements and the Bermuda II agreement would have to be changed, to include the notion of a European or "community" carriers, then this would logically have to be negotiated between the member states

and the US government. Since the US government was very open to reconsidering the nationality clauses, it proposed a meeting with its traditional negotiation partners in Paris in February 2004. Yet the Commission was not willing to be sidelined. Without invitation, a representative from DG TREN appeared at the Paris meeting and reminded the member states of the ECJ judgment, which stated that ownership and control was under Community competence through Article 43 of the Treaty. Indeed, the ECJ ruling had left a real competence question for the future of air transport negotiations. While traffic right negotiations were outside of Community competence, several aspects negotiated within the agreements were within it. This paradox blocked member states from negotiating alone with the US, but did not provide a legal base for the Commission entering into negotiations with the US.

In a second communication on February 26, 2003, the Commission reiterated the need for a negotiation mandate, but modified its initially somewhat aggressive position, by arguing that it was necessary to distinguish between the infringements and the need for a wider mandate (European Commission 2003). It clearly distinguished between different kinds of requests: (1) a specific mandate to negotiate an agreement between the EU and the US, (2) a horizontal mandate for international negotiations in those areas considered Community competence, and (3) a procedure for coordination and information on international negotiations between the Commission and the member states.

Between the two communications issued by the European Commission, the Brattle Group had finished their report on an Open Aviation Area between the EU and the US (Moselle, et al. 2002) – the name had been changed to dissociate the project from the old TCAA. While addressing the main concerns of the US, the report estimated economic benefits to fall especially on the European side.

The legal strategy and the insistence on US competition eventually paid off. Shortly after the ECJ decision in November 2002, a representative of a liberal minded member state had still expressed their doubts about the benefits of a competence transfer.

> It is not certain that we will grant a mandate for US negotiations to the EU. We have had a series of discussions on this, but so far the Commission had not be able to clarify the value added for a competence transfer in this domain. If they can do so convincingly, we will consider their proposition, but so far we are still waiting.[21]

In the spring of 2003, this national resistance has faded, especially in the countries that already had open sky agreements with the US.[22] Even in the United Kingdom, which had traditionally been very hesitant to enter into negotiations of opening their market for fear of losing privileged access to Heathrow airport, a European solution was considered an advantage.[23] Yet neither the economic benefits or losses of open sky agreements nor the bilateral negotiation had changed dramatically in early 2003.[24] So what brought about the shift in national positions?

Between November 2002 and spring 2003, several changes had become evident. First, the judicial strategy of the Commission had changed the default condition of external negotiations. Member states could not keep their old agreements, nor negotiate new ones without the Commission's participation on the ownership and control clause. Second, the cognitive strategy concentrating on US opposition has enabled the Commission to specify the value added of a competence transfer in dollars and cents and to create a sense of European unity against unfair US advantages.

Based on the second Commission communication after the ECJ ruling, the Council of Ministers finally granted a negotiating mandate for external aviation to the

Commission on June 5, 2003. The objective of the mandate was twofold: on the one hand, member states wanted to clarify the procedure and the coordination for external negotiations of traffic rights with third countries between the Commission and the national delegations; on the other hand, they sought to advance on negotiations with the US government on an Open Aviation Area between the two countries.[25]

Conclusion

This article has examined the case study of international air transport in order to understand how the Commission contributes to the development of the EU's foreign policies. Instead of simply executing the external competences it has obtained from member states, the Commission also has room for maneuver which allow it to increase these competences. Similarly to Schmidt's (2000) analysis of internal market integration, the increase of external competences derives from the Commission's reliance on legal strategies. Certainly, not all legal strategies are bound to work. The Commission's attempt to rely on its trade mandate proved unsuccessful and the administration of competition policy was only important in the integration of the internal aviation market. However, its right to start an infringement procedure, combined with a cognitive strategy of using the US as a focal point for an EU consensus ultimately led to the Council decision on June 5, 2003.

As a guardian of the Treaties, the Commission was able to create legal uncertainty about the appropriate procedure Secondly, as an arena for elaborating consensus, it had developed a very concrete proposal centered on US-EU relations, which member states were eventually willing to agree upon. The first of these two elements affected the default condition of member states; the second created a focal

point for rearranging the interest distribution of member states around a new stake. Even though member states were firmly opposed to ceding sovereignty of external negotiations to the Commission, they did feel that they needed to unite in order to be able to negotiate with the US. The Commission's Open Aviation Area proposal was a suitable solution to both concerns: it provided a lesser evil and thus an acceptable answer to the legal uncertainty and helped to create a European issue identity. The mechanisms upon which the Commission can rely in its interactions with the Council of Ministers are therefore quite similar in external relations and internal integration, even though rhetoric centered on common goals and identity plays a larger role when the EU acts towards the outside.

As a single case study, this article is limited in the generalizations that can be made about other foreign policy areas. However, it is not meant as a mechanistic prediction stating that the Commission will *always* rely on legal or cognitive strategies to increase its external competences. Rather, it challenges the null hypothesis which assumes that this will never be the case and cautions against accounts of institutional competences in European foreign policy analysis. Studying the activism of the Commission is helpful to understand the pitfalls of delegation and to appreciate the "more varying patters of supranational autonomy" (Pollack 1997: 101) Despite variation in the particular combination of tools the Commission will use in different policy areas, understanding how the Commission can increase its competences needs to be part of an institutional analysis of EU foreign policy development.

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Notes

[1] European foreign policies refer here widely to all political actions of the European Union that specifically address issues beyond its own boundaries. They cover not just the Common Foreign and Security Policy but also areas such as trade relations and foreign economic policy, development aid, regional cooperation, enlargement, the promotion of human rights or external elements of migration policy.

[2] For nuanced discussion of the principal-agent problem in EU governance and the changing relations between the Commission and the member states see Pollack (2003) and Kassim and Menon (2003).

[3] The analysis of the case study is based on 26 semi-directed interviews with government representatives, airlines and aviation experts from the United States and the European Union, carried out between September 2002 and October 2003.

[4] Energy, the environment (Bretherton and Vogler 2000) or competition policy (Damro 2001), for example, are areas where the Commission has taken a lead in promoting and negotiating international agreements.

[5] Jobert and Muller (1987) call policy frames that govern a particular sector "référentiel sectoriel" and Muller (1995) has argued that the European Union is a political space where such policy frames can be defined. This is precisely what happens in the case of international air transport. For more information, see Surel (2000) and Muller (2004).

[6] Interview in Brussels on November 26, 2002.

[7] Effective ownership is defined in the US as less than 25% foreign ownership, across the EU as less than 49%.

[8] The *Nouvelles Frontières* decision of 1986 annulled a French judgment against a number of private airlines and travel agencies operating in France, which had sold cheap, non-approved tickets. The ECJ ruled in favor of these agencies, arguing that the price-fixing mechanisms of the French Civil Aviation Code distorted competition within the EC.

[9] Soft rights are auxiliary services related to the exercise of traffic rights, such as ground-handling, aircraft maintenance or repair, leasing or rental services or marketing and reservation services. Traffic rights are hard rights and cover the actual movement of an air carrier in or between foreign countries.

[10] Interviews with government and airline representative in the EU on November 18, 27, December 2 and 5, 2002.

[11] Interviews with representatives from national governments and airlines, 27 November and 2 December 2002.

[12] Interview with a representative from the European Commission, 21 October 2003.

[13] Most importantly, foreign entities cannot own and control more than 25% of a US carrier ("ownership and control") or establish a new carrier within the US ("right of establishment"). A foreign carrier cannot provide domestic services within the US ("cabotage") or lease an aircraft with a crew to a US company ("wet-leasing"). Lastly, foreign carriers are also excluded from a government program, which assigns US government personal on flights operated by US carriers ("Fly America"). See House of Lords (2003).

[14] While it is true that this right is little used by passenger airlines, it does facilitate cargo operation of US cargo airlines within Europe.

[15] In this particular case, the US wanted to use the occasion to renegotiate its access into Heathrow airport in London.

[16] Interviews with EU airline representatives on November 27 and December 2, 2002.

[17] Interview with member state representatives, 18 and 27 November 2002, 20 August and 5 September 2003.

[18] In contrast to other policy domains, the external aviation strategy was quite coherent and not affected by internal divisions within the Commission. A representative of DG Competition described the cooperation with DG TREN as "very intense" since they "share the common goals of liberalization and competition". Interview on September 10, 2003.

[19] Interview with a representative from the European Commission, 21 October 2003.

[20] For a detailed discussion of the interplay and feedback effects of airline lobbying and the Commission strategy, see Woll (2004).

[21] Interview with a public official of the national government's air transport department on November 22, 2002.

[22] Only the UK, Ireland, Spain and Greece have not concluded open skies with the US.

[23] As a government representative remarks, "we have had such a difficult time negotiating by ourselves with the Americans, the EU can only be more successful." Interview on May 20, 2003. Interestingly, the US observer put it similarly, "after all our frustration in negotiating with the British, it cannot be worse with the Commission."

[24] Furthermore, actual US competition was not very threatening since American carriers were still struggling with the aftermath of September 11th.

[25] These talks are still going on at the time of writing and have been somewhat difficult due to the divergent ambitions of the US and the EU delegation. For more information, see John Byerly (2003), "US Aims for Comprehensive Accord in Air Service Talks with EU," Speech delivered at the United States Mission to the European Union," 29 September, available at http://www.useu.be/ Categories/ Transportation/Sept2903ByerlyOpenSkies.html and Loyola de Palacio, "Jurassic Flight," *The Wall Street Journal*, 10 May 2004.

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