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Commission and member states in EU-US Open Skies negotiations: opportunities and constraints in the internal decision-making process

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1. Introduction

Since 30 March 2008, European and American airlines are able to fly from any point in the EU to any point in the US. This liberalization of transatlantic air services was preceded by long, difficult and politicized negotiations between the EU and the US, which ultimately resulted in the 2007 EU-US Open Skies Agreement. Before the entry into force of this agreement, European airlines could *de facto* only operate services between a city in the US and a city in their home member state. Indeed, transatlantic aviation used to be regulated by bilateral agreements in which traffic rights were agreed upon between the US and each European member state separately. The EU-US Open Skies Agreement, by contrast, is an EU wide agreement replacing the various bilateral agreements between the US and the member states. On behalf of the EU, this agreement was negotiated by the European Commission, authorized by the member states to express the EU's single voice. Consequently, the Commission did not only negotiate at the external level with the US Administration, but it also had to negotiate at the internal level with the member states it represents. This paper analyses the internal negotiations in the EU between the Commission and the member states with regard to the external negotiations leading to the 2007 EU-US Open Skies Agreement.

The reason why the Commission is involved in constant negotiations with the member states lies in article 300 of the EC Treaty. This article stipulates that the Commission conducts the negotiations on an international agreement to which the European Community will become a party. However, the agreement reached (and initialled¹) by the Commission externally, has to be approved by the member states in the Council internally before it can become legally binding.² Consequently, if the Commission wants to be successful in the external negotiations, constant negotiations to anticipate on the member states' reactions and to keep them on board are necessary. This is the most effective way to avoid an 'involuntary defection'. An involuntary defection occurs when the Commission is called back by the member states at the moment it has made a commitment vis-à-vis the external negotiation partner (Putnam, 1988; Lantis, 2006). Hence, the EU-US Open Skies agreement is not only negotiated between the EU and the US, but inside the EU, between the Commission and the member states, as well. This paper focuses on the internal decision-making process in the EU with regard to the EU-US Open Skies negotiations. More in particular, it analyses the

¹ Initialling an international agreement is the act by which the negotiators confirm that a particular text is the result of the negotiations. It does, however, not yet legally bind the negotiators vis-à-vis each other, as the signature and the ratification of the agreement still have to follow. Nevertheless, initialling an agreement indicates a political commitment of the negotiators vis-à-vis each other.

² Moreover, as the Open Skies Agreement is a mixed agreement, to which both the European Community and the member states are a party, it has to be signed and ratified by each member state separately.

opportunities and constraints the Commission is facing vis-à-vis the member states when an international agreement is negotiated. In this sense, it extends the comprehensive studies by Meunier and Woll on the relation between the Commission and the member states on the authorization and mandate for the Commission to negotiate an Open Skies Agreement with the US (Meunier, 2005; Woll, 2006). However, the internal EU dynamics of the actual negotiation process (from 2003 to 2007) has not been studied so far. This paper fills that gap. The basic question behind the analysis is how the European Commission has succeeded to reach an EU wide Open Skies Agreement with the US, which was ultimately accepted by the member states. This question is particularly relevant since for a long time it did not seem likely that the Commission would succeed in this objective it had since the 90s. Three dynamics pointed indeed in the opposite direction.

First, for a long time member states have been reluctant to authorize the Commission to negotiate international air transport agreements. Because of reasons of national security and prestige, they historically preferred to keep national authority on the external dimension of aviation policy. This has led to a long-lasting struggle by the Commission to become active in this domain. Second, for a couple of big member states, these negotiations were extremely politically sensitive. Big economic interests were at stake, particularly for the UK, since the greater parts of flights between the EU and the US pass through London Heathrow.³ The UK-US market was very protected, since the air traffic between both countries was still regulated under an old-fashioned Bermuda II agreement, stipulating that only four airlines were allowed to fly between the US and Heathrow.⁴ An Open Skies agreement with the US would open up Heathrow for all European and American airlines to fly across the Atlantic. Therefore, it comes as no surprise that the UK had the most reluctant position in the EU. The UK only wanted to open up its market if the US market was opened up as well and if UK carriers could invest and operate in the US (Robyn, Reitzes, Moselle, 2005). Such a completely liberalized market, called an 'open aviation area', in which also the American market was opened for investment and for operating air services from one point in the US to another point in the US (so-called 'cabotage') was therefore the only acceptable starting point for the UK to engage in EU wide negotiations with the US. Third, in the mandate the member states granted to the Commission, they indicated that an open aviation area with the US was the final aim of the negotiations. However, the agreement that was finally presented to the member states after almost four years of negotiations did not create a

³ In 2006, 38% of the EU-US air traffic passed through Heathrow (Chang, Williams, Hsu, 2009).

⁴ Those four airlines were American Airlines, United Airlines, British Airways, and Virgin Atlantic.

completely open aviation area, as it still includes restrictions on foreign investment and as it still does not allow cabotage in the US. Since the EU-US Open Skies Agreement of 2007 does not reflect the aim outlined in the mandate, one would rather expect a rejection by the member states than an approval.

Hence, since (a) member states were reluctant to grant the Commission the power to negotiate externally, (b) a lot was at stake for certain big member states, and (c) the final agreement does not reflect the aim put forward in the mandate, one would suspect that the member states did not accept such an Open Skies Agreement. However, after almost four years of negotiations, they did. To explain why the member states approved the agreement, the opportunities and the constraints of the Commission to bring this negotiation process to a successful end have to be studied. Indeed, to solve this puzzle, one should look at how the Commission managed to reach an agreement that was accepted at two fronts: externally by the US and internally by the member states.

The empirical data for the analysis of the internal decision-making process in the EU with regard to international negotiation process leading to the EU-US Open Skies Agreement of 2007 is collected through triangulation: different sources are complemented to check each other's validity. First and foremost, data on the internal decision-making process in the EU comes from interviews with officials who attended and witnessed this process.⁵ Second, official documents, such as Council conclusions or Commission documents, with regard to the negotiations were studied. Third, the well-documented coverage by Agence Europe of the whole process (from 1995 to 2008) was examined.

The paper as structured is follows: section 2 overviews the historical context on the EU-US Open Skies negotiations. Before 2003, the relation between the Commission and the member states with regard to the external dimension of aviation policy can be considered as a struggle for competences, in which the member states were initially gaining ground, but which was ultimately won by the Commission in 2003. By means of process-tracing, section 3 examines the internal EU decision-making process with regard to the external negotiations with the US, pointing to the behaviour of the Commission vis-à-vis the member states. Section 4 analyses the opportunities and the constraints the Commission is facing vis-à-vis the member states in its attempt to bring international negotiations with the US to a successful end. Section 5, finally, presents the conclusions. Figure 1 represents the various stages in the decision-making process.

⁵ Ten interviews were conducted in March and April 2009: with two Commission officials, one representative of the Council Secretariat, one industry representative who participated as an observer, and six representatives of different member states were interviewed. The selection of the member states assures that officials were interviewed from big and small member states, from member states having a bilateral Open Skies agreement with the US and member states that did not have such an agreement, and from member states that were reluctant, neutral and keen towards an EU-US Open Skies Agreement.

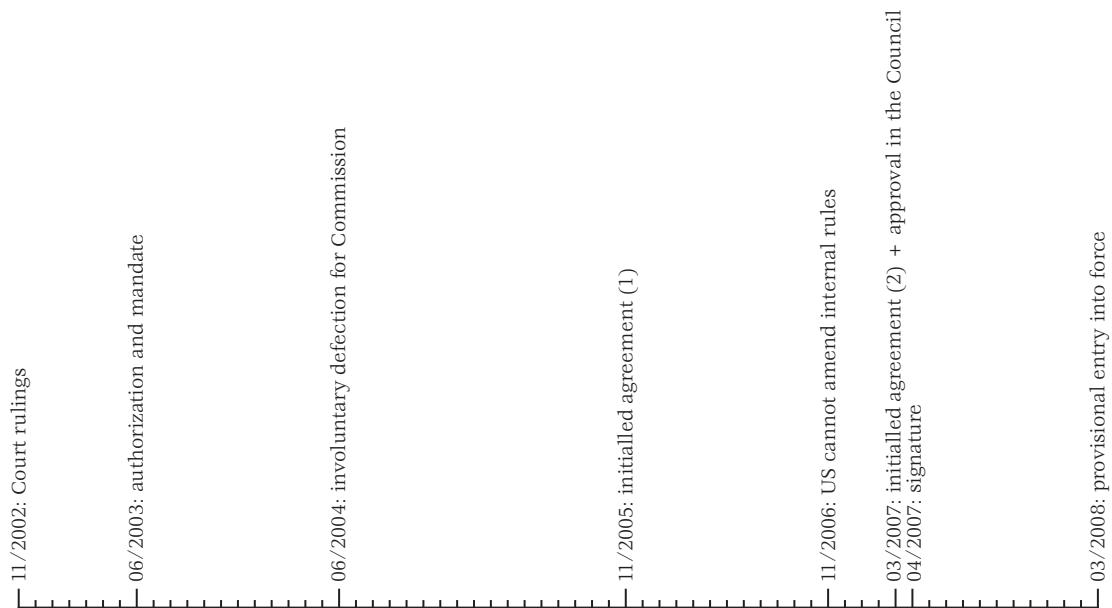


Figure 1: chronological overview of the EU decision-making process with regard to the EU-US Open Skies negotiations (2003-2008)

2. Historical context: Commission versus member states on external aviation competences

Since the beginning of the 90s, the external dimension of the EU's aviation policy has constantly been subject to tensions and disagreements between the member states and the Commission about the question whether the Commission could negotiate international air services agreements on behalf of the European Community. For a long time the member states have been able to preserve their authority in this domain (section 2.1), but the battle has finally been won by the Commission in June 2003, when the Council granted a mandate to the Commission (section 2.2).

2.1. Member states gaining ground in the 90s

Since 1944, international air transport is organized under the Chicago Convention and by bilateral air services agreements between states, in which the routes, frequencies, capacities and fares are regulated for each flight between the two countries that are a party to that bilateral agreement (Meunier, 2005). In the 90s, as a result of deregulation in domestic air transport policy and the wish of the US to expand the number of transatlantic routes, the US wanted to renegotiate their old bilateral agreements with European countries. Although the European Commission was very much opposed, most of the member states concluded such bilateral Open Sky agreements with the US. Meunier argues that the US could exploit the absence of a single EU voice by 'picking off one country at a time' to conclude a bilateral Open Sky agreement with (Meunier, 2005, p. 151).

At the same time, the Commission made a few attempts to get an authorization of the member states to negotiate a Community agreement with the US. In 1990, the Council rejected the Commission's proposal for a mandate. Also in Council meetings in 1993 and 1995, the member states confirmed that the external relations on aviation matters should remain their responsibility. In June 1996, the Commission achieved a small success, as it obtained a mandate from the Council to negotiate an air transport agreement with the US. However, this win quickly seemed to be a Pyrrhic victory, since the mandate only covered secondary air transport issues ('soft rights'), such as computer reservation systems, state aid, competition rules and ownership restrictions (Charokopos, 2008). Indeed, traffic rights were left out of the mandate. Since these 'hard' rights are the cornerstone of every international air services agreement, the mandate was *de facto* meaningless. After two rounds of negotiations between the Commission and the US Administration, negotiations broke up since the US was not interested in an agreement on soft rights if the hard rights could not be negotiated. The main reason why the US wanted a EU-US Open Skies agreement was after all to gain access to London Heathrow. Therefore, traffic rights should indeed be negotiated. Disappointed about this failure – both about the restricted mandate internally and about the collapse of the negotiations with the US externally – the Commission twice requested the Council to extend its mandate to incorporate traffic rights in 1997 and 1998. However, the Council opposed the extension of the mandate.

2.2. Commission gaining ground: authorization and an ambitious mandate

After years of struggle between the Commission and the member states, the Commission finally succeeded in getting a mandate from the Council to negotiate a comprehensive Open Skies agreement with the US. In June 2003, the Council authorized the Commission to negotiate such an agreement, with the aim to achieve an open aviation area between the EU and the US.

2.2.1. Explaining authorization

Why did the member states ultimately authorize the Commission in 2003, while they considered the external dimension of aviation policy as a national sovereignty before? As also argued by Woll, the answer partly lies in the activism by the Commission, which changed its approach and deployed two different strategies to become the European negotiator for an EU wide agreement with the

US (Woll, 2006). The other part of the answer can be found in substantive evolutions in international aviation.⁶

The main reason why the Council granted a mandate to the Commission was the fact that the Commission made use of its role of 'guardian of the Treaties'. In 1998, the Commission decided to bring eight member states, which had concluded bilateral Open Sky agreements with the US, before the European Court of Justice.⁷ The Commission argued that their bilateral agreements affected the European single aviation market, since airlines from a member state having an Open Sky agreement with the US enjoyed an unfair advantage compared to airlines from a member state that did not have such an agreement. Indeed, airlines from the eight accused member states could operate services to any point in the US, while airlines from the other member states were not able to do so.

In November 2002, the Court issued its ruling. On the one hand, it disagreed with the Commission's claim that the Commission had exclusive EC competences to negotiate international agreements on air transport. On the other hand, the Court judged that three kinds of provisions of the bilateral Open Skies agreements violated EC law: the establishment of fares on intra-EU routes, rules on computerized reservation systems, and the so-called 'nationality clause'. Such a nationality clause entails that both parties to the bilateral agreement have the right to refuse carriers on their routes that are not majority owned by citizens of the other party. In other words, only carriers that are designated by one party to the agreement can fly from and to cities of the other party to the agreement. In the case of the bilateral agreements with the US, this means that only carriers that are owned by a particular member state could fly between that member state and the US. The Commission – followed by the Court – found these clauses illegal, since it discriminates carriers from different member states in the European single aviation area. The Court ruled that the nationality clause should be replaced by a Community designation (Robyn, Reitzes, Moselle, 2005). This means that the designation of European airlines does not longer happen on the basis of national ownership, but on the basis of European ownership.

The Court ruling had three main consequences. First, in regulation 847/2004, member states agreed on new rules for continuing their bilateral negotiations with third countries (European Community, 847/2004). According to this regulation, member states have to inform the Commission and the other member states on the progress and results of their bilateral negotiations. Moreover, they

⁶ Charokopos conceives the various steps put by the Commission in the direction of a EU-US agreement as a process in which the member states learn that bilateral air services agreements are in the long term incompatible with the European single aviation area (Charokopos M., 2008).

⁷ At that moment, the Commission took legal action against Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden and the UK. The Commission also sent letters of warning to the Netherlands and France.

have to propose Community designation to be included in their bilateral negotiations. Second, the Council granted the Commission a mandate to negotiate exclusive Community agreements with third countries with the aim to replace the nationality clause by Community designation. In other words, this mandate authorized the Commission to conduct so-called 'horizontal agreements' with third countries in order to get a Community designation that immediately holds for every member state that has a bilateral agreement with this third country. Nowadays, approximately 50 horizontal agreements are concluded in this way and this practice has become uncontroversial in the EU. Third, and in the context of this analysis most importantly, member states also granted a mandate to the Commission to negotiate an Open Skies agreement with the US.

The Commission's activism by using the Court ruling is only one strategy used by the Commission (Woll, 2006). Furthermore, the Commission also tried to convince member states with economic and commercial arguments. It ordered a study by the Brattle Group to analyse the effects of liberalizing the EU-US aviation market. The primary purpose by the Commission was to support their case for having a mandate with commercial arguments. The study indeed showed that an open aviation area between the EU and the US would imply big economic advantages for the member states (The Brattle Group, 2002). Hence, the Commission enforced its legal claim with commercial arguments, reasoning that a comprehensive EU-US agreement would make it easier to consolidate European airline companies beyond strict national limits. The Commission argued that it was archaic that airlines could not develop further because they were hindered to fly to other destinations than those destinations that were in the bilateral agreements of the member states in which the airline was majority-owned.

Beside the increasing activism by the Commission, also substantive evolutions in international air transport contributed to a growing awareness among the member states that a strict national approach to external aviation relations was no longer tenable. An open aviation area would not only facilitate reorganisations (e.g. merger) within the EU⁸, but it would also enable carriers to engage in transatlantic modes of cooperation and alliances. Briefly, liberalizing and opening the markets would generate business opportunities that were still latent at that time because of the absence of a liberalized market, but they would become possible with an EU-US agreement. Moreover, since the European single aviation market was being implemented, the Community could offer provisions to the US

⁸ In this sense, Woll noticed that carriers from EU could only merge if the US does not refuse to give the same traffic rights to the new merged carrier as the traffic rights that existed in the bilateral agreements with the member states of these national carriers (Woll, 2006, p. 60).

that the member states could no longer offer in their bilateral agreements. Indeed, if the member states would enter into an agreement with the US on e.g. aviation safety or access to intra-EU routes, they had to work through the Community (Meunier, 2005).

2.2.2. An ambitious mandate

The mandate granted by the Council to the Commission in June 2003 was very ambitious: it envisaged a comprehensive agreement with the US leading to an open aviation area. This means that the mandate included a complete liberalisation of the EU-US aviation market with the full possibility of free foreign investment and control and in which European and American carriers could deliver free air transport services without restrictions, including cabotage.

Beside substantive provisions, the mandate also prescribed that the Commission would negotiate the agreement in consultation with a special committee composed of member state representatives, like it is stipulated in article 300 TEC. The special committee assisted the Commission in conducting the negotiations, both *ex ante* and 'sur place'. On the one hand, internal European coordination meetings between the Commission and the member states took place in the context of the special committee, aiming to determine a common position. On the other hand, the members of the special committee attended every negotiation session with the US, although they did not take the floor as the EU position was exclusively expressed by the Commission.

At both sides of the Atlantic, the conditions to start real credible negotiations on an EU-US Open Skies Agreement were now fulfilled. On the one side, the Commission was finally authorized by the member states. On the other side, since traffic rights were now included in the mandate, which was not the case in the 1996 mandate, the US was keen to engage in negotiations with the EU as well. The negotiations kicked off at the EU-US Summit of June 2003, followed by eleven formal negotiation rounds in Brussels and in Washington DC, to finally lead to a signed agreement in March 2007. However, in this negotiation period, a number of hurdles still had to be taken, not at least by the Commission vis-à-vis the member states.

3. Opening the black box of the EU during transatlantic negotiations on Open Skies

This section discusses the EU decision-making process with regard to the EU-US Open Skies negotiations from the moment the Commission was granted a mandate (June 2003) to the approval by the Council of the agreement negotiated by the Commission (March/April 2007). In an initial phase of the negotiations,

the Commission faced an involuntary defection by the member states (section 3.1), followed by a parallel negotiation process at two levels aiming to rectify the situation (section 3.2), interrupted by an involuntary defection for the US Administration (section 3.3), but nonetheless finally leading to an agreement (section 3.4).

3.1. An involuntary defection for the Commission

One year after it got a mandate from the Council, the Commission intended to finalize the negotiations and to agree on a deal with the US. Timing is crucial for understanding why the Commission aimed to have an agreement in June 2004. On the one hand, the Commission strived for an agreement finalized before the EU-US Summit at the end of June. On the other hand, since the US would enter into a pre-election period, the Commission believed that if it did not present a deal to the Council at that time, it would have to wait for the new US Administration (in Spring 2005) to continue the negotiations.

Hence, in June 2004, the Commission presented the principles for an agreement to the Council. The Commission aimed to get an approval of the Council for an outlined proposal of basic principles, on the basis of which an agreement was intended to be reached with the US, approved by the Council. Indeed, the Commission wanted to get that deal approved by the member states, at the same time being convinced that the US would accept it afterwards.⁹ However, the Council did not accept the Commission's proposal, leaving the Commission with an involuntary defection, since the Commission had indicated to the US that it would be able to conclude a deal in June 2004. The member states did not approve the draft agreement proposed by the Commission because they considered it as insufficient, in particular about opening the US market for European airlines. The lack of significant progress on cabotage and on foreign investment and control made the member states reject the deal. For the Commission, it was important that the legal issue was solved. Indeed, the US accepted the Community designation in exchange for more liberalization on the EU side. However, that was not what the most reluctant member states, and in particular the UK, wanted. The UK's position was that the European market, including Heathrow, could only be opened if the American market was opened as well. The provisions

⁹ The deal that was proposed by the Commission to the Council was not an initialled agreement or a text that was formally agreed with the American negotiators. However, the rejection by the Council can still be seen as an involuntary defection, since Commission officials at that time really wanted to get the principles approved and since they considered the rejection by the Council as a defeat. The interpretation of the June 2004 Council as an involuntary defection for the Commission is also supported by the Council Conclusions of June 2005, where the member states described their decision of one year before as 'the Council refused to give the Commission the green light to finalise a "first step" agreement with the United States' (Council of Ministers, 10285/05, p. 25). Moreover, the Council Conclusions of April 2005 make clear that the Council considered the situation of June 2004 as one of an involuntary defection, since the Conclusions refer to the 'draft agreement of June 2004' (Council of Ministers, 7933/05, p. 12). This claim is also supported by Robyn, Reitzes and Moselle, who argue that '[d]espite the European Commission's strong support for the agreement, it was rejected in June 2004 by the EU Transport Ministers' (Robyn, Reitzes, Moselle, 2005, p. 71).

on foreign ownership and control of American airlines were considered clearly insufficient by the UK.

Although there were substantive reasons why the Council rejected the Commission's proposal on the principles for a deal with the US, the question remains why the Commission miscalculated the reaction of the Council in June 2004. Why could it not foresee the reasoning of the reluctant member states, as sketched above? Why did the Commission expect the member states to agree on their proposal? These questions become even more intriguing if one reads the Council Conclusions of March 2004 (*i.e.* three months before the involuntary defection), in which the member states declared that 'the proposals on the table for an initial agreement this year, including a movement by the US to 49% foreign ownership of its airlines, would, in principle, be acceptable only if a tangible improvement could be made to those proposals' (Council of Ministers, 6606/04, p. 20). As these 'tangible improvements' were not reached in June 2004, the Commission could reasonably have anticipated on the rejection by the Council. Why did the Commission fail to do so?

First, officials from the member states and the Commission acknowledge that the Commission at that time had insufficiently involved the member states in the negotiations and that the Commission had not taken enough time to discuss with the member states to assess what they could support. Indeed, the then responsible officials in the Commission did not pay sufficient attention to the cooperation with the member states in order to keep them on board or to be able to estimate accurately the range of agreements that could be approved by the Council. Second, some officials in the Commission considered it possible to get the deal supported by the Council by isolating the most reluctant member state, namely the UK, and to present the UK a kind of *fait accompli* that was supported by other member states. However, the June 2004 experience clearly showed that such a strategy does not work. Third, since the Court ruling of 2002, negotiating international agreements in the field of aviation was a new arena for the Commission. Negotiating such a politically sensitive agreement with one of the EU's most important aviation partners confronted the Commission with a new configuration. In other words, the practice of the institutional setting, in which the Commission negotiates and a special committee of member state representatives assists, could not rely on a practical *modus operandi* that had proved to function in the past. This situation was not only new and unprecedented for the Commission, but for the member states as well since this was the first negotiation on an air transport agreement that they could not conduct themselves. Finally, after the struggle by the Commission in the 90s, the

resulting tensions with the member states and the fact that the Commission even brought the member states to the Court, the atmosphere between the member states and the Commission was rather conflicting between June 2003 and June 2004. Member states did not fully trust the Commission at that time and they were somewhat upset about the situation in which they had arrived.

After the involuntary defection of 2004, the Commission was very disappointed that the Council had not followed the Commission. Also the US negotiators, to whom the Commission had hinted that reaching an agreement would be very likely, were dissatisfied. Moreover, the decision of the Council not to support the Commission had two other consequences. On the one hand, the negotiations were put on hold for a while. A change in staff of the Commission, the US elections of November 2004 and the damaged trust between the negotiating partners made continuing the negotiations inappropriate. On the other hand, the Commission started infringement proceedings against twelve member states that had concluded bilateral aviation agreements with the US. It concerns the eight member states that were subject to the Court rulings of November 2002, as well as France, Greece, Italy and Portugal. Moreover, the Commission also sent out letters of formal notice under article 226 TEC to Spain, Ireland, Hungary, Poland, the Czech Republic, Slovakia and Malta, which had also concluded a bilateral aviation agreement with the US, although not necessarily an Open Sky agreement. Hence, at that moment, twenty of the twenty-five member states were subject to infringement proceedings by the Commission, although they were in different stages of the proceedings.¹⁰

3.2. Repairing the damage at two levels

After the failure of June 2004, the US was not willing to restart negotiations unless it could be sure that the next agreement it negotiated with the Commission would be supported by the member states. Therefore, the Commission engaged in two kinds of discussions, at the international level with the US and at the European level with the member states, both intending to repair the damage and to restore confidence.

In the first months of 2005, the Commission held informal discussions with the new US Administration, explaining what happened in the Council in June 2004, why the draft agreement was not accepted, and aiming to create the right level of expectations about what would be an acceptable deal for the EU. In order to be able to deliver adequate messages to the US, the Commission needed to have a good insight about how far it could go. That is the reason why parallel and

¹⁰ Only Latvia, Lithuania, Estonia, Cyprus and Slovenia were not subject to an infringement proceeding, as they had not entered into a bilateral aviation agreement with the US containing a nationality clause.

intense discussions were held with the member states. Moreover, the Commission intended to restore confidence with the member states after the insufficient involvement of the member states that was partly at the basis of the involuntary defection of June 2004. This attempt seemed to work, as most European representatives in the EU-US Open Skies negotiations describe the atmosphere and confidence in the EU in terms of 'before' and 'after' June 2004. The consultations with the member states did not only allow the Commission to understand what the member states really wanted substantively, or what they ultimately could (not) accept to be included in an EU-US Open Skies agreement. The Commission also learned how to conduct negotiations on behalf of the member states in a more effective way. The distinction between the representing Commission and the represented member states, which was to a certain extent the case until June 2004, decreased as from 2005. In this context, an illustrative observation is that before June 2004, the member state representatives were seated behind the Commission officials during the negotiations with the US, while from 2005 onwards, they were seated alongside the Commission negotiating team.

Formal negotiation rounds were held with the US in October and November 2005. The main European message was that the US should liberalize to a greater extent its foreign investment and control rules. In US law, the foreign investment and control of American airlines by foreign companies was limited to 25% of the voting stock. In the draft agreement of June 2004, the US had committed itself to increase this to 49% of the non-voting stock. Since in practice this increase would not really matter for European airlines, this was considered insufficient by the Council. Hence, the EU wanted the US to open its foreign investment and control rules more significantly. As the US could not deliver stronger commitments on this under its existing legal framework, the US committed itself to produce a reinterpretation of its law that would be more open to foreign investment and control. After this declaration of intent by the US, the Commission thoroughly checked with the member states – and especially with the UK – whether such a reinterpretation would be acceptable by the Council. The special committee signalled that this US commitment would be sufficient for the member states to accept an agreement. With this message in mind, the Commission and the US Administration initialled a draft EU-US Open Skies Agreement in November 2005, which was presented to the Council in December 2005. As indicated by the special committee, the Council indeed stated that it would accept such a deal, but only if the US indeed delivered its commitment.¹¹

¹¹ The Council concluded that 'improvements in the field of ownership and control of airlines would be an essential element for a Stage One deal to be concluded' (Council of Ministers, 14636/1/05 REV 1, p. 42).

3.3. An involuntary defection for the negotiation partner

The agreement of November 2005 was subject to the US Administration delivering the reinterpretation of its internal legislation. However, after one year of discussions at the domestic level of the US, the American negotiators had to report to their European counterpart that they were not able to change their internal legislation of foreign ownership and control and, hence, to deliver their commitment. The reason of this failure lies in internal US politics. Indeed, two years and a half after the Commission had faced an involuntary defection with its member states, the roles were reversed as the US Administration was now called back by the US Congress.

When the US Administration initialled the agreement in November 2005, it was well aware that changing US law on foreign investment and control would be politically very difficult, since it could provoke opposition in Congress. Therefore the US Department of Transportation opted to change the rules by an administrative reinterpretation of the law, instead of changing the law by a legislative process in which Congress would be the central (veto) player. However, the strategy of bypassing Congress failed because of internal developments and concerns in American politics in the course of 2006. The issue of foreign investment and control in the transport sector became extremely politicized in the US. In February 2006, the Dubai Ports World, a state-owned company in the United Arab Emirates, was planning to buy the management of six main American ports. The controversy on foreign control of important American ports and the perceived impact on national security generated a spill-over effect to the air transport area. The link between national security and US airlines controlled by foreign companies became subject of political controversy. Moreover, the increasing level of politicization took place in a post-9/11 context, in which the possibility that an airline, controlled by a European company, would be able to fly between two American cities became extremely sensitive because of national security concerns. As a result, the likelihood of the Department of Transportation being able to resolve this issue by an administrative reinterpretation of the law decreased considerably. When Congress passed legislation making it impossible for the Department of Transport to reinterpret the rules on foreign ownership and control, the US negotiators failed to deliver the commitments they had made to the European partners in the international negotiations. Hence, after the US negotiators announced their decision to withdraw the proposal to amend American foreign ownership and control legislation, it did not come as a surprise that the Council in November 2006 expressed its 'deep disappointment and regret at this decision' and 'requested the

Commission to enter into urgent consultations with the United States' (Council of Ministers, 15900/06, p. 34).

3.4. Towards a (first stage) agreement

Besides engaging in negotiations with the US, the Commission consulted the member states very intensively after the November 2006 Council. The challenge for the Commission was clear: it had to find an agreement that was acceptable to the US and to the member states, without having the possibility of an amendment of the US rules on foreign investment and control, while this issue was of key importance for the member states, and in particular for the UK. Unlike in June 2004, the Commission did not opt anymore to present a *fait accompli* to the member states. By contrast, the Commission now was convinced that an agreement could only be reached if it was supported by the UK.

How did the Commission succeed in finding an agreement, without having the possibility to make significant progress on the foreign investment and control issue, and while keeping the member states on board? This question is particularly relevant because the EU-US Open Skies agreement that was going to be reached in February 2007 did not include a full liberalization of the American investment and control rules. In this sense, the basic demand of the UK, namely opening of the US market in exchange for opening up Heathrow, was not completely fulfilled in February 2007. In other words, the goal outlined in the mandate (an open aviation area) was not realized, yet the member states did not reject it anymore. The explanation of this situation lies again – like in June 2003 when the mandate was finally granted to the Commission – in a combination of factors relating to Commission strategies and to substantive evolutions.

The Commission opted to activate the possibility that was already foreseen in the mandate of June 2004 to complete an open aviation area between the EU and the US in multiple stages. This means that a first stage Open Skies agreement was opted for, including the intention to hold second stage negotiations on a second stage agreement while the first stage agreement provisionally entered into force. However, in order to get the most reluctant member states accepting this, an additional guarantee for further liberalization needed to be included. Therefore, the EU-US Open Skies agreement of 2007 contains, on the one hand, an article with the commitment to negotiate a second stage EU-US Open Skies Agreement in the future and a list of issues to be included in that second stage agreement¹², and, on the other hand, a so-called 'sunset clause'. This clause, basically

¹² In the second stage negotiations, *inter alia* a further liberalization of traffic rights and additional foreign investment opportunities should be on the agenda. Hence, the aim is still to get further access to the US market.

stipulating that the parties to the agreement have the right to suspend the (traffic) rights if no second stage EU-US Open Skies Agreement is reached before the end of 2010, was a necessary condition for keeping the UK on board and guaranteeing an approval of the agreement by the Council.¹³ During intense – and often bilateral – discussions between the Commission and the UK, the UK had clearly indicated not to accept a first stage agreement without such a clause. Since the Commission now considered it politically and commercially impossible to impose an agreement with such a big impact to the UK and since the Commission was keen to have an agreement with the US and thus to avoid another involuntary defection, it presented the acceptance of a sunset clause as an absolute requirement for having agreement to the US. From the UK perspective, this clause guarantees that the UK in the long run still realizes its ultimate aim: only opening London Heathrow in exchange for full market access to the US.

Besides insisting on the sunset clause, the Commission, which aimed to conclude the negotiations with the US, also deployed three strategic tools in order to increase the 'cost of no agreement' for the member states. First, the Commission used the resumption of the infringement proceedings against most of the member states as a threat to win the support of the member states for a first stage EU-US Open Skies agreement. The infringement proceedings had been put on hold during the negotiations, since it was expected that the negotiations would succeed and that the legal problem would be solved through an EU wide Open Skies agreement with the US. At this point in the negotiations, resuming these proceedings were presented by the Commission as a feasible option, thereby increasing the pressure to the member states to agree upon an agreement with the US. Hence, the argument by Woll that the Commission is able to make use of rulings by the Court to receive a negotiation mandate and to become active in the international aviation relations (Woll, 2006) can be extended towards making use of the Court rulings to avoid an involuntary defection and to increase the likelihood of an approval by the Council of commitments made by the Commission vis-à-vis third countries. The member states – and certainly their airlines – aimed to avoid at all cost that the infringement proceedings were resumed, since this would probably lead to the Court judging that the bilateral agreements with the US should be terminated, causing legal chaos and uncertainty for European airlines.

Second, by closely involving member states in the negotiations and by bilaterally discussing the most difficult and sensitive issues with the most reluctant member

¹³ The sunset clause is not only included in the EU-US agreement (article 21§3), it is also incorporated in the Council Conclusions of March 2007, where the member states politically approved the agreement.

states, the Commission succeeded in transmitting to the internal level the difficult situation it faced at the external level. This helped to pass on the compellingness of the international negotiations towards the member states, and to the member states getting to understand that approving a first stage agreement was the most feasible result at that moment.

Third, in its attempts to increase the cost of no agreement for the member states, the Commission also could appeal to other actors in the EU, who were, just like the Commission, in favour of reaching a first stage Open Skies agreement with the US. Most importantly, the member states that did not have a bilateral Open Sky agreement with the US, such as Ireland or Spain, were said to be desperate to have an agreement and to be prepared to sign almost every text lying on the negotiation table. Those member states also exerted pressure on their more reluctant colleagues to approve an agreement. Also Germany, holding the Presidency in the first half of 2007, wanted to finalize the negotiations, as the EU-US Open Skies agreement was one of the few concrete deliverables that could be presented at the April EU-US Summit. This issue was even at the agenda of a meeting of German Chancellor Merkel and US President Bush in January 2007.

This strategic behaviour by the Commission vis-à-vis the member states finally worked since these procedural dynamics were complemented with substantive evolutions in the agreement. Between December 2006 and February 2007, a new annex on foreign investment and control was added to the agreement. Although this did not in the least go as far as proposed amendments of US legislation in November 2005, the Commission and the member states considered it as an additional – and feasible – effort by the US, as they had recognized the difficulties related to changing the American legislation on foreign investment and control. Another substantive – yet minor – gain for the EU was that European airlines were allowed access to the ‘Fly America’ programme, which covers air transport of passengers and cargo financed by the US federal government. Finally, the UK also achieved a delay in the provisional application of the EU-US Open Skies Agreement until almost one year after the signing of the agreement, *i.e.* until 30 March 2008, after a fifth terminal at London Heathrow was opened, allowing additional airline slots to be used.

The first stage EU-US Open Skies Agreement, replacing the existing bilateral agreements of the member states, was initialled on 2 March 2007 in Brussels. A few weeks later, member states politically approved the agreement at Transport Council meeting. After legal linguists had finalised the agreement, it was formally adopted by a written procedure at 26 April 2007, after which was signed in Washington DC at the EU-US Summit on 30 April 2007.

4. Opportunities and constraints for the Commission vis-à-vis the member states

As mentioned in the first section, the unanimous approval by the member states of the EU-US Open Skies agreement in March 2007 can be considered somewhat counterintuitive since the Commission was not able to fulfil the main objective outlined in the mandate (*i.e.* the establishment of an open aviation area). Moreover, the negotiations took place in a political context where member states had been reluctant to the Commission becoming active on international aviation policy and where the issues at stake were economically and commercially of great importance for the member states. On the basis of the process-tracing presented in the previous section, this section discusses the opportunities the Commission can use to make an approval by the Council more likely, as well as the constraints the Commission faces when it attempts to do so.

4.1. Using third actors to increase the cost of no agreement

The Commission's main strategy to avoid an involuntary defection is to increase the cost of no agreement for the member states. The Commission can do so by itself, but it can also call on third actors helping to increase that cost. First, the Commission was able to make use of its role as the guardian of the Treaty and the opportunity this implies to take legal action against the member states. This allowed the Commission to realize its preference in two crucial stages of the internal decision-making process. On the one hand, it brought the member states that concluded a bilateral Open Sky agreement with the US before the Court, resulting in the member states giving up their opposition against a mandate for the Commission to negotiate an EU wide Open Skies Agreement with the US (Woll, 2006). Here, the Court was used as leverage to start the negotiations. On the other hand, the Court was also used to be able to finish the negotiations in a successful way. For the Commission, a successful ending of the negotiations consisted of reaching an agreement, which solved the legal problem and thus contained a clause on Community designation, and which was approved by the member states. In the final phase of the negotiations, *i.e.* after it had become clear that the US could not deliver its commitment to amend its internal legislation, the Commission pressurized the member states to bring them before the Court if no EU wide agreement was reached. In this sense, the Commission gradually increased the cost of no agreement of the member states. This cost was related to the legal uncertainty and possible inability to operate transatlantic services this would generate for the European airlines. Presenting the threat to resume the infringement proceedings as a sword of Damocles hanging over the member states, the Commission was able to strengthen its position vis-à-vis the

member states at the end of the negotiations. To be able to do so, it took the first legal steps under articles 226 and 228 TEC in 2004, after it had faced an involuntary defection in the Council. These legal steps were not only addressed to the member states that were subject to the Court ruling of 2002, but also to other member states, aiming to increase the scope of its leverage in the final phase of the negotiation process.

Second, not only the Court is the Commission's ally in increasing the cost of no agreement for the member states. To enlarge the pressure on the most reluctant member states to approve the agreement, the Commission can make use of two other opportunities. On the one hand, the member states that are in favour of reaching an international agreement pull in the same direction like the Commission, as they also try to convince the most conservative player in the EU not to deploy its veto power. In the case studied in this paper, the member states that did not have bilateral Open Sky agreements with the US yet, helped the Commission to keep all the member states on board. In other words, the preference heterogeneity among the member states helped the Commission in convincing the most reluctant ones to approve the agreement. On the other hand, also the member state holding the Presidency during the semester in which the agreement was planned to be signed is most likely an ally of the Commission. Indeed, as the finalization and the signing of an important international agreement with a crucial international partner is often considered a significant deliverable for a Presidency, the Presidency mostly strives for a successful conclusion of the negotiations.

4.2. Involving the member states or presenting them a *fait accompli*?

The case of the first stage Open Skies negotiations between the EU and the US has shown that it is beneficial for the Commission to involve the member states as much as possible in the negotiations if its aim is to reach an agreement with the external negotiation partner. During the negotiation process, the Commission tried to use both strategies: presenting the member states a *fait accompli*, and involving them to a large degree in the negotiations. The former strategy failed (in June 2004), the latter succeeded (in March 2007).

The *fait accompli* logic, in which the Commission conducted the negotiations in a more isolated way without sufficiently involving the member states and presented them a 'take it or leave it' proposal in the Council, did not work out since the interests of the member states on the issue were too big and since the negotiations were politically and commercially very sensitive in a couple of member states. In the run-up to the June 2004 Council, the Commission considered reaching an agreement quickly, *i.e.* before the EU-US Summit and

before the US elections, as more important than a step-by-step approach in which the member states were kept on board by transmitting the difficulties and the compellingness of the external negotiations and by preparing them little by little for the unavoidable situation that an open aviation area could not be completely realized in a first stage agreement. After it had faced an involuntary defection in 2004, the Commission changed its strategy, as it then chose to involve the member states very closely in the negotiations, to check every step and every concession with the most reluctant member states, and to repair confidence with them. Indeed the pre-June 2004 situation was characterized by a tense relation between the member states and the Council, having its roots in the continuous struggle about external aviation competences between them in the 90s.

The post-June 2004 period, by contrast, showed that an institutionally dense EU decision-making process, in which the member states can trust their EU negotiator, is more instrumental for the Commission. Indeed, the degree of trust in the Commission increased, just because the Commission did all it could to involve the member states and to take their positions, concerns and sensitivities into account as much as possible. The post-June 2004 developments demonstrate that it is possible for the Commission to avoid an involuntary defection – and to realize its preference of reaching an international agreement – if the member states are sufficiently involved, even if the result of the negotiations does not fulfil the purposes set up by the member states *ex ante*, and even in a highly politicized context where authorizing the Commission to negotiate an agreement on their behalf was not in the least evident for the member states. Hence, before June 2004, the EU decision-making process was characterized by a split between the Commission and the member states, a lack of trust, an insufficient involvement of the member states and an unprecedented negotiation configuration, ultimately resulting in an involuntary defection. When the decision-making process is, by contrast, characterized by cooperation between the Commission and the member states, trust, a constant involvement of the member states and a satisfactory negotiation configuration, an approval of an even imperfect agreement becomes increasingly likely. The explanation is that this allows the member states to experience that such an agreement is at that moment the best feasible deal. This is only possible if the Commission performs as a transparent, trustworthy and confidence building interface between the external and the internal negotiations.

Just like presenting a *fait accompli* to the member states is counterproductive for the Commission, trying to get one of them isolated – or even outvoted – does not function well in the context of international negotiations. Although it would have been theoretically and legally possible to isolate the UK, being the most reluctant

member state, the Commission had understood that this would turn out counterproductive as well. There is a twofold reason for this. On the one hand, the fact that the EU decision-making process takes place with regard to international negotiations makes this decision-making process more cooperative than traditional Community policy-making on internal legislation. The presence of a third player outside the EU assembles the Commission and the member states around a common European position against an external partner. On the other hand, although the decision to sign the EU-US Open Skies Agreement is taken on the basis of QMV¹⁴, the nature of the agreement remains mixed, meaning each member state is a party to the agreement as well and that, as a consequence, all member states have to sign the agreement separately before it can enter into force.

5. Conclusion

This case study identified the constraints and opportunities the Commission faced in its bilateral negotiations with the US on the 2007 Open Skies Agreement. On the one hand, it has shown that the Commission was faced with several constraints in its internal negotiations with the member states: the high degree of political sensitivity on the issue, the tensions between the Commission and the member states based on a long struggle on external aviation competences, the resulting lack of trust between them, and an ambitious mandate. Being faced with these constraints, presenting a *fait accompli* to the member states or attempting to isolate the most reluctant member states did not work for the Commission in order to reach an Open Skies agreement with the US. On the other hand, as the negotiation process evolved, the Commission was able to transform these constraints into opportunities, which it could use to obtain the approval by the member states on an agreement that did not completely correspond to the mandate. First, by involving the member states more closely in the external negotiation process, the Commission was able to build an institutionally more dense EU decision-making process in which the degree of trust augmented. Second, the Commission made use of the opportunity to increase the cost of no agreement for the member states in a politically sensitive domain by exploiting the advantages of internal allies: mainly the Court of Justice, but also member states with Commission-like preferences and the Presidency wanting an important Transatlantic deliverable.

¹⁴ The decision on the signature of the agreement is based on article 80§2 TEC *juncto* article 300 TEC (European Community, 2007/339).

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