

Judgment of the Court of Justice, AETR, Case 22/70 (31 March 1971)

Caption: The AETR judgment shows that powers which, at the outset, have not been conferred exclusively upon the European Community may become so progressively through the exercise of those powers by the Community. In this case, the implementation of a common transport policy by the Community, through the laying down of common rules of an internal nature (adoption of a regulation), excludes the possibility of concurrent powers on the part of the Member States throughout the sphere of transport. The Court of Justice, while aware that the system of internal Community measures may not be separated from that of external relations, concludes that Member States may no longer enter into agreements with third countries in this field.

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Judgment of the Court of 31 March 1971 ¹

Commission of the European Communities v Council of the European Communities ²

Case 22/70

Summary

1. EEC — Legal personality — External relations — Capacity of the Community to conclude agreements with third countries (EEC Treaty, Article 210)

2. Powers of the Community — Common policy — Implementation — Transport — Social measures — International agreements — Authority conferred by a regulation (EEC Treaty, Articles 74 and 75; Regulation No 543/69 of the Council)

3. Procedure — Application for annulment — Act open to judicial review — Proceedings of the Council intended to have legal effects — Admissibility of the application (EEC Treaty, Articles 164, 173 and 189)

4. Procedure — Legal interest — Object of the application for annulment — Effect of the annulment with regard to an act of the Council (EEC Treaty, Article 174)

5. International agreements — Transport — Distribution of powers amongst the institutions (EEC Treaty, Articles 75 and 228)

6. International agreements — Conferment of powers in the course of negotiations entered into by the Member States — Situation to be assessed by the institutions concerned — Need for agreement between the Council and the Commission — Joint action by the Member States in the interests of the Community (EEC Treaty, Article 5; Treaty establishing a Single Council and a Single Commission, Article 15)

7. Objectives of the Community — Attainment — Absence of necessary powers — Powers of the Council — Exercise in external relations — Optional nature (EEC Treaty, Article 235)

8. Measures: adopted by an institution — Category not covered by Article 189 — Statement of reasons — Absence may not be invoked by the Commission (EEC Treaty, Article 190)

1. The Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined by the Treaty. This authority arises not only from an express conferment by the Treaty, but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.

In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope.

With regard to the implementation of the provisions of the Treaty, the system of internal Community measures may not be separated from that of external relations.

2. The powers of the Community in the sphere of transport extend to relationships arising from international law, and involve the need for agreements with the third countries concerned. This authority was vested in the Community by Regulation No 543/69 of the Council on the harmonization of certain social legislation relating to road transport.

3. In accordance with the objective laid down by Article 164, an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.

4. In the event of annulment, proceedings of the Council would have to be deemed non-existent and the disputed questions reconsidered in order that a solution might be reached in accordance with Community law. It is therefore incontestable that the Commission has an interest in pursuing its action against the proceedings of the Council relating to coordination between Member States.

5. With regard to agreements in the sphere of transport policy, the Commission is entitled to make proposals and negotiate, whilst it is for the Council to conclude the agreement.

6. With regard to negotiations entered into before authority was vested in the Community, it is for the institutions whose powers are directly concerned, namely the Council and the Commission, to concur on the appropriate methods of cooperation with a view to ensuring the defence of the interests of the Community; in negotiations between governments, Member States are at all times bound to act together in the interests and on behalf of the Community, in accordance with their obligations under Article 5.

7. Although Article 235 empowers the Council to take any 'appropriate measures' equally in the sphere of external relations, it does not create an obligation but confers on the Council an option, failure to exercise which cannot affect the validity of proceedings.

8. The requirement imposed by Article 190 to provide a statement of reasons in the case of regulations, directives and decisions may not be invoked by the Commission against proceedings of the Council in which the former has itself participated.

In Case 22/70

COMMISSION OF THE EUROPEAN COMMUNITIES represented by Gérard Olivier, Assistant Director-General of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Ernst Wohlfart, Legal Adviser to the Council and Director-General of its General-Secretariat, acting as Agent, assisted by Jean-Pierre Puissochet, Director of the General-Secretariat of the Council, with an address for service in Luxembourg at the office of J. N. Van den Houten, Director of the Legal Department of the European Investment Bank, 2 place de Metz,

defendant,

Application for the annulment of the proceedings of the Council of 20 March 1970, relating to the negotiation and conclusion by the Member States of the EEC of the European Agreement concerning the work of crews of vehicles engaged in international road transport,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and A. Trabucchi, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore (Rapporteur) and H. Kutscher, Judges,

Advocate-General: A. Dutheillet de Lamothe

Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

The European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR) was signed at Geneva on 19 January 1962 under the auspices of the United Nations Economic Commission for Europe by five of the six Member States of the EEC and a number of other European States.

However, since a sufficient number of ratifications was not obtained, this agreement did not enter into force.

In 1967 negotiations for the revision of the said agreement were resumed, initially within the framework of

the European Conference of Ministers of Transport in Paris and subsequently under the auspices of the Economic Commission for Europe at Geneva.

Similar work undertaken at Community level with regard to standardizing driving and rest periods of drivers of road transport vehicles resulted in Regulation No 543/69 of the Council of 25 March 1969 on the harmonization of certain social legislation relating to road transport (OJ L 77 of 29.3.1969, p. 49).

In the course of its 107th meeting on 20 March 1970 the Council, in view of the meeting of the sub-committee on Road Transport of the Economic Commission for Europe of 1 to 3 April 1970 at Geneva, discussed in particular the attitude to be taken by the six Member States of the EEC in the current negotiations for the conclusion of a new European Agreement on the work of crews of vehicles engaged in international road transport.

The Member States conducted and concluded the negotiations in accordance with the proceedings of 20 March 1970.

The AETR was made available by the secretariat of the Economic Commission for Europe from 1 July 1970 for signature by the Member States.

II — Procedure

On 19 May 1970 the Commission of the European Communities lodged the present application for the annulment of the proceedings of the Council of 20 March 1970 regarding the negotiation and conclusion of the AETR by the Member States of the EEC.

By a document lodged on 21 July 1970 the Council applied to the Court under Article 91 (1) of the Rules of Procedure for a decision on a procedural issue to the effect that the Commission's application was inadmissible and that it be dismissed. In the observations which it lodged on 24 September 1970 the Commission requested the Court to dismiss the preliminary objection or at least to reserve its decision for the final judgment.

Having heard the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided, by an order of 14 October 1970, to reserve the decision on the preliminary objection for the final judgment.

After the President of the Court had prescribed new time-limits for continuing proceedings, the written procedure followed the normal course.

However, the Council refrained from supplementing its defence by a rejoinder.

Having heard the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

At the request of the Court, however, the Council lodged various documents, including an extract from the minutes of its meeting of 20 March 1970.

The oral submissions of the parties were put forward at the hearing on 11 February 1971.

The Advocate-General delivered his opinion at the hearing on 10 March 1971.

III — Conclusions of the parties

The *Commission* claims that the Court should:

‘annul with all legal consequences the proceedings of the Council of 20 March 1970 relating to the negotiation and conclusion of the AETR by the Member States.’

The *Council* contends that the Court should:

‘declare the Commission’s application inadmissible or, alternatively, dismiss it as unfounded.’

IV — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — Admissibility

The *Council* maintains that its proceedings of 20 March 1970 do not constitute an act, within the meaning of Article 173 of the EEC Treaty, against which proceedings may be instituted.

(a) After first reviewing the essential characteristics of the case-law of the Court with regard to admissibility, asserting that in proceedings between institutions admissibility must be strictly appraised, the defendant maintains that even if the proceedings in dispute were to be considered as one of the measures referred to in Article 189 they do not constitute, whether with regard to their form, objective or content, a regulation, decision or directive and thus are not an act, within the meaning of Article 173, against which proceedings may be brought; on any view they have not conferred any right, imposed any obligation or altered any legal situation; since they have no binding legal effect no action may be brought in respect of them.

(b) Although matters of form are not conclusive it must be observed that the present case mainly involves proceedings of the Council leading to the emergence of an agreed position, accompanied by declarations of intent having political rather than legal significance.

Moreover, these proceedings were neither published nor notified to the Member States, as would have been required under Article 191 if the Council had intended to adopt a decision or directive binding on the Member States and empowering or requiring them to take action.

(c) With regard to the subject matter and purport of the disputed proceedings, at its meeting of 20 March 1970 the Council confined itself, after an exchange of views, to taking note of the cooperation established between the Member States in the course of negotiations on the AETR and expressing its political approval of this agreement. The contested proceedings thus merely represent the finding that the endeavours of the Member States to adopt a common position had a specific outcome, which was duly noted as such.

(d) Whatever authority is competent under the Treaty to negotiate and conclude the AETR, the contested proceedings could neither have empowered nor required the Member States to take any action in this connexion. In fact:

— if the States are competent, the Council has no authority to ‘restore’ to the States a power conferred on the Community by the Treaty;

— if the Community is competent only where the agreement to be negotiated and concluded might involve modification of a Community regulation already in force, the situation must be analysed on the basis of one of the two foregoing hypotheses.

(e) Analysis of the effects which might be produced by the annulment of the proceedings of the Council of 20 March 1970 confirms that they have no legal effect. Such an annulment would invalidate the

proceedings, that is to say the finding as to the coordination between the States, but not the actual fact of that coordination; it therefore seems neither necessary nor sufficient for the attainment of the real objective desired by the Commission, namely to have the negotiation of the AETR by the Member States declared incompatible with the Treaty.

(f) If the Commission considered that the hypothesis attributing authority to the Community was well founded, it ought to have taken the measures necessary for the exercise of this authority; by allowing the negotiations to proceed without bringing the matter before the Court until those negotiations were concluded the Commission is largely responsible for the situation thus created.

(g) Alternatively, if it is conceded that the disputed proceedings constitute a decision against which an action may be brought, the Council pleads that the present application is out of time; the contested proceedings merely repeat principles accepted at least since 1969 with regard to the negotiation and conclusion of the AETR.

With regard to the objections of inadmissibility raised by the Council, the *Commission* submits essentially the following arguments:

(a) There is no justification for the assertion that the admissibility of an action brought by an institution must be more strictly appraised than that of one brought by an individual.

Moreover, the case-law of the Court provides no decisive ground for instituting a strict parallel between two classifications — that of the first paragraph of Article 173 and that of Article 189 — which are concerned with different matters.

(b) Matters of form may not be considered as decisive in determining the nature of an act.

There is no merit in the argument relating to the absence of publication or of notification: no measure of national law was necessary to give effect to the contested proceedings, and in any event the absence of publication or of notification of an act have no direct bearing on its classification.

(c) As to the subject-matter and purport of the contested act, it is clear both from the minutes of the Council meeting and from the documents annexed (press release dated 21 March 1970, summary of decisions taken by the Council at its meeting on 20 March, and report of 7 April 1970 concerning the negotiations leading to the AETR) that the Council settled decisively a question of international negotiations which manifestly had to be resolved and which had been specially considered.

The Council did not confine itself to recognizing the coordination existing between the Member States; it adopted an attitude which, as a matter of law, must at the very least be regarded as amounting to approval. Furthermore, actual directives on the negotiations were issued to the Member States. The results of the Council's decision, moreover, were not slow in making themselves felt — namely, the lack of any Community involvement in the formulation and conclusion of the AETR and the participation in this agreement of the Member States alone.

The disputed proceedings cannot be treated as merely an exchange of views pursuant to Articles 6 and 145 of the EEC Treaty. In any event, the fact that there was an exchange of views does not exclude the possibility that this led to the adoption of a decision.

According to the Court's case-law there is a decision against which an action for annulment may be brought whenever an institution determines unambiguously the attitude it will henceforth take when certain conditions are fulfilled. This is just such a case.

(d) The Council's attempt to define the nature of the contested act by *a posteriori* reasoning based on a distinction between the two possible hypotheses — authority exercised by the State or the Community — seems quite artificial and simply begs the question.

The argument that the Council's proceedings could have no legal effect because it had no power to authorize the Member States to negotiate and conclude an agreement such as the AETR implies that there can never be annulment on the ground of lack of authority. It does not matter that the Council had no intention of 'restoring' to the Member States a power reserved to the Community; the nature of an act cannot depend on an investigation into the purity of its authors' intentions in relation to the Treaty.

(e) The inadmissibility of the application cannot be deduced from the consequences which would follow from the Court's annulment of the contested act.

Rather than indulge in possibly hazardous conjecture as to the results of a possible annulment, consideration should be given to the act itself and the consequences which have in fact followed from it. Here the Council again begs the question: the premise of its argument is that the only purpose of its deliberation was to recognize the coordination between the States, the conclusion being that annulment of that deliberation would not affect the reality of such coordination. To assert that the annulment of the contested act cannot affect the behaviour of Member States amounts to an assumption that the States would abide by a judgment of the Court but would not regard a decision of annulment as having the authority of *res judicata*.

(f) The objection that the Commission is largely responsible for the situation complained of is inaccurate in fact and irrelevant in law. Various steps taken by the Commission left no doubt as to the purport and effect of the decision which it requested the Council to take. Even if the objection were well-founded, it provides no basis for arguing either that no act of the Council existed or that the application is inadmissible.

(g) The objection that the application is out of time ignores the consequences of the adoption of Regulation No 543/69 and disregards the very idea of a progressive establishment of the common transport policy in the course of the transitional period. Moreover, it is contrary to the facts, since the Commission did in fact request the Council to involve the Community in the negotiation of the AETR.

B — Substance

Arguments relating to the infringement of the EEC Treaty

The *Commission* submits that the negotiation and conclusion of the AETR, involving as it did a matter arising out of the common transport policy and governed by Community law within the territory of the six Member States since Regulation No 543/69 came into force, could only be carried out by the Community.

1. Infringement of Articles 75 and 228

The *Commission* is of opinion that the legal basis of an agreement such as the AETR is to be found in Article 75 (1) of the Treaty and that the procedure to be followed for its negotiation and conclusion is defined by Article 228.

(a) Article 75 (1) provides, within the framework of the common transport policy, the legal foundation for Community action with respect to third countries. Doubtless the Community must respect the limits and conditions imposed by Articles 74 to 84; but Article 75 (1) (c) provides that, for the purpose of implementing the objectives of the Treaty regarding the common transport policy, there shall be laid down 'any other appropriate provisions'. The very general wording of the provision as a whole leave room for the exercise by the Community of treaty-making powers; and express provision would be needed to limit Community action to unilateral measures.

(b) This interpretation of Article 75 (1) of the Treaty is in accordance with common sense, with the *ratio legis* and with the principle that provisions should be given their full effect. It would have been unreasonable to provide for a common policy in a field as extensive as transport without conferring on the Community the means of taking appropriate action in respect of external relations, particularly since transport by its very

nature frequently involves an international aspect transcending the framework of the Community alone.

(c) The Commission states that the Council itself recognized this state of affairs in providing, in Article 4 (2) of Regulation No 117/66 of 28 July 1966, on the introduction of common rules for the international carriage of passengers by coach and bus (OJ No 147, p. 2688), and Article 3 of Regulation No 543/69, which is in question and was adopted on the sole basis of Article 75, that ‘the Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation’.

(d) The Commission does not seek to deny that Community powers have been conferred restrictively and that the institutions only have such powers as have been conferred on them. But this restriction, as far as external agreements are concerned, does not arise from Article 228 of the Treaty; the latter was designed to lay down general rules, mainly of a procedural nature, on the conclusion and effects of international agreements entered into by the Community. It is Article 75 which, in the sphere of transport, provides the basis and defines the limits of Community powers in relation to external agreements.

Nor does the Commission claim by virtue of Article 75 of the Treaty exclusive competence on the part of the Community regarding all agreements which might be entered into with third countries in the sphere of transport. The same principles which govern unilateral measures of the countries when the latter have an immediate and direct impact on the content or scope of provisions applicable within the Community. Member States retain their powers only so long as the Community has not exercised its own, that is, has not in fact adopted common provisions. Conversely, where and to the extent to which the Community actually laid down such regulations, Member States lose their authority to legislate at the same level, and can only be called upon to take such measures as may be necessary to implement the Community provisions.

Thus, as Community rules enter into force Community powers on the topics thereby dealt with become, progressively, exclusive.

(e) There is a direct and far-reaching conflict between Regulation No 543/69 and the AETR. The regulation is based on the principle of territoriality and the AETR on that of nationality; the AETR could therefore be applied in the Community only by restricting the scope of Regulation No 543/69, jeopardizing the general principle of territoriality, and abandoning the uniformity of arrangements within the Community. Furthermore, as regards their substantive content, several provisions of the AETR are at variance with the corresponding provisions of the regulation.

(f) Since Article 75 (1) (c) authorizes the Community institutions to lay down any ‘appropriate provisions’ for the purpose of implementing the common transport policy, it is doubtless for the Council to consider in each case whether it is desirable to enter into an agreement with third countries, but the Council’s discretion does not extend to deciding whether to proceed through inter-governmental or Community channels.

(g) To concede that Member States are still empowered to enter into the AETR would, as regards the exercise of Community powers, have the following principal consequences:

— Since the AETR involves a restriction in the scope of Regulation No 543/69, the competent Community institutions would have to choose between denying Member States the facilities for applying the agreement, or acknowledging the restriction imposed by the agreement on the scope of the Community regulation.

— Even assuming that the Community regulation and the AETR were in harmony to begin with, such harmony could only be maintained by making any modification of the Community system dependent on the agreement of the Member States; any development of the Community system would thus, in violation of a fundamental rule governing the working of the Community institutions, be dependent on the unanimous agreement of the Member States.

— Within the Community, identical provisions covering comparable situations would be interpreted by different authorities: the Court of Justice of the Communities for Community regulations, and national

authorities — if not Ministers of Foreign Affairs — for agreements with third countries.

The *Council* contends that Article 75 (1) does not confer on the Community exclusive authority to conclude agreements in the sphere of transport.

(a) By providing that the Council shall ‘lay down’ certain ‘provisions’, that article quite clearly refers to the formulation of unilateral measures, and does not include the conclusion of international agreements.

The Commission’s argument that an express provision would have been needed to restrict Community action to unilateral measures cannot be accepted. The EEC Treaty does not confer on the Community treaty-making powers precisely co-extensive with its internal authority; because certain matters arise out of the Treaty it does not follow that authority to deal with their external aspects has changed hands. The power of the Community to promulgate legal measures was deliberately confined to unilateral measures except where unequivocal provisions such as Articles 111, 113 and 238 has conferred authority on the Community to enter into international agreements.

(b) Article 75 (1), especially subparagraph (c), still has ‘full effect’, even if that only involves authority to adopt rules by means of a unilateral legal measure. The sphere of transport may well involve international aspects, but this is no argument against its being regulated by unilateral national or Community provisions.

(c) Article 4 (2) of Regulation No 117/66 and Article 3 of Regulation No 543/69 cannot be interpreted as recognizing a general authority on the part of the Community, based on Article 75, to enter into international agreements.

(d) The fact that Community rules exist which have the same subject matter as the AETR does not necessarily require that this agreement must be entered into by the Community itself. Even if it is conceded that Article 75 (1) (c) may confer on the Community authority to enter into international agreements, such authority cannot be general and exclusive, but at the most incidental. It is thus indispensable that in each case the Council should decide whether the matter is to be dealt with by unilateral measures or by treaty, and, in the latter case, whether the international agreement should be concluded by the Community or by the Member States.

(e) If the Commission was of the opinion that it held directly from the Treaty the authority to undertake negotiations in the name of the Community, it was, to say the least, inconsistent in not making use of that authority and submitting a proposal. Inasmuch as no decision based on Article 75 has established authority on the part of the Community, the Member States must, on any view of the matter, still retain their powers.

2. Other submissions (infringement of Article 235; failure to state reasons)

As an alternative, the *Commission* points out that even if Article 75 is not considered an adequate legal basis for the Community’s external powers with regard to the AETR, the conditions envisaged by Article 235 are satisfied.

For this provision to be applicable, first, it must appear that action by the Community is necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community, and secondly, the Treaty must have failed to provide for the necessary powers.

The second conditions must be satisfied if it is accepted that Article 75 (and indeed Article 113) cannot be taken into consideration.

The necessity for action by the Community follows from the existence of Community rules covering the same ground as the AETR.

The Council thus had power to adopt ‘the appropriate measures’; it is generally accepted that this provision, by reason of its wording, permits the creation of new powers in the sphere of treaty relations with third

countries.

Article 235 leaves no room for a policy decision as to whether it is better to act through intergovernmental or Community channels. If, within the framework of the Treaty, action should prove really necessary to 'attain, in the course of the operation of the common market, one of the objectives of the Community', it must be taken through Community channels.

In this connexion it is not sufficient that the Member States should jointly enter into the AETR and concert their activities with the Community institutions. Such 'concerted action' does not comply with the provisions in the Treaty governing the institutions, and joint action by Member States cannot be regarded as equivalent to action by the Community. Difficulties might arise if there were no lasting guarantee of identical behaviour by Member States; no prior review by the Court of Justice could be made to the compatibility of the projected agreement with the provisions of the Treaty; nor could uniformity of interpretation of the provisions within the Community be ensured.

The *Council* points out that before any agreement can be entered into by the Community on the basis of Article 235, the procedure laid down by the said article has to be observed. Until a proposal has been submitted by the Commission, the Assembly has been consulted and the Council has acted, the conclusion of international agreements remains within the powers of the Member States.

The fact that Community rules exist having the same subject-matter as the AETR does not necessitate that this agreement be concluded by the Community itself. To avoid any differences of content between the two sets of rules it is sufficient that the Member States should enter into this agreement jointly and should in this connexion act in concert with the Community institutions which exercise, by virtue of Article 75, internal powers in the same sphere.

The *Commission* points out that the contested measure gives no indication of its legal basis, and contains no statement of reasons explaining, in particular, what relationship the Council considered its decision bore to the Treaty.

The *Council* is of opinion that, since the contested proceedings amounted to nothing more than a recognition of the coordination existing between Member States, there was no need either to give an express indication of its legal basis or formally to set out its reasons. Moreover, the minutes of the meeting of 20 March 1970, which are the formal instrument of the contested proceedings, contain numerous points providing a sufficient explanation of the grounds and objective of the common action by the Member States.

Grounds of judgment

1 By an application lodged on 19 May 1970 the Commission of the European Communities has requested the annulment of the Council's proceedings of 20 March 1970 regarding the negotiation and conclusion by the Member States of the Community, under the auspices of the United Nations Economic Commission for Europe, of the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR).

2 As a preliminary objection, the Council has submitted that the application is inadmissible on the ground that the proceedings in question are not an act the legality of which is open to review under the first paragraph of Article 173 of the Treaty.

3 To decide this point, it is first necessary to determine which authority was, at the relevant date, empowered to negotiate and conclude the AETR.

4 The legal effect of the proceedings differs according to whether they are regarded as constituting the exercise of powers conferred on the Community, or as acknowledging a coordination by the Member States of the exercise of powers which remained vested in them.

5 To decide on the objection of inadmissibility, therefore, it is necessary to determine first of all whether, at the date of the proceedings in question, power to negotiate and conclude the AETR was vested in the Community or in the Member States.

1 — The initial question

6 The Commission takes the view that Article 75 of the Treaty, which conferred on the Community powers defined in wide terms with a view to implementing the common transport policy, must apply to external relations just as much as to domestic measures in the sphere envisaged.

7 It believes that the full effect of this provision would be jeopardized if the powers which it confers, particularly that of laying down ‘any appropriate provisions’, within the meaning of subparagraph (1) (c) of the article cited, did not extend to the conclusion of agreements with third countries.

8 Even if, it is argued, this power did not originally embrace the whole sphere of transport, it would tend to become general and exclusive as and where the common policy in this field came to be implemented.

9 The Council, on the other hand, contends that since the Community only has such powers as have been conferred on it, authority to enter into agreements with third countries cannot be assumed in the absence of an express provision in the Treaty.

10 More particularly, Article 75 relates only to measures internal to the Community, and cannot be interpreted as authorizing the conclusion of international agreements.

11 Even if it were otherwise, such authority could not be general and exclusive, but at the most concurrent with that of the Member States.

12 In the absence of specific provisions of the Treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy — a category into which, essentially, the AETR falls — one must turn to the general system of Community law in the sphere of relations with third countries.

13 Article 210 provides that ‘The Community shall have legal personality’.

14 This provision, placed at the head of Part Six of the Treaty, devoted to ‘General and Final Provisions’, means that in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty, which Part Six supplements.

15 To determine in a particular case the Community’s authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.

16 Such authority arises not only from an express conferment by the Treaty — as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements — but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.

17 In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.

18 As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.

19 With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not therefore be separated from that of external relations.

20 Under Article 3 (e), the adoption of a common policy in the sphere of transport is specially mentioned amongst the objectives of the Community.

21 Under Article 5, the Member States are required on the one hand to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions and, on the other hand, to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty.

22 If these two provisions are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.

23 According to Article 74, the objectives of the Treaty in matters of transport are to be pursued within the framework of a common policy.

24 With this in view, Article 75 (1) directs the Council to lay down common rules and, in addition, 'any other appropriate provisions'.

25 By the terms of subparagraph (a) of the same provision, those common rules are applicable 'to international transport to or from the territory of a Member State or passing across the territory of one or more Member States'.

26 This provision is equally concerned with transport from or to third countries, as regards that part of the journey which takes place on Community territory.

27 It thus assumes that the powers of the Community extend to relationships arising from international law, and hence involve the need in the sphere in question for agreements with the third countries concerned.

28 Although it is true that Articles 74 and 75 do not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force, on 25 March 1969, of Regulation No 543/69 of the Council on the harmonization of certain social legislation relating to road transport (OJ L 77, p. 49) necessarily vested in the Community power to enter into any agreements with third countries relating to the subject-matter governed by that regulation.

29 This grant of power is moreover expressly recognized by Article 3 of the said regulation which prescribes that: 'The Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation'.

30 Since the subject-matter of the AETR falls within the scope of Regulation No 543/69, the Community has been empowered to negotiate and conclude the agreement in question since the entry into force of the said regulation.

31 These Community powers exclude the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law.

32 This is the legal position in the light of which the question of admissibility has to be resolved.

2 — Admissibility of the application

33 The admissibility of the application is disputed by the Council on various grounds, based on the nature of the proceedings in question, and to a lesser extent on the Commission's alleged lack of interest in the matter, its previous attitude, and the fact that the application is out of time.

(a) Submission relating to the nature of the proceedings of 20 March 1970

34 The Council considers that the proceedings of 20 March 1970 do not constitute an act, within the meaning of the first sentence of the first paragraph of Article 173, the legality of which is open to review.

35 Neither by their form nor by their subject-matter or content, it is argued, were these proceedings a regulation, a decision or a directive within the meaning of Article 189.

36 They were really nothing more than a coordination of policies amongst Member States within the framework of the Council, and as such created no rights, imposed no obligations and did not modify any legal position.

37 This is said to be the case more particularly because in the event of a dispute between the institutions admissibility has to be appraised with particular rigour.

38 Under Article 173, the Court has a duty to review the legality 'of acts of the Council ... other than recommendations or opinions'.

39 Since the only matters excluded from the scope of the action for annulment open to the Member States and the institutions are 'recommendations or opinions' — which by the final paragraph of Article 189 are declared to have no binding force — Article 173 treats as acts open to review by the Court all measures adopted by the institutions which are intended to have legal force.

40 The objective of this review is to ensure, as required by Article 164, observance of the law in the interpretation and application of the Treaty.

41 It would be inconsistent with this objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by Article 189.

42 An action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.

43 The nature of the proceedings in question has to be determined in the light of the foregoing.

44 In the course of the meeting on 20 March 1970, the Council, after an exchange of views between its members and the representative of the Commission, reached a number of 'conclusions' on the attitude to be taken by the Governments of the Member States in the decisive negotiations on the AETR.

45 These proceedings were concerned partly with the objective of the negotiations and partly with negotiating procedure.

46 As regards the objective to be pursued, the Council settled on a negotiating position aimed at having the AETR adapted to the provisions of the Community system, apart from the concession of certain derogations from that system which would have to be accepted by the Community.

47 Having regard to the objective thus established, the Council invited the Commission to put forward, at the appropriate time and in accordance with the provisions of Article 75 of the Treaty, the necessary proposals with a view to amending Regulation No 543/69.

48 As regards negotiating, the Council decided, in accordance with the course of action decided upon at its previous meetings, that the negotiations should be carried on and concluded by the six Member States, which would become contracting parties to the AETR.

49 Throughout the negotiations and at the conclusion of the agreement, the States would act in common and would constantly coordinate their positions according to the usual procedure in close association with the Community institutions, the delegation of the Member State currently occupying the Presidency of the Council acting as spokesman.

50 It does not appear from the minutes that the Commission raised any objections to the definition by the Council of the objective of the negotiations.

51 On the other hand, it did lodge an express reservation regarding the negotiating procedure, declaring that it considered that the position adopted by the Council was not in accordance with the Treaty, and more particularly with Article 228.

52 It follows from the foregoing that the Council's proceedings dealt with a matter falling within the power of the Community, and that the Member States could not therefore act outside the framework of the common institutions.

53 It thus seems that in so far as they concerned the objective of the negotiations as defined by the Council, the proceedings of 20 March 1970 could not have been simply the expression or the recognition of a voluntary coordination, but were designed to lay down a course of action binding on both the institutions and the Member States, and destined ultimately to be reflected in the tenor of the regulation.

54 In the part of its conclusions relating to the negotiating procedure, the Council adopted provisions which were capable of derogating in certain circumstances from the procedure laid down by the Treaty regarding negotiations with third countries and the conclusion of agreements.

55 Hence, the proceedings of 20 March 1970 had definite legal effects both on relations between the Community and the Member States and on the relationship between institutions.

(b) Alternative submissions on admissibility

56 The Council contends that analysis of the consequences which an annulment of the proceedings on 20 March 1970 might involve confirms that the latter were devoid of all legal effect.

57 Such an annulment would cancel the recognition of the coordination between Member States, but would not affect either the reality of that coordination or the subsequent action of those States in the negotiation of the AETR.

58 The Council claims that the Commission's action therefore cannot achieve its aim, and is thus devoid of purpose.

59 Under Article 174, 'If the action is well founded the Court of Justice shall declare the act concerned to be void'.

60 If that were done, the Council's proceedings would have to be deemed non-existent in so far as they had been annulled by the Court; the parties to the dispute would then be restored to their original position, and would have to reconsider the disputed questions so as to resolve them in accordance with Community law.

61 It is thus incontestable that the Commission has an interest in pursuing its action.

62 Next, the Council considers that the Commission is disqualified from pursuing such an action because the

Commission itself is responsible for the situation in question through having failed to take, at the proper time, the steps necessary to allow Community powers to be exercised, by submitting suitable proposals to the Council.

63 However, since the questions put before the Court by the Commission are concerned with the institutional structure of the Community, the admissibility of the application cannot depend on prior omissions or errors on the part of the applicant.

64 Moreover, an evaluation of the objections raised by the Council can only be undertaken as part of the examination of the substance of the dispute.

65 Finally, the Council objects that the application is out of time, on the ground that the proceedings of 20 March 1970 did nothing more than re-state principles laid down at previous meetings of the Council, of which the last one took place on 17 and 18 March 1969.

66 The proceedings of 20 March 1970, however, cannot be regarded as simply a confirmation of previous discussions, since Regulation No 543/69 of 25 March 1969 brought about a decisive change in the allocation of powers between the Community and the Member States on the subject-matter of the negotiations.

67 For all these reasons, the application is admissible.

3 — Substance

68 Essentially, the Commission disputes the validity of the proceedings of 20 March 1970 on the ground that they involved infringements of provisions of the Treaty, more particularly of Articles 75, 228 and 235 concerning the distribution of powers between the Council and the Commission, and consequently the rights which it was the Commission's duty to exercise in the negotiations on the AETR.

(a) Submission relating to infringement of Articles 75 and 228

69 The Commission claims that in view of the powers vested in the Community under Article 75, the AETR should have been negotiated and concluded by the Community in accordance with the Community procedure defined by Article 228 (1).

70 Although the Council may, by virtue of these provisions, decide in each case whether it is expedient to enter into an agreement with third countries, it does not enjoy a discretion to decide whether to proceed through intergovernmental or Community channels.

71 By deciding to proceed through inter-governmental channels it made it impossible for the Commission to perform the task which the Treaty entrusted to it in the sphere of negotiations with third countries.

72 In the absence of specific provisions in the Treaty applicable to the negotiation and implementation of the agreement under discussion, the appropriate rules must be inferred from the general tenor of those articles of the Treaty which relate to the negotiations undertaken on the AETR.

73 The distribution of powers between the Community institutions to negotiate and implement the AETR must be determined with due regard both to the provisions relating to the common transport policy and to those governing the conclusion of agreements by the Community.

74 By the terms of Article 75 (1), it is a matter for the Council, acting on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly, to lay down the appropriate provisions, whether by regulation or otherwise, for the purpose of implementing the common transport policy.

75 According to Article 228 (1), where agreements have to be concluded with one or more third countries or an international organization, such agreements are to be negotiated by the Commission and concluded by the Council, subject to any more extensive powers which may have been vested in the Commission.

76 As a subsidiary point, since the negotiations took place under the auspices of the United Nations Economic Commission for Europe, the first paragraph of Article 116 has also to be taken into account. By the terms of that paragraph, from the end of the transitional period onwards, Member States shall 'proceed within the framework of international organizations of an economic character only by common action', the implementation of such common action being within the powers of the Council, basing its decisions on proposals submitted by the Commission.

77 If these various provisions are read in conjunction, it is clear that wherever a matter forms the subject of a common policy, the Member States are bound in every case to act jointly in defence of the interests of the Community.

78 This requirement of joint action was in fact respected by the proceedings of 20 March 1970, which cannot give rise to any criticism in this respect.

79 Moreover, it follows from these provisions taken as a whole, and particularly from Article 228 (1), that the right to conclude the agreement was vested in the Council.

80 The Commission for its part was required to act in two ways, first by exercising its right to make proposals, which arises from Article 75 (1) and the first paragraph of Article 116, and, secondly, in its capacity as negotiator by the terms of the first subparagraph of Article 228 (1).

81 However, this distribution of powers between institutions would only have been required where negotiations were undertaken at a time when the vesting of powers in the Community had taken effect, either by virtue of the Treaty itself or by virtue of measures taken by the institutions.

82 In this connexion it must be borne in mind that an earlier version of the AETR had been drawn up in 1962, at a period when, because the common transport policy was not yet sufficiently developed, power to conclude this agreement was vested in the Member States.

83 The stage of negotiations of which the proceedings in question formed part was not aimed at working out a new agreement, but simply at introducing into the version drawn up in 1962 such modifications as were necessary to enable all the contracting parties to ratify it.

84 The negotiations on the AETR are thus characterized by the fact that their origin and a considerable part of the work carried out under the auspices of the Economic Commission for Europe took place before powers were conferred on the Community as a result of Regulation No 543/69.

85 It appears therefore that on 20 March 1970 the Council acted in a situation where it no longer enjoyed complete freedom of action in its relations with the third countries taking part in the same negotiations.

86 At that stage of the negotiations, to have suggested to the third countries concerned that there was now a new distribution of powers within the Community might well have jeopardized the successful outcome of the negotiations, as was indeed recognized by the Commission's representative in the course of the Council's deliberations.

87 In such a situation it was for the two institutions whose powers were directly concerned, namely, the Council and the Commission, to reach agreement, in accordance with Article 15 of the Treaty of April 1965 establishing a Single Council and a Single Commission of the European Communities, on the appropriate methods of cooperation with a view to ensuring most effectively the defence of the interests of the Community.

88 It is clear from the minutes of the meeting of 20 March 1970 that the Commission made no formal use of the right to submit proposals open to it under Articles 75 and 116.

89 Nor did it demand the simple application of Article 228 (1) in regard to its right of negotiation.

90 It may therefore be accepted that, in carrying on the negotiations and concluding the agreement simultaneously in the manner decided on by the Council, the Member States acted, and continue to act, in the interest and on behalf of the Community in accordance with their obligations under Article 5 of the Treaty.

91 Hence, in deciding in these circumstances on joint action by the Member States, the Council has not failed in its obligations arising from Articles 75 and 228.

92 For these reasons, the submission must be rejected.

(b) Other submissions put forward by the Commission (Article 235; failure to state reasons)

93 As a subsidiary matter, the Commission claims that in view of the requirements in connexion with the implementation of the common transport policy, the Council, if it failed to base its action on Article 75, ought at least to have made use of the powers conferred on it by Article 235.

94 For its part, the Council takes the view that, since the means of joint action by Member States was available, there was no need to resort to this provision; moreover, the Commission never took the initiative in submitting a proposal to that effect, as is required by the provision in question.

95 Although Article 235 empowers the Council to take any 'appropriate measures' equally in the sphere of external relations, it does not create an obligation, but confers on the Council an option, failure to exercise which cannot affect the validity of proceedings.

96 This submission must therefore be rejected.

97 The Commission also claims that the contested proceedings did not indicate the legal grounds on which they were based and provided no statement of reasons.

98 These requirements are imposed by Article 190 in relation to regulations, directives and decisions, and cannot be extended to measures of a special nature such as the proceedings of 20 March 1970.

99 The Commission's participation in the actual work of the Council afforded it all the legal safeguards which Article 190 was designed to ensure for third parties affected by the measures mentioned therein.

100 The application must therefore be dismissed.

4 — Costs

101 Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading.

102 In the present case neither party has asked for costs.

103 The parties should therefore bear their own costs.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 3, 5, 6, 74, 75, 111, 113, 114, 116, 164, 173, 174, 189, 190, 210, 228, 235, and 238, together with Article 15 of the Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby:

- 1. Dismisses the application;**
- 2. Orders the parties to bear their own costs.**

Lecourt
Donner
Trabucchi
Monaco
Mertens de Wilmars
Pescatore
Kutscher

Delivered in open court in Luxembourg on 31 March 1971.

A. Van Houtte
Registrar
R. Lecourt
President

1 — Language of the Case: French.
2 — CMLR.