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COMPETENCE OF THE EUROPEAN UNION TO REGULATE AIR TRANSPORT

Master thesis

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TABLE OF CONTENT

LIST OF ABBREVATIONS

Chicago Convention	Convention on International Civil Aviation
CJEU	Court of Justice of the European Union
DHS	Department of Homeland Security
ECAC	European Civil Aviation Conference
EDPS	European Data Protection Supervisor
ELFAA	European Low Fares Airline Association
EU	European Union
GATS	General Agreement on Trade in Services
ICAO	International Civil Aviation Organization
Montreal Convention	Convention for the Unification of Certain Rules for International Carriage by Air
MS	Member State
PNR	Passenger Name Record
PRM	Person with Reduced Mobility
Regulation 1107/2006	Regulation No 1107/2006 of the European Parliament and of the Council concerning the rights of disabled persons and persons with reduced mobility when traveling by air
Regulation 261/2004	Regulation No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights
SEA	Single European Act
SES	Single European Sky
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Treaty of Rome	Treaty establishing the European Economic Community
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
VCLTIO	Vienna Convention on the Law of Treaties between States and International or between International Organizations
WTO	World Trade Organization

INTRODUCTON

The relevance and the originality of the research.

The international air industry was challenged, during past years, by the opening of the European single market. The Transport and Tourism Committee of the European Parliament[1] time to time debates on the Single European sky legislative framework, which is relevant in the aspect of the EU competences to regulate air transport. Since the liberalization scheme of air transportation services was created, it requires permanent observation and regular changes. Due to this reason, it is relevant not only for the whole Europe, but for Lithuania as well, because Lithuania is a part of the EU.

Since the EU was established, it adopted many regulations concerning air transport. The liberalization process of the international air transportation left unsolved questions of the extent of the EU to regulate air transportation area. An air transportation sphere has always been an issue that was dealing with by states concluding bilateral air service agreements. In the light of them, the question whether the EU can be responsible for the regulation of air transportation area has arisen and also question whether the EU adopts acts that are binding on the MSs or if it has a right to conclude an international agreement with a non-EU country left unsolved as well[2].

Further, the research is relevant in the light of the relationship of the international treaties and the EU regulations, mainly in the area of passenger rights. Although the liberalization process took its time and the development of the agreements on air transportation services is broadening, however areas, where the EU is the main actor, arise. The relevant example of that is the Montreal Convention[3] and regulations of the EU. Both, the Montreal Convention and the EU regulate air passenger rights; so naturally, this has led to a debate of the primacy of these documents against each other[4]. Moreover, there are number of applications[5] nowadays brought

[1] European Parliament Committees, Transport and Tourism Committe of the European Parliament, [last accession on 2014-03-11].
<http://www.europarl.europa.eu/committees/en/tran/home.html>

[2] Many authors (such as S. Dempsey, M. Barlik, R. D. Verwey, A. R. Wessel, J. Moxon and others – *author's comment*) rise these questions, which are recent nowadays as well.

[3] Convention for the Unification of Certain Rules for International Carriage by Air (adopted 28 May 1999, entered into force 4 November 2003), *Official Journal L 194, 18/07/2001 P.0039-0049* (The Montreal Convention), [last accession on 2013-12-07].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22001A0718(01):en:HTML>

[4] This question is analyzed by authors such as C. van Dam, S. Radoševič, also case law of the CJEU (*author's comment*).

[5] Court's of Justice of the European Union official database, [last accession on 2014-03-10].
<http://curia.europa.eu/juris/documents.jsf?pro=&lgrec=lt&nat=or&oqp=&lg=&dates=&language=en&jur=C&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3BALL&text=261%252F2004&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=13146>

against the CJEU in order to give the preliminary ruling concerning Regulation 261/2004[6]. This means that the CJEU must issue decisions concerning air passengers' rights, which will create new practice and discussions in this area.

The authors do not always agree with the judgments of the CJEU on the decisions concerning air passenger rights such as the right to compensation due to denied boarding, delay or cancellation[7]. However, they interpret it differently, because there is no practice under which their opinions could rely on. Despite the fact, national practice is developing and national courts interpret and apply provisions of regulations of the EU in the national level. The results of this research are novel as the recent rulings brought a new approach to the passengers' rights; furthemore, judicial bodies, by invoking the cases concerning passengers' rights and competences of the EU towards international air regimen, try to solve limitations of passenger rights. Furthermore, air passengers' rights were not analyzed in the academic society of the Lithuania. Issues, which could be taken into consideration, were mainly discussed by assoc. prof. I. Daukšienė, but only in the aspect of the jurisdiction of the CJEU to settle disputes between MSs and the EU[8]. The lack of reviews in Lithuania shows the originality of the research. Therefore, due to the lack of the academic sources, the research is based mainly on articles by the EU scholars, international treaties and case law of the CJEU.

Finally, in the end of 2013 and the beginning of 2014 the European Commission and the European Parliament took initiative to amend Regulation 261/2004, which is the main source to protect passenger rights and to ensure air carriers liability when infringing air passengers' rights. The EU transport commissioner Siim Kallas commented that "the new rules will give a lot more certainty to airlines and passengers"[9]. This is the new beginning of the Regulation 261/2004 and this research is going to determine the main suggestive changes.

The hypothesis of the research. There are several hypotheses in the research:

1) The EU's competence to conclude air transportation agreements with third countries more effectively ensures the use of air space than separate MSs.

[6] Regulation (EC) No. 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. [2004], OJ L46/1, [last accession on 2014-03-10].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:046:0001:0007:en:PDF>

[7] For example, S. Radoševič in the Article "CJEU's Decision in Nelson and others in Light of the Exclusivity of the Montreal Convention" (*author's comment*).

[8] Daukšienė, I. Disputes between member states of the European Union and jurisdiction of the court of justice of the European Union, *Jurisprudence*. 2011, 18(4).

[9] Blog/news – the Article "EU unveils new air passenger rights", published on March 13th of 2013, [last accession on 2014-03-11].
<http://www.air-passenger-rights.co.uk/tag/eu-directive-2612004/ >

2) Due to high standards of passengers' rights protection and harmonized conditions of air carriers operation in a liberalized market, the EU protects passengers' rights in more effective way than international law.

The aim of the research is to examine the competence of the EU to regulate the scope of the air transportation services, to conclude air transportation agreements and to determine the competence of the EU to act outside the EU, mainly with non-EU countries. Constantly changing sphere in the light of passengers' rights creates lots of difficulties in order to protect passengers' rights, so the research also aims to analyze aspects of the effective protection of their rights.

Objectives of the research.

1. To analyze the development of the liberalization process towards separation of the air transportation;
2. To clarify competences of the EU to regulate air transport;
3. To determine whether the EU has a right to conclude air transportation agreements with third countries;
4. To analyze the passengers rights in the light of EU regulations and to settle their scope.

Methods of the research. There are several methods, which are combined together and applied to this research. Historical method is used mainly in the first part, where the creation of a single market for air transportation services, the liberalization process towards it is analyzed. Furthermore, method of systematic analysis and linguistic method, examining and interpreting legal sources, the case law of the CJEU, are used throughout the whole thesis. Finally, the comparative method is used in entire research, in the second part, where different views of the CJEU and most of the scholars opinions concerning the responsibilities of the EU and the MSs in air transportation agreements and regulation of the passengers rights, and mainly in the third part, where the comparison of the international law source, the Montreal Convention, and the EU law sources, the Regulations 261/2004 and 1107/2006[10], is made and where the impact of the EU law to international regulation of passenger rights is discussed. Logical-analytical method, as the logical contemplation, is used to reveal goals of the research, summarizing results and providing outcomes. Documental method was used for searching and analyzing documents such as the EU treaties, regulations, and conventions, relevant to the aim of this work.

The structure of the research. The master thesis consists of several parts, namely introduction, in which the scope of the research is provided, three main chapters and conclusions.

[10] Regulation (EC) No 1107/2006 of the European Parliament and of the Council concerning the rights of disabled persons and persons with reduced mobility when travelling by air. [2006], OJEU L 204/1, [last accession on 2014-01-28].
<http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_204/l_20420060726en00010009.pdf>

The first part of the work, which is necessary to comprehend the importance of the role of the EU in international sphere of the air services, will consist of two sub-chapters, where the legal sources and historical background leading towards the liberalization of the European air law, the extent and treaty making powers of the EU institutions and MSs to conclude air transport agreements, will be scrutinized.

The second chapter focuses on application of existing rules of international treaty law concerning air transportation agreements, as well as responsibilities of MSs for the fulfillment of international agreements, which are binding (or not) to all MS. The essential part of this chapter is going to scrutinize the competence of the EU and MSs to distribute air traffic rights and to set up responsibilities of the EU while performing air transportation agreements with non-EU countries.

Finally, in the third chapter, which is the most important in the whole research, the relationship between international legal acts, namely the Montreal Convention, and regulations of the EU, namely the Regulation 261/2004 and the Regulation 1107/2006, will be discussed in the light of passengers rights. The necessity to amendments of the EU regulations will be examined as well.

Sources of the research. In order to make complex research, three types of sources are used.

The first block of sources consists of academic researches, namely articles, textbooks amd monographs. S. Dempsey[11] and M. Bartlik[12] particularly focus on the liberalization process towards the single market for air transportation services, J. Balfour and K. Button[13] gives economic reasons for separation of the air transportation. S. Dempsey, together with M. Bartlik and P. Eeckhout[14] focus on analysis of the treaty making powers to conclude air services agreements. The lectures' material of prof. S. Platon[15] is used as well when touching questions of the EU's external and internal powers. M. Bartlik, R. Verwey[16], A. R. Wessel[17] and M.

[11] Dempsey, S. European Aviation Law. The Hague: Kluwer Law International, 2004.
[12] Bartlik, M. The impact of EU law on the regulation on international air transportation. Hampshire: Ashgate Publishing Limited, 2007.
[13] Button, K. The Impacts of Globalisation on International Air Transport Activity: past trends and future perspectives, Global Forum on Transport and Environment in a Globalising World, *International Transport Forum*, School of George Mason University, 2008, Guadalajara, Mexico, [last accession on 2013-10-23]. <http://www.oecd.org/greengrowth/greening-transport/41373470.pdf>
[14] Eeckhout, P. EU External Relations Law, Oxford: Oxford university press, 2011.
[15] Prof. Sebastian Platon material during Institutional system of the EU lecture on 2012-11-09 (*author's comment*).
[16] Verwey, R. D. The European Community, The European Union and the international law of treaties: a comparative legal analysis of the community and Union's external treaty-making practice, Hague: TMC Asser Press, 2004, reviewed by Srini Sitaraman, 320pp. Vol. 16 No. 9 (September, 2006) pp. 672-675., [last accession on 2013-12-04].
<http://www.lawcourts.org/LPBR/reviews/verwey0906.html>
[17] Wessel, A. R. The EU as a party to international agreements: shared competences, mixed responsibilities, University of Twente, the Netherlands, [last seen 2013-12-04]
< http://www.utwente.nl/mb/pa/research/wessel/wessel14.pdf>

Koskennieni[18] focus on the aspects the EU as a party to international agreements, sovereignty transfer to MSs, the EU's competence to distribute air traffic rights. J. Moxon[19] and K. van Miert[20] mainly analyze the prerogative of the EU or each MS to conclude air transport agreements, while Ch. Pounder raises resent problematic aspects on the EU and the US PNR agreements. Further, Ch. Erotokritou[21] pays attention to the responsibility of the EU and its MSs towards each other, while I. Daukšienė[22] concentrates in disputes settlement between MSs of the EU and jurisdiction of the CJEU. M. Chatzipanagiotis[23] researches the notion of 'flight', J. Balfour, C. van Dam[24], L. Giesberts and G. Kleve[25] concentrate on air carrier liability when breaching passengers' rights, A. Milner[26], J. Balfour and S. Johansson[27] analyze the liability and the right to compensation for passengers in the event of extraordinary circumstances, S. Radoševič[28] focuses on exclusivity of the Montreal Convention. Finally, J. M.Viegas[29] specifies important issues on rights of passengers with reduced mobility and PRM. Although different aspects are widely analyzed at European level, none of these sources encompass a systematic analysis on all the objectives of the master thesis.

The second category of sources involves legal acts, primary and secondary sources of law. International treaties such as historical Treaty establishing the European Economic Community[30], the TFEU[31], the Chicago Convention[32] and Vienna conventions on the law of

[18] Koskenniemi, M. International law aspects of the European Union. The Hague/London/Boston: Kluwer Law International, 1998.
[19] Moxon, J. EC Sets Open-Skies Schedule, *Flight Global Aviation Connected*, Brussels, 1995, [last accession on 2013-12-07].
<http://www.flightglobal.com/news/articles/ec-sets-open-skies-schedule-25692/>
[20] Van Miert, K. The transatlantic and global implications of European competition policy, *The European Commission speeches*, Brussels, 1998, [last accession on 2013-12-07].
< http://ec.europa.eu/competition/speeches/text/sp1998_054_en.html>
[21] Erotokritou, Ch. Sovereignty Over Airspace: International Law, Current Challenges, and Future Developments for Global Aviation, *The International Student Journal "Student pulse"*, 2012, VOL. 4 NO. 05 | PG, [last accession on 2013-12-08].
<http://www.studentpulse.com/articles/645/sovereignty-over-airspace-international-law-current-challenges-and-future-developments-for-global-aviation>
[22] Daukšienė, I. *supra* note 8.
[23] Chatzipanagiotis. M. The notion of 'flight' under Regulation (EC) No. 261/2004. *Air & Space law* 37, no 3, [2012]:245-258.
[24] Van Dam, C. Air Passenger rights after Sturgeon. *Air & Space law* 36, no. 4/5, [2011]: 259-274.
[25] Giesberts, L., Kleve, G. Compensation for passengers in the event of flight delays. *Air and space law* 35, no. 4/5, [2010]: 293-304.
[26] Milner, A. Regulation EC 261/2004 and "Extraordinary circumstances", *Air & Space law* 34, no. 3, [2009] 215-220.
[27] Dempsey, S., Johansson, S. Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage, *Air and Space law* 35, no. 3, [2010]: 207-224.
[28] Radoševič, S. CJEU's Decision in Nelson and others in Light of the Exclusivity of the Montreal Convention. *Air & Space law* 38, no. 2, [2013]: 95-110.
[29] Viegas, J. M. Passengers with Reduced Mobility in the European Union: Legal issues Regulation (EC) No 1107/2006 of 5 July 2006. *Air and Space law*, no.1, p. 52 [2013]: 47-66.
[30] The treaty establishing the European Economic Community (adopted 25 March 1957, entered into force 1 January 1958), known as the Treaty of Rome (*author's comment*), [last accession on 2013-09-10]. <http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf>

treaties[33] will help to analyze mainly the first chapter of the research. The second chapter of the research will be scrutinized by using European Commission's communications concerning the creation of SES[34], relations between the EU and third countries in the field of air transport[35], consequences of the CJEU's judgment in 2002[36]. Also Regulation 847/2004[37], Agreement between US and the EU on the use and transfer of passenger name records to US[38] and European Commission's report[39] and the review[40] on PNR will allow to make research on the competence of the EU to conclude air service agreements with third countries. Finally, the analyze of the Montreal Convention, Regulation 261/2004 and Regulation 1107/2006 will allow to give clear results for the third chapter,also the Proposal[41] of the Commission together with the Report[42] of

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[31] Treaty on the Functioning of the European Union (consolidated version 2012), OJ C 326/47 26.10.2012, [last accession on 2013-10-23].
< http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0047:0200:EN:PDF>

[32] Convention on International Civil Aviation, (Chicago Convention) (concluded on 7 December 1944, entered into force on 4 April 1947),15 UNTS 295 (ICAO), [last accession on 2013-10-15].
<http://www.icao.int/publications/Documents/7300_orig.pdf>

[33] International Vienna Convention on the Law of Treaties, 1969.MTDSG XXIII-1 and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986, MTDSG XXIII-3, not yet into force., *International law Commission*, [last accession on 2013-12-04].
<http://legal.un.org/ilc/texts/1_1.htm>

[34] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament – The creation of the Single European Sky, COM(1999) 614 final – Not published in the Official Journal, [last accession on 2013-10-23].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0614:FIN:EN:PDF>

[35] Commission of the European Communities, Communication from the commission on relations between the community and third countries in the field of air transport, Brussels, 26.2.2003, COM (2003) 94 final, 2003/0044 (COD), [last accession on 2013-12-02].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0094:FIN:EN:PDF>

[36] Commission of the European Communities. Communication from the Commission on the consequences of the Court judgments of 5 November, 2002 for European air transport policy. COM (2002) 649 final. Brussels, 19.11.2002, [last accession on 2013-12-08].
< http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0649:FIN:EN:PDF>

[37] Regulation (EC) No. 847/2004 of the European Parliament and of the Council on the negotiation and implementation of air service agreements between Member States and third countries., *Official Journal of the European Union*, OL L195/3 30.4.2004, [last accession on 2013-10-23].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:157:0007:0017:EN:PDF>

[38] Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, *Official Journal* L 0215 , 11/08/2012 P. 5 – 0014, (adopted 14 December 2011, entered into force April 20120, [last accession on 2014-03-08].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22012A0811(01):EN:HTML>

[39] European Commission, Report from the commission to the European parliament and the Council on the joint review of the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of passenger name records to the United States Department of Homeland Security, Brussels, 2013, COM(2013) 844 final, [last accession on 2014-03-08].
<http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131127_pnr_report_en.pdf>

[40] European Commission, Joint Review of the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of passenger name records to the United States Department of Homeland Security, Brussels, 2013, SEC(2013) 630 final, [last accession on 2014-03-08].
<http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131127_pnr_report_en.pdf>

[41] European Commission, The proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, Brussels, 2013, COM(2013) 130 final, [last accession on 2014-03-09].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0130:FIN:EN:PDF>

[42] European Parliament, The report on the proposal for a regulation of the European Parliament and of the Council

the European Parliament will be explored in the light of the necessary changes for the better protection of the passengers rights.

The third type of sources of the research is case law. The case law of the CJEU is used during the whole analysis of the research. Examples under national Lithuanian law are also touched when the third chapter is explored.

amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, 2014, A7-0020/2014, [last accession on 2014-03-09].
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0020+0+DOC+XML+V0//EN>

1. THE ROLE OF THE EUROPEAN UNION IN INTERNATIONAL SPHERE OF THE AIR SERVICES

The regulation of air transportation has always been an important issue in the EU. The development of air transport policy has a significant role in the light of the creation of the internal market, as well as the settlement of powers and obligations of institutions of the EU[43]. Several problems arise concerning the creation of the single market for the air transportation services and the whole liberalization process towards to it. First of all, the author will research the necessity to separate air transportation services from other areas of internal market. Secondly, the author will determine the legal basis of the CJEU decisions taken towards the above mentioned separation. Thirdly, in the light of the CJEU decisions, the extent of the EU's right to regulate air transportation services will be highlighted in Section 1.3 through the treaty making powers of the EU.

1.1. The liberalization process towards the single market for air transportation services

The creation of the EU common market was a cornerstone since the Treaty of Rome in 1957 had been concluded. According to the professor Paul Stephen Dempsey, while economic unification had come easy in many sectors, creating a single market for air transportation had faced difficult challenges[44]. Normally, aviation has been conducted on the basis that each country has sovereignty over the air space above its territory[45]. Notably the TFEU specifically refers to air transport in order to exclude it from other areas. Title VI of the TFEU sets out provisions on a common transport policy, and, at the end of this Title, Article 100 of the TFEU makes it clear that these provisions apply to transport by rail, road and inland waterway[46], but that with regard to air transport „the European Parliament and the Council may, in accordance with the ordinary legislative procedure, decide whether, to what extent and by what procedure appropriate provisions may be laid down"[47]. It was clear, that it was necessary to defer the development of the EU air transport policy from other areas of the single market and this is the most important reason to separate air transport from other areas[48]. Secondly, John Balfour found out one more reason -"as either cause or effect, or a mixture of both, air space has been seen as a

[43] The European Parliament, the Council of the European Union, the European Commission, the Court of Justice of the European Union (*author's comment*).
[44] Dempsey, S., *supra* note 11, p.1.
[45] Convention on International Civil Aviation, *supra* note 32, Article 1.
[46] Treaty on the Functioning of the European Union, *supra* note 31, Article 218.
[47] Treaty on the Functioning of the European Union, *supra* note 31, Article 100.
[48] European Air Law Association, 2013 EALA Prize, EU's external aviation relations: the question of competence, June 2013), [last accession on 2013-10-23].
<http://www.eala.aero/library/eala-prize/eu-s-external-aviation-relations-the-question-of-competence.pdf >

valuable national asset, access to which can be traded for similar reciprocal benefits or even benefits in areas outside aviation"[49]. Thirdly, air transport has important social and economic functions, in providing links both within a state and between a state and the rest of the world[50].

Taking into account the aspect of the separation of services of different areas of the single market, it is necessary to mention the liberalization process during which the EU reached its goal to regulate air transportation, at least has a right to do so. In order to create a single market for the air transportation, the EU liberalized its air transport sector. What is important for the liberalization towards the single market for air transportation services, "the attainment of a *bona fide* internal market in all economic sectors, including aviation, requires not only removal of trade barriers"[51], but also "a fusion of the members in to a single economic area […] extended to include freedom of movement of workers, the right of establishment, and a common transport policy"[52]. In effect, capacity on the majority of routes was artificially restricted, fares were high and entry into markets by non-flag carrier airlines was virtually impossible.[53] Also national governments utilized air carriers to promote public policy objectives beyond allocative efficiency, such as increasing tourism and foreign exchange, enhancing national security, reducing unemployment, and promoting domestic aircraft manufacturing[54]. Various European regions left outside agreed route networks due to decisions taken at national level, had either no possibility of attracting air services or had to rely on connecting services through the emerging network centers of the flag carriers[55]. This means that consumers could not afford to travel and European integration suffered, so in order to liberalize the air transportation, the EU had to do something.

Although the beginning of the creation of the single market in Europe for air transportation derives from the Treaty of Rome, the Regulation 17[56] and case law of the CJEU, the liberalization of air transportation made the biggest effect. What is more, the liberalization process has reasonable grounding. According to the ELFAA, "prior to the liberalization process of European air transport between, the industry was highly regulated and inflexible, with no real

[49] Balfour, J. EC External Aviation Relations: The Community's increasing role, and the new EC/US Agreement, *Common Market Law Rev 45*, 2008, p. 443-463. (cited by: European Air Law Association, 2013 EALA Prize, EU's external aviation relations: the question of competence, June 2013), [last accession on 2013-10-23].
< http://www.eala.aero/library/eala-prize/eu-s-external-aviation-relations-the-question-of-competence.pdf>
[50] Button, K., *supra* note 13.
[51] Dempsey, S., *supra* note 11, p. 24.
[52] *Ibid.* (cited by: Creation of internal market, 1 COMMON MKT. REP. (CCH) para 202.07 (1978) (CCH Explanation).
[53] *Ibid.*
[54] *Ibid.*, p. 3. (cited by: Sorensen, Progress Towards the Development of a Community Air Transport Policy, IATA MAG., June-July 1985, at 3, 78.).
[55] *Ibid.*
[56] Council Regulation No 17 (EEC): First Regulation implementing Articles 85 and 86 of the Treaty (at present Articles 81 and 82), *Official Journal* No. 013, 21.02.1962, [last accession on 2013-10-23].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:EN:HTML>

competition between national carriers and fares that were set through bilateral agreements between states"[57].

The liberalization process was achieved in three stages. In 1987 the Council reached an agreement in principle on a package of liberalization measures to increase competition in the civil aviation sector (hereinafter - First Package), under which fare restrictions were reduced and air carriers were also given additional flexibility for cooperation within the limits of existing air service agreements[58]. In 1990 the so-called 'Second Package' of liberalization measures allowed all European airlines to carry passengers to and from their home countries to other EU MSs. Also 5th freedom[59] flights, i.e. intra-European flights with stop-over in a third country and the right to pick-up and drop-off passengers during the stopover, were allowed to a greater extent[60]. Fare and capacity restrictions were further abolished[61]. Finally, in 1993, the last of measures was adopted, bringing the EU deregulation process to an end. As its name suggests, the Third Package of liberalization measures represented the culmination of the liberalization proce[62]. Most significantly, the Third Package gave practical effect for the first time in the air transport sector to the right of establishment provisions of the Treaty of Rome by introducing common licensing criteria for air carriers across of the whole EU, which means that all air carriers were allowed to carry any international route within the EU[63]. Finally, air carriers were given almost full freedom to set fares. In 1997, as part of the Third Package, all carriers, holding a community license, were given the right of cabotage[64], that means the right to operate domestic routes within the whole of the EU, or in other words "since this moment every air carrier is entitled to offer air transportation services between any MS and even with a single MS state"[65].

Last but not least, another major step towards the creation of the single market for the air transportation services was the creation of the SES. The SES plan is aimed at restructuring European airspace on the basis of air traffic flows rather than national borders, while also increasing the efficiency of air traffic control over Europe[66]. According to the Commission, one of the biggest reasons to create single market for air transportation services is

[57] European Low Fares Airline Association, Liberalisation of European Air Transport: The Benefits of Low Fair Airlines to Consumers, Airports, Regions and the Environment. 2004, p. 3, [last accession on 2013-11-18]. <http://www.elfaa.com/documents/ELFAABenefitsofLFAs2004.pdf >
[58] *Ibid.*
[59] The right to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory (*author's comment*).
[60] European Low Fares Airline Association, *op. cit.*
[61] *Ibid.*
[62] International Civil Aviation Organization, European experience of air transport liberalization, February 2003, [last accession on 2013-10-23].
<http://www.icao.int/sustainability/CaseStudies/StatesReplies/EuropeLiberalization_En.pdf>
[63] Bartlik, M., *supra* note, p. 15.
[64] Dempsey, S., *supra* note 11, p. 7.
[65] Bartlik, M., *op. cit.*
[66] Commission of the European Communities, *supra* note 34.

the problem of delayed flights – "in Europe today one flight in three is not on time. The average delay is 20 minutes and that can stretch up to several hours at peak periods. This situation angers passenger, it frustrates airlines and some do not shrink from talking about chaos. It also creates costs to the economy, over and above lost business and ruined holidays damage to the environment"[67]. In order to solve these problems, the European Parliament and the Council laid down the framework[68] for the creation of the SES. The objective of the SES is to ensure an optimum use of European airspace to meet the requirements of all airspace users. According to this regulation, the implementation of the common transport policy requires an efficient air transport system allowing safe and regular operation of air transport services, thus facilitating the free movement of goods, persons and services[69].

Here the question of duality concerning the Chicago Convention arises, but the Regulation 17 determines that "the SES initiative should be developed in the line with the principles laid down in by the 1944 ICAO"[70]. Although the Regulation 17 does not confront with the Chicago Convention, but there is always a small line between the real actions. What is more, one of the answers why the EU wants to regulate the air transportation services is that the EU is not bound by the Chicago Convention. The CJEU concludes that the Chicago Convention, the main multi-State treaty regulating air transportation, is not a valid instrument against which an EU directive could be judicially assessed[71]. Further, the CJEU concludes that neither the TFEU, nor the CJEU's previous rulings on 'functional succession' to treaties, would require that the EU be considered bound by a treaty simply because all of its MS are parties.[72] The Chicago Convention regulates air transportation through its provisions such as the right of countries to decide which carriers can land or even use its airspace[73], actually, all aspects of civil aviation from landings to safety. So, the second reason why the EU wants to regulate international air transport could be the desire to vouch for safety. Further, according to the former Vice-President of the European Commission with responsibility for Transport Jacques Barrot, "one major benefit of the EU's single market is the high level of safety and security in all aspects of air transportation"[74]. Mainly the European Commission took the main role into matter of planning

[67] Commission of the European Communities, *supra* note 34.
[68] *Ibid.*
[69] *Ibid.*
[70] Council Regulation No 17, *supra* note 56.
[71] Havel F. B, Mulligan Q. J. Flying too high? Extraterritoriality and the EU Emissions Trading Scheme: the Air Transport Association of America judgment, *Matrix Chambers EU law group*, posted on 2 February 2012, [last accession on 2013-10-23].
<http://eutopialaw.com/2012/02/02/958/>
[72] *Ibid.*
[73] Convention on International Civil Aviation, *supra* note 32, Article 2.
[74] European Commission, Directorate-General for Energy and Transport, Flying together, 2007, [last accession on 2013-10-23].

the eventuality of this economic and political unification, as well as in air transportation matters. In its programme, the Commission stated that the internal market would be incomplete unless citizens of the EU could reside in other MS – even without economic justification[75].

To sum up, some of the effects of liberalization are apparent, although not knowing what would have happened in the absence of liberalization, makes it difficult to assess the impact of the single aviation market in Europe with any precision. Taking into account the ICAO sighting, the author determines that consumers have benefited from a wider range of choice, both in locations served and in quality and type of service, also fares at the bottom end of the market have fallen, but, as it is seen, it is less clear quite what impact liberalization has had on the prices paid by business travelers[76]. By contrast, liberalization has had only limited impact on the basic structure of the airline sector, almost certainly because this is influenced to such a key extent by the traditional international regulatory framework, which is outside the direct control of any one country or even group of countries[77]. While the Fist Package, the Second Package and proposals did much to change the competitive area of air transport, the largest impact by far was made by the Third Package of reforms to complete air transport liberalization[78].

1.2. Liberalization process: legal motivations towards it

Concerning the liberalization of air transportation services, the question about the legal basis of the EU, particularly first decisions of the CJEU, moving towards the separation of the air transportation services, comes into the light of research of this Section.

During the 1970s and 1980s, the CJEU delivered several decisions that laid the foundation for regulation of air transportation. Before it was unclear whether the Commission and Council had jurisdiction to regulate air transportation services. Through these cases, the

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<https://www.google.lt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCcQFjAA&url=http%3A%2F%2Fbookshop.europa.eu%2Fen%2Fflying-together-pbKO7606431%2Fdownloads%2FKO-76-06-431-EN-C%2FKO7606431ENC_002.pdf%3Bpgid%3Dy8dIS7GUWMdSR0EAlMEUUsWb0000gjWp4RDq%3Bsid%3D5q9FGr2Z44lFVe3LX-_bvd-8q8xbaPD6-N0%3D%3FFileName%3DKO7606431ENC_002.pdf%26SKU%3DKO7606431ENC_PDF%26CatalogueNumber%3DKO-76-06-431-EN-C&ei=04rmUqWoOKqG4ASn6oGIAw&usg=AFQjCNGoANiT6cQULwt-ZdJ91TE9aSj3vw&sig2=-3nSdNPOrfkUnxagHFRXUg>

[75] Commission of the European Communities, Programme of the Commission for 1984 Office for Official publications of the European Communities, 1984, [last accession on 2013-10-06]. <http://webcache.googleusercontent.com/search?q=cache:kaCiVcTEwpoJ:bookshop.europa.eu/en/programme-of-the-commission-for-1984-pbCB3883815/downloads/CB-38-83-815-EN-C/CB3883815ENC_001.pdf%3Bpgid%3Dy8dIS7GUWMdSR0EAlMEUUsWb0000TOkwmJCi%3Bsid%3DYb77dpg9Ncn7ecjgYk1l0foYw32HJtVef8w%3D%3FFileName%3DCB3883815ENC_001.pdf%26SKU%3DCB3883815ENC_PDF%26CatalogueNumber%3DCB-38-83-815-EN-C+&cd=9&hl=en&ct=clnk&gl=lt>

[76] International Civil Aviation Organization, *supra* note 62.

[77] *Ibid.*

[78] *Ibid.*

CJEU detailed "the structural extent of air transport regulatory power, and constructed a framework in which the Commission and Council could continue the liberalization process"[79].

Before the TFEU came into force, the most important provision for sea and air transport was the one, which allowed the Council to act without a proposal from the Commission. In the *French Seamen's* case in 1974, the CJEU pronounced that"the general rules of the Treaty of Rome (now the TFEU – *author's comment*) – such as non-discrimination on national grounds, right of establishment, competition, mobility on labour, and equal pay – apply to air transport, even though no regulation had been adopted to enforce those laws."[80] This means, that Article 100 TFEU (ex Article 84 (2) of the Treaty of Rome – *author's comment*) is applicable only after the Council and the Commission have adopted rules making them so[81].

Further, in the *Bombardella* case in 1985, the CJEU concluded, that the Council failed to act with regard to freedom to provide services in the field of international transport and the fixing of conditions under which non-resident carriers may operate transport services within a MS, by not taking measures necessary for that purposes before the expiration of the transitional period[82]. Taking into consideration this decision, the fact that the Council failed in its duty to provide a common transport policy, other bodies of the EU had the right to obtain judicial review of the Council's activities.

In the case *Nouvelles Frontieres* decided in 1986 the problem whether the MS of the EU have the right to regulate the price of airline ticket sold within their borders had arisen and the potential application of sanctions of the competition provisions of the TFEU (ex Treaty of Rome – *author's comment*) to air transport[83] was considered. A French travel agency was selling tickets at fares that had not been approved by the French Government under the French Civil Aviation Code, so the issue of the case was "the validity of the French Civil Aviation Code, which sets forth a compulsory procedure for the approval of air fares by the French Minister for Civil Aviation"[84]. Article 108 of the TFEU (ex Article 88 of the Treaty of Rome – *author's comment*) gave power to MS to rule on the lawfulness of agreements, decisions or concerned practices and on abuses of dominant positions according to their national law, until the Council (acting on proposal of the Commission – *author's comment*) promulgated regulations implementing the

[79] Dempsey, S., *supra* note 11, p. 29.
[80] *Ibid.*, p. 7. (Cited by: Case C-167/73, *Commission v. French Republic* [1974] ECR 359).
[81] *Ibid.*, p. 30.
[82] *Ibid.*, p. 31. (Cited by: Case 13/83 *European Parliament v. Council of the European Community* [1985] ECR1513).
[83] Joined cases 209-13/84, *Ministre Public v. Asjes* [1986] ECR 1425 (cited by: Dempsey, S. European Aviation Law. The Hague: Kluwer Law International, 2004, p. 32)
[84] Licalzi, O. J. Competition and deregulation: Nouvelles Frontieres for the EEC Air Transport Industry. *Fordham International Law Journal.* 1986, 10(4): 808-841, p. 810, [last accession 2013-10-23]. <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1164&context=ilj>

competition rules[85]. When the decision of this case was released, Article 89 of the Treaty of Rome (now Article 109 of the TFEU – *author's comment*) gave the Commission more limited power, and the Commission in the cooperation with the MS had the right to investigate cases of suspected infringements of the competition rules and in the event of infringement it had a right to propose measures to end it[86]. If the infringement still existed, the Commission had the right to issue a reasoned decision authorizing the MS to remedy the situation. Although such procedural question had changed and now "the Council on a proposal from the Commission, and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108"[87], the CJEU in this case concluded that air transport is subject "to the general rules of the Treaty, including the competition rules" [88] and that "absent specific regulations governing air transport adopted by the Council under Article 87 (of the Treaty of Rome – *author's comment*, now Article 107 of the TFEU – *author's comment*), it was, in effect, up to the competent authorities in MSs under Article 88 (of the Treaty of Rome – *author's comment*, now Article 108 of the TFEU – *author's comment*) to apply the competition rules of the Treaty of Rome (now the TFEU – *author's comment*) to agreements concerning the air transport industry"[89]. This means that the competition rules are applicable to international air transportation and expanded power to distribute air traffic rights for the Commission concerning anticompetitive situations among the European airlines.

To sum up, moving towards the single internal market through liberalization process, the role of the European institutions changed. The SEA made a lot of changes concerning the EU institutions. Firstly, the European Parliament granted control over the Council decisions, the Commission's role was expanded as well and the Council was allowed, with the request of CJEU, to set up a court to hear, among other matters, appeals brought from Commission decisions on competition[90]. What is more, the biggest difficulty going towards the creation of internal market was the right of veto. The SEA made no provision for this right, so any MS which declared that the decision of the Council is negative to its national interests, and other MS agreed with that, could outvote veto[91]. This means that concerning the development of a common transport policy, the Council could act by qualified majority in deciding "whether, or to what extent and by what procedure appropriate provisions may be laid down for sea and air

[85] Licalzi, O. J., *supra* note 84.
[86] Dempsey, S., *supra* note 11, p. 33.
[87] Treaty on the Functioning of the European Union, *supra* note 31, Article 109.
[88] Joined cases 209 to 213/84, *Ministre Public v. Asjes*, *supra* note 83 (cited by: Dempsey, S. European Aviation Law. The Hague: Kluwer Law International, 2004, p. 33)
[89] *Ibid.*
[90] Good, K. Institutional Reform Under the Single European Act. American University International Law Review . *Washington College of Law Journals & Law Reviews at Digital Commons*, 1988 , [last accession on 2013-10-06]. <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1624&context=auilr>
[91] Dempsey, S., *op. cit.*, p. 26.

transport"[92]. Finally, concerning the analyzed cases, legal motivations towards the liberalization process gave the jurisdiction to the Commission and the Council to regulate air transportation.

1.3. The treaty making power to conclude air service agreements

As regard to the third problem, it is necessary to determine that treaty-making power of the EU to conclude the international air agreements consists of two kinds of treaty-making powers: explicit treaty-making powers and implied powers. Explicit powers are expressed to a limited number of areas such as the common commercial policy, environmental issues and others. Article 216 (1) of the TFEU provides, in relation to the EU treaty-making competence in general, that "the Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope"[93]. Touching the question, when the EU treaty-making competence is exclusive, Article 3 (2) of the TFEU provides that "the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope"[94]. This general point of view means that where the TEU and the TFEU assign explicit powers to the EU in a particular area such as the international air transportation, it must also have similar powers to conclude agreements with non-EU countries in the same field (it will be discussed in the Section 2.2 – *author's comment*).

As it was mentioned above, the explicit treaty-making powers are clearly written in TFEU. They have obvious meaning and cannot be interpreted as suppositional ones[95]. The most important explicit treaty-making power for international air transportation since the creation of the single market for air transportation services is Article 207 (3) TFEU. According to dr. Martin Bartlik, this article was "the only provision empowering the EU to conclude international agreements until the development of implied powers"[96]. Although this Article talks about the common commercial policy, it also can be referred to international air transportation, where "agreements with one or more third countries or international organizations need to be negotiated

[92] Dempsey, S., *supra* note 11, p. 26 (Cited by: Wouter, M. Some aspects of E. C. Law in Relation to the Air Transport Industry 1 (unpublished address of 1 April 1992).
[93] Treaty on the Functioning of the European Union, *supra* note 31, Article 216 (1).
[94] *Ibid.*, Article 3 (2).
[95] Prof. Sebastian Platon, *supra* note 15.
[96] Bartlik, M., *supra* note 12, p. 18.

and concluded"[97]. It can be referred to international air transport only in accordance with Article 218 of the TFEU, otherwise transport related aspects cannot be understood in respect of air service agreements.

Further analyzing the explicit treaty-making powers of the EU, another important provision, which gives a right to the EU to conclude international agreements, is Article 352 of the TFEU. It provides that "if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament"[98]. According to it, the purpose derives from the first paragraph – to ensure that the EU posses the necessary powers to adopt necessary measures, when matters that appears under the scope of the EU, but which were not discovered during that time when the EU was not able to get such the necessary powers[99]. This basically means that above-mentioned Article 352 of the TFEU is applicable when it is necessary to attain the objectives of the TFEU. According to dr. Ivo E. Schwartz, "it is supplementary provision and only applicable, if other, more appropriate and special powers are not available"[100]. What is important, it cannot be applied to any other objectives, which are not set out in the TFEU, because it is clearly written in the Article.

Analyzing further, definition of 'appropriate measures' is not set out clearly in the Article, but generally it can be understood as all sorts of activities applicable to the conclusion of air service agreements. Together with Article 100 of the TFEU it can provide for the necessary treaty-making power to conclude air service agreement "since the wording of Article 80 (2) EC (now Article 100 of the TFEU – *author's comment*) is quite broad and since it neither prescribes any particular objectives nor means that must be followed with the respect to the regulation of air […] transportation"[101]. When the MS grant the necessary powers to the EU, it is done by bilateral and multilateral air transportation agreements and to put more, Article 352 of the TFEU is a rule - unlike the implied powers – the doctrine in case, where the EU as a whole is not empowered in a certain area, but the EU operation is necessary to achieve the agreed goals[102].

[97] Treaty on the Functioning of the European Union, *op. cit.*, Article 207 (3).
[98] Treaty on the Functioning of the European Union, *supra* note 31, Article 352.
[99] Bartlik, M., *supra* note 12, p. 20-21.
[100] *Ibid.*, p. 21. (Cited by: Ivo E. Shwartz, in: Hans von der Groeben and JurgenShwarze, eds. (2004), Vertraguber die Europaische Union und VertragzurGrundung der EuropaishenGemeinschaft), vol. 4, 6 thedn. (Baden-Baden, Germany: NomosVerlagsgesellchaft) Article 308 EC at paras 9 ff.
[101] *Ibid.*
[102] *Ibid*., p. 20-23.

This leads to the further examination of the implied treaty-making powers of the EU concerning international agreements in the area of air transportation.

Also regarding to the third problem, it is also necessary to describe the implied treaty-making powers. This is the second kind of treaty-making powers, which are implied from the provisions of the TFEU. They derive from explicit internal competence and the CJEU basically had expanded them in order to have more rights for the EU to conclude international agreements.

As it is determined in the TFEU, the EU has exclusive external competence for the conclusion of international agreement when there are one of three conditions – firstly, where conclusion of an international agreement is provided for in a legislative act; secondly, when it is necessary to enable the EU to exercise its internal competence and thirdly, when conclusion of international agreement can affect common rules or change their scope[103].

Exactly this provision was intended as a codification of the *AETR*[104] judgment doctrine. According to Article 91 of the TFEU, "for the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down common rules applicable to international transport to or from the territory of a MS or passing across the territory of one or more MS"[105]. This means that the EU competence derives not only from well-to consolidate the provisions of the TFEU and within the framework of secondary legislation adopted. The main question set out in the *AERT* case was whether the EU has the competence to conclude international agreements in the field of transport[106]. The Commission argued that the TFEU provisions on a common transport policy and Article 91 of the TFEU applied to external relations "just as much as to domestic measures and the full effect of this provision would be jeopardized if the powers, which is conferred within the meaning of subparagraph 1 (d) of the Article, did not extend to the conclusion of agreements with third countries"[107]. But the answer of the CJEU was a bit different - it presumed that the TFEU gave for the EU the right to conclude international agreements in this field of transport, especially after the adoption of the regulation on this matter[108].

The decision of the *AETR* case was changed by the judgment of the CJEU in *Kramer* case. Here the CJEU held that the EU has implied external competence, even if it has not adopted

[103] Treaty on the Functioning of the European Union, *supra* note 31, Article 3 (2).
[104] Case 22/70, *Commission of the European Communities v. Council of the European Communities* [1971] ECR 263, [last accession on 2013-12-02].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61970J0022:en:HTML>
[105] Treaty on the Functioning of the European Union, *op. cit*., Article 91.
[106] Case 22/70, *Commission of the European Communities v. Council of the European Communities, op. cit.*
[107] Eeckhout, P., *supra* note 14, p. 72.
[108] *Ibid.*

secondary legislation to implement it, but this time the MS retains the competence to conclude international treaties as long as these are compatible with the objectives held in the TFEU[109]. This means that internal and external the EU competences is parallel to each other – if, under the TFEU, the EU has the competence to make decision, it follows that it has jurisdiction in the fields to conclude air transportation agreements[110].

Further analyzing the implied powers of the EU concerning conclusion of international agreements in the field of transportation, it is important to mention *Opinion 1/76*. Here the question whether was there an implied power to conclude international agreements in the absence of internal EU legislation[111]. According to the CJEU, the EU may have exclusive external competence, even in cases where it has not adopted secondary legislation in the certain field, as long as MS actions may pose a threat to the achievement of objectives of the EU[112].

As regard to the third problem, after the separation of the air transportation from the internal market, the long development of the doctrine of implied external EU competence, regarding the opinion of professor Gonzalo Villalta Puig "the utility of the doctrine that the ECJ (now the CJEU – *author's comment*) developed […] is questionable"[113]. From the development of the CJEU case law concerning implied powers of the EU in the area of air transportation, it is still unclear the competence under which the EU may rely upon. Finally, the CJEU established genuine parallelism between internal and external powers, which means that it gave the authority to the EU to conclude international agreements an all areas where powers have been conferred in it[114].

To conclude, the creation of the common market in the air transportation sector took the most important role during the liberalization process. The treaty-making powers of the EU determine the extent of the EU's right to regulate air transportation services. Analyze of them showed that the EU has a right to regulate air transportation services and to conclude air transportation agreements in order to achieve the EU's objectives, settled in the TEU and the TFEU. Further, the EU does not have absolute right to regulate air transportation, but only in

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[109] Joined cases 3, 4 and 6/76, *Comelis Kramer and others* [1976] ECR 1279, (citeb by: prof S. Platon material during lecture on 2012-11-09), [last accession on 2013-12-02].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976CJ0003:EN:PDF>
[110] Prof. Sebastian Platon, *supra* note 15.
[111] Opinion 1/76 of the Court of 26 April 1977 given pursuant to Article 288 (1) of the EEC Treaty - 'Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels' [1977] ECR 741, [last accession on 2013-12-02].
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CV0001>
[112] *Ibid.*
[113] Villalta Puig G., Darkis C. The development of European Union implied external competence: the Court Of Justice and Opinion 1/03, *University of Navarra Journals and Serials, A.E.D.I.*, vol. XX V (2009), [last accession on 2013-12-02].
<http://dspace.unav.es/dspace/bitstream/10171/21456/1/ADI_XXV_2009_15.pdf >
[114] Eeckhout, P., *supra* note 14, p. 119.

those matters, where the MSs grant necessary powers to it. Finally for reasons mentioned above, it is necessary to examine the role of the entire EU as the party in international agreements, the responsibility to conclude air transportation agreements towards each other MS and the EU, as well the competence of the EU to conclude the air transportation agreements with non-EU countries.

2. INTERNATIONAL AGREEMENTS: PARTIES, COMPETENCES AND RESPONSIBILITIES

Since the Treaty of Maastricht, the EU has become a party to a huge number of international agreements, and has conducted the same big number of such agreements. The EU acts as the sole contracting party in some cases but mostly it acts as a joint contracting party together with the MSs. It is known that the MSs exercise their competence to the extent that the EU has decided to cease exercising its competence[115], so part of international agreement falls within exclusive competence of the EU and part within exclusive competence of the MS. This leads to the question to what extent the EU applies existing rules of international treaty law concerning air transportation agreements and how the Commission decided that it had prerogative to conclude such air transportation agreements. Following that, there is a need to emphasize the role of the EU in international agreement, as a party of such bilateral and multilateral air transportation agreements, which will be put in Section 2.1. Then, the competence of the EU and MSs to distribute air traffic rights and responsibilities of the EU when performing multilateral and bilateral air transportation agreements with non-EU countries will be explained in Section 2.2. Finally, the competence and responsibility of MSs and the EU towards each other for the fulfillment of air transportation agreements will be analyzed in Section 2.3.

2.1. The European Union as a party to international agreements

As it was mentioned above, the MSs are recognized to be the primary actors in the scope of international relations, and under international law they are said to possess legal personality to negotiate and enter into agreements and treaties with each other as well[116]. Without legal personality an entity cannot become a subject of international law and conclude international agreements[117]. However there have been an increasing number of non-state actors such as inter-governmental organizations and international organizations that also have the legal capacity to join treaty and participate in negotiations, when the treaty itself allows that[118]. So the question arises – what are the legal implications of the EU's international treaty-making practice and what is its influence on the development of international law, especially the impact on the law of international agreements regarding the air transportation services?

The ability to enter into international treaties has normally been the prerogative of states. Only they have legal personality which allows them to conclude, negotiate, sign and ratify

[115] Treaty on the Functioning of the European Union, *supra* note 31, Article 216 (2).
[116] Verwey, R. D., *supra* note 16.
[117] *Ibid*., p. 3 (cited by: Brownlie, I. Principles of public international law, 2003, at 4-5).
[118] *Ibid.*

international agreements. However, when the VCLTIO[119] comes into force such ability will be extended to international organizations, so it means also that if the EU ratifies the VCLTIO as an international organization, it will have "this ability to contract such treaties"[120]. Despite this fact, the problem regarding the appropriate role and legal standing of the EU as the sole international organization in relation to international law sphere arises.

One more interesting and at the same time problematic issue concerning the EU and international relations is that the EU's MSs have not lost their sovereignty on their legal personality, which gives them the right to participate in international legal regimen[121]. Here it is important to mention that international civil aviation is basically governed by "the principle of the sovereignty of a state over its airspace"[122]. On the other hand, the MS have transferred some of their sovereignty to the EU, so this means, that the EU is empowered to sign treaties and international agreements on behalf of its members dependently on the area to which the international agreement is intended to, while the MS possess all privileges of statehood, including negotiating and signing international conventions, also in the area of international air transportation and services[123]. So here the question of the EU's competence in the area of internal political arrangements and external treaty-making process arises.

Talking about current international treaty law, which is based on two Vienna Conventions on law of treaties[124], another question arises whether international law provides adequate guarantees to cover contractual relations among the EU, the MS and third parties, which mostly involve states or other international organizations[125]. It is difficult that international roles played by the EU and the MS not only procedure legal complexity but it also creates some doubts among contracting third parties about the MS's legal obligations and again raises questions about legal responsibility and distribution of the rights[126], especially as the author thinks, air traffic rights.

To answer these questions, the jurisprudence has two points of view. Firstly, the CJEU considered itself competent to interpret all provisions of a mixed international agreement, not taking into account exclusive competence of the MS[127], but later, its jurisdiction was limited and

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[119] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, *supra* note 33.
[120] *Ibid*., Article 85.
[121] Verwey, R. D., *supra* note 16.
[122] Convention on International Civil Aviation, *supra* note 32, Article 1.
[123] Wessel, A. R., *supra* note 17.
[124]International Vienna Convention on the Law of Treaties and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations *supra* note 33.
[125] Verwey, R. D., *op. cit.*
[126] *Ibid.*
[127] Case 181/73, *R. & V. Haegeman v Belgian State* [1974] ECR 449, para 5. [last accession on 2013-12-04]. <http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61973J0181&lg=en>

modified to respect MS's exclusive competence (mostly in cases[128] which are related to the WTO– *author's comment*). For matter of shared competence CJEU has exclusive jurisdiction for deciding on interpretation of mixed international agreements, regardless of whether the EU has exercised its competence on relevant area by adopting secondary legislation and irrespective of whether treaty regimen has established its own mechanisms for solving disputes[129]. Generally, agreements not concluded by the EU are not part of the EU law, so lawfulness of the EU instrument in this matter does not depend on its conformity with an international agreement to which the EU is not a party[130]. This rule obviously is not applied to international agreements concluded by all the MSs before establishment of the EU or before their membership if respective competence has been fully conferred to the EU[131]. This provision is mostly applied to the GATS. What is more, with regard to pre-EU's agreements of the MSs, the TFEU requires "the MS not only to act towards eliminating incompatibilities between those arrangements and the EU law but also to achieve elimination"[132].

Talking about mixed international agreements, some special problems appear which lead to decisions under international transportation law, for example in the area of the WTO law. In *Opinion 1/94* the CJEU stated that only when the EU needs to conclude international agreement to attain its objectives, the respective treaty-making power becomes an exclusive treaty-making power of the EU, as well as internal implementation of competence is sufficient in order to reach agreed targets[133]. This *Opinion 1/94* was quite restrictive for the treaty-making powers of the EU to sign the international agreements establishing the WTO because it concluded that only one

[128] Such as: Joined cases C-300/98 and C-392/98 P*arfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH v. Wilhelm Layher GmbH&CoKG* [2000], para 35 (*author's comment*), [last accession on 2013-12-04] .
<http://oami.europa.eu/en/mark/aspects/pdf/JJ980300.pdf >

[129] Case C-459/03, *Commission v Ireland* [2006] ECR 4635, (cited by: von Bogdandy, A., Smrkolj, A. European Community and Union law and international law, 2011,), [last accession on 2013-12-04].
<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e620?rskey=f1MtzO&result=1&prd=OPIL>

[130] Case C-377/98, *Kingdom of the Netherlands v European Parliament* [2001] ECR 1-7079 (cited by: von Bogdandy, A., Smrkolj, A. European Community and Union law and international law, 2011), [last accession on 2013-12-04].
<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e620?rskey=f1MtzO&result=1&prd=OPIL>

[131] Case C-308/06 *International Association of Independent Tanker Owners and Others v Secretary of State for Transport* [2008] I-4057 (cited by: von Bogdandy, A., Smrkolj, A. European Community and Union law and international law, 2011), [last accession on 2014-12-04]
<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e620?rskey=f1MtzO&result=1&prd=OPIL>

[132] Case C–402/05 P and C–415/05, *P. Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351(cited by: von Bogdandy, A., Smrkolj, A. European Community and Union law and international law, 2011), [last accession on 2013-12-05].
<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e620?rskey=f1MtzO&result=1&prd=OPIL>

[133] Bartlik, M., *supra* note 12, p. 28 (cited by: Opinion 1/94 of the Court of 15 November 1994. Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228 (6) of the EC Treaty [1994] ECR I-5267).

kind of services (the provision of cross border services – *author's comment*) out of four provided in GATS fell under the responsibility of the EU[134]. This basically means that citizens and entities from non-EU countries crossing the border to the EU to provide services were not covered by the common commercial policy[135].

Furthermore, when concluding international agreements with third countries and international organizations, situations where neither the EU, nor the MSs have exclusive competence in particular area, or there are some political or other reasons of necessity that both the EU and the MSs participate in international agreement occur[136]. Sometimes statutes and rules of international organization only states to become its members[137]. So what is the role of the EU then? The answer could be that the EU in such cases exercises its competence through the MSs acting jointly in the EU's interest, even in areas where the EU has exclusive competence[138]. According to professor Martti Koskenniemi, mixed international agreements also state question about "responsibility of the MSs towards each other for the fulfillment of international agreement"[139](it will be discussed in Section 2.3 – *author's comment*).

Finally, when competences are shared, it is doubtful whether the MS are responsible among themselves, but when competences are parallel among these states, it is obvious that such responsibility exists[140]. Insomuch as the MSs are responsible for implementing a mixed international agreement, question about methods of national implementation arise[141]. This question becomes important especially in cases of exclusive national competences, with having in mind in which case respective part of the agreement arguably does not become part of the EU law[142].

To sum up the part, joint participation of the MSs and the EU is unavoidable because of existence of shared competence in the EU legal order in the area of air transportation. As regards to the Section's 2.1 problem concerning the role of EU to participate in international agreements, the conclusion comes that it is difficult to compare the EU's treaty-making practice with international organizations' practice in general. This is so might because not all organizations have legal personality. Also, following the opinion of the professor Delano Verwey, "neither the

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[134] Bartlik, M., *supra* note 12, p. 18.
[135] *Ibid.*, p. 19 (cited by: Opinion 1/94 of the Court of 15 November 1994. Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228 (6) of the EC Treaty [1994] ECR I-5267).
[136] Loo, J. Mixed agreements in the external relations of the European Community and their importance for Estonia as a new member state, Estonian Ministry of Foreign Affairs, Legal Department, [last accession on 2013-12-05]. <http://www.vm.ee/?q=en/node/4061>
[137] *Ibid.*
[138] *Ibid.*
[139] Koskenniemi, M., *supra* note 18, p. 142.
[140] *Ibid.*
[141] *Ibid.*
[142] *Ibid.*

Vienna Conventions[143] […] nor customary international law, are equipped to fully take into account the unique nature of the European Community (now the EU – *author's comment*)"[144].

What is more, contracting third parties would not enter into treaty relations with the EU states because of the concern that it would be difficult to hold the MS responsible for its legitimate international obligations because of legal complications surrounding external competence of the EU as the sole international organization[145]. As professor Delano Verwey observes, international legal relations entered into by the EU and MSs impact the development of treaty law and third countries that enter into treaty relations with the EU and its Member States can always include safeguard clauses to protect themselves[146]. However the uncertainty of external treaty-making competence has not stopped non-EU states from signing agreements with the EU and its MSs. As regards to this problem, it is a question which has not been clearly answered yet and the legal sources, concerning it, are very poor.

2.2. The jurisdiction and responsibility of the EU to regulate the air transportation

2.2.1. The competence of the EU to distribute air traffic rights: by the EU, the MSs or by both

The air traffic rights are set of aviation rights and privileges granted to a country, which lightens that country's entry and landing in another country's space of air. According to the Chicago Convention and bilateral and multilateral air services agreements, there are eight air traffic rights, which are often called 'freedoms'. The first freedom gives the "right to overfly the territory of a state without any landings"[147], the second freedom grants the privilege "to land in a foreign country for technical reasons such as refueling or maintenance, without offering any commercial service to or from that point"[148]. First two freedoms set out it Chicago Convention are more technical than others and were multilaterally exchanged in International Air Service Agreement (hereinafter – the Transit Agreement). The third freedom gives "the right to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses" [149] and basically means the right to fly passengers, mail and cargo from the registration state of the air carrier to a foreign state. The fourth freedom grants the privilege "to

[143] International Vienna Convention on the Law of Treaties and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, *supra* note 33.
[144] Koskenniemi, M., *supra* note 8, p. 206.
[145] Verwey, R. D., *supra* note 16.
[146] *Ibid.*
[147] Convention on International Civil Aviation, *supra* note 32, Article 10.
[148] *Ibid.*
[149] International Air Trasport Agreement (concluded on November 1944, entered into force 7 December 1944), 171 UNTS 502, Article 1, Section I, No 3, [last accession on 2013-10-27]. <http://library.arcticportal.org/1584/1/international_air_transport_agreement_chicago1944c.pdf>

take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses"[150] and by correlating with third air traffic right means that passengers, mail and cargo can fly from a foreign state to the registration state of the air carrier. The fifth air traffic right gives a privilege "to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory"[151] and is one of the most important rights concerning air traffic services, which allow for an airline to carry traffic between two countries outside its own country of registry as long as the flight originates or terminates in its own country of registry. Further the sixth freedom is not formally a part of the original convention, however it enables an airline "to offer air transportation services between two foreign countries by making a stop-over in the home state of that air carrier"[152], so this means that an airline has the right to carry traffic between two foreign countries over its own flag state of registry. The seventh freedom is also not an explicitly granted but it covers the right to operate services between two other countries, which are both not the registration state of the operating air carrier. The eighth freedom is called 'cabotage' and means that an airline has the right "to carry traffic from one point in the territory of a country to another point in the same country on a flight, which originates in the airline's home country"[153].

It is important to distinguish that although these provisions are called 'freedoms', they are not automatically granted to an airline as a right – they are privileges, not rights[154]. These air traffic rights, which are granted by non-EU states, must be distributed among the EU air carriers[155]. Such a distribution is not that easy as from the first sight and faces with difficulties, firstly who are responsible for an execution of these obligations - the EU itself or the MSs and secondly, who is responsible – the EU itself or the MSs for the administration of the EU law[156].

The administrative power to distribute air traffic rights can be performed by a MS, the EU or by the EU and the MSs altogether. Concerning the distribution by the MSs, it can be said that "where a MS concludes an agreement, or amendments to an agreement or its Annexes, that provide for limitations on the use of traffic rights or the number of the EU air carriers eligible to be designated to take advantage of traffic rights, that MS shall ensure a distribution of traffic rights among eligible the EU air carriers on the basis of a non discriminatory and transparent

[150] International Air Trasport Agreement, *supra* note 149.
[151] *Ibid.*
[152] Bartlik, M., *supra* note 12, p. 4.
[153] Convention on International Civil Aviation, *supra* note 32, Article 7.
[154] Dr. Rodrigue, J. P. The geography of transport systems, *Hofstra University*, 1998-2014, [last accession on 2014-03-07].
<https://people.hofstra.edu/geotrans/eng/ch3en/conc3en/airfreedom.html>
[155] Bartlik, M., *op. cit*., p. 113.
[156] *Ibid.*, p. 399.

procedure"[157] and according to dr. M. Bartlik"as long as air service agreements are concluded solely by the MS without any participation of the EU, there is no reason at hand, why the MS should not be also exclusively responsible for the distribution of the obtained air traffic rights"[158]. Normally, the MS is responsible for the distribution of air traffic rights when the departure and arrival continues in the territory of one MS and the air service agreement is concluded between the EU and one MS on one side and a non-EU state on the other side, but the problem of the responsibility of the air traffic rights distribution rises when few MS and the EU are the parties to the air service agreement[159]. The MS can participate in distribution of the air traffic rights only through multilateral agreements, and they "are not able to distribute air traffic rights, if a multilateral air service agreement is concluded, to which several MS and the EU are parties to"[160].

The responsibility of the EU to distribute the air traffic rights granted by the non-EU state arises due to the event of such situation. According to professor doctor J. Suerbaum "the EU is responsible for legislative measures, while the execution of the EU law is left to the MS"[161]. This means that the EU does not execute its distribution of air traffic rights but grants this opportunity to the MS, but professor doctor R. Stettner supports the idea that it "does not mean that the EU itself cannot execute EU law at all"[162]. This confrontation of different point of views leads to deeper examination of the distribution of the air traffic rights concerning the executive competences of the institutions of the EU.

The TFEU does not clearly envisage provisions about the distribution of executive competences. It is known that legislative, executive and judicial powers are stated in the TFEU, but all functions are correlated to each other and between the EU institutions. Although the Commission normally performs as executive body of the EU, the Council can also be taken into consideration when concluding international air service agreements and usually the Council is a legislative body, but sometimes legislation falls under the responsibility of the Commission, for example the legislative powers, which relate to competition law[163]. In the area of the common transport, Article 95 of the TFEU and Article 96 of the TFEU grant powers for the EU in conclusion of the international transport agreements. In areas, where the Commission has explicit powers, it can act "any additional regulations needed to be adopted to vest the

[157]Regulation No 847/2004, *supra* note 37.
[158] Bartlik, M., *supra* note 12, p. 113.
[159] *Ibid.*, p. 114.
[160] *Ibid.*, p. 115.
[161] *Ibid.*, p.113 (cited by: Suerbaum, J. The distribution of powers in the Execution of EC law, Berlin: Duncker and Humblot, 1998 at 113f).
[162] *Ibid.*, p. 113 (cited by: Sttetner, R. Manualof EU CommercialLaw. Munich, 2004, vol 1, at B. III).
[163] *Ibid.*, p. 116.

Commission with the necessary executive powers"[164]. Professor J. Schwarze argues that "within the scope of the EC Treaty (now the TFEU – *author's comment*), the Community (now the EU – *author's comment*) has only legislative, but no administrative competences"[165], howeverthe author supports opinion of doctor Martin Bartlik, who, although it is not clearly settled in the TFEU, thinks that such competences can be seen through implied powers[166].

Concerning the administrative powers based on the implied-power theory, professor doctor J. Suerbaum says, that "administrative powers can be only discharged, if the EU requires executive powers to ensure an effective application of the EU law that may not be guaranteed, if the MS in charge of executing the respective EU law"[167]. This means that when the MS by executing the EU law cannot guarantee full application of the EU law, then the EU can adopt measures under administrative procedure[168].

As regard to the Section's 2.2.1 problem concerning the competence to allocate air traffic rights and as far as distribution of powers concerning the air transport issues is concerned, the appropriate institution to take decisions would be the Council, but it can transfer the right to adopt such decisions to the Commission. Most of scholars (such as dr. Martin Bartlik – *the author's comment*) agree that regulations regarding the international air transportation concerning the Article 100 of the TFEU do not fall under the exclusive competences of the EU, others, especially the Commission has opposite opinion about that and moreover, whether a powers belongs to the MS or to the EU, it is necessary to decide taking into consideration rules of legal interpretation[169].

It is important to mention that the Commission argued that it has the exclusive competence to negotiate air transport agreements with non-EU countries on behalf of the MS[170]. According to it, the EU derives external competence in civil aviation matters from the Treaty provisions on transport, which was cited by the CJEU in *AERT* case[171]. This established the principle that once there is the EU law in field of international air transportation, the EU has exclusive competence to negotiate air service agreements[172]. Hence the doctrine of implied powers, which states that the MS lose their right to assume obligations with non-member countries as and when common

[164] Bartlik, M., *supra* note 12, p. 117.
[165] *Ibid.*, p. 117 (cited by: Schwarze, J. European Administration law, vol. 1, Baden-baden, Germany, at 113f).
[166] *Ibid.*, p. 117-118.
[167] *Ibid.*, p. 119 (cited by: Suerbaum, J. The distribution of powers in the Execution of EC law, Berlin: Duncker and Humblot, 1998 at 103).
[168] *Ibid.*, p. 119.
[169] *Ibid.*, p. 126.
[170] European Commission, Open sky agreements: Commission welcomes European Court of Justice ruling, Press releases databse, Brussels, 2002, IP/02/1609, [last accession on 2013-10-15].
<http://europa.eu/rapid/press-release_IP-02-1609_en.htm>
[171] *Ibid.*
[172] *Ibid.*

rules which could be affected by those obligations come into being, did not solve the problem of responsibility to execute the distribution of air traffic rights, mainly of the responsibility of the EU and the MSs to allocate the air traffic rights[173].

To conclude, differently than in the beginning of the creation of the EU, where the above mentioned discretion to decide to what extent and by what procedure to adopt measures in the field of the air transportation belonged to the Council, according to the TFEU, after the establishment of the common market of the EU, this discretion nowadays belongs to the European Parliament and the Council but they have to consult with the Economic and Social Committee of the Regions[174]. As regards to this Section, the author understands that once the EU becomes involved in concluding air service agreements, the necessity arises to set up a thorough distribution system for air traffic rights, including institutions of the EU and the MSs. However, the distribution of air traffic rights is a confusing situation, especially when it determines the allocation of air traffic rights granted to the EU and the MSs by a third country. In order to better understanding of the distribution of air traffic rights and the conclusion of air transportation agreements with non-EU countries, the following Section 2.2.2 will scrutinize to which extent the EU has competences concerning the air service agreements when concluding them with non-EU countries and who has the prerogative to conclude such agreements, the EU or the MSs.

2.2.2. Air transportation agreements with non-EU countries: prerogative of the EU or each MS

The VCLT is a treaty concerning the international law on treaties between states. According to it, "the present Convention applies to treaties between States"[175]. This basically means that every MS of the Convention must follow the rules of this Convention when concluding international agreements. Although the EU is not a party of this Convention, it has decided that it also has a right to conclude international agreements, especially in the area of air transportation. Also, according to the *French Seamen*[176] judgment, Article 100 of the TFEU (ex Article 80 of the Treaty of Rome – the author's comment) does not exclude the applicability of the TFEU to air transport and talking further with the relation of the common market in the air transportation sector, every air carrier was entitled to offer air services between any MS of the EU[177]. So this means that the impact of the EU law to air transportation is still under

[173] European Commission, *supra* note 170.
[174] Treaty on the Functioning of the European Union, *supra* note 31, Article 216 (2).
[175] International Vienna Convention on the Law of Treaties, *supra* note 33, Article 1.
[176] Case C-167/73, *Commission v. French Republic* [1974] ECR 359, [last accession on 2013-10-27]. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61973CJ0167:EN:HTML>
[177] Dempsey, S., *supra* note 11, p. 29.

consideration because "international air transportation is traffic between two countries offered by non-EU air carriers of if the EU air carriers undertake such flights these two countries are both not MS of the EU"[178]. This raises the question, whether the EU concludes air transportation agreements with non-EU countries or it is better to leave this to each MS of the EU?

Historically, air transportation has been ruled by bilateral agreements between nations, which settled out the terms of market access for the respective states' air carriers[179]. The MSs of the EU were not an exception but after the formation of the single aviation market by the Third Package of liberalization, the Commission began negotiations on implementation of air transportation agreements on behalf of its MS[180]. In 1993 the MSs Transport ministers rejected a proposal to pool their bilateral agreements and vest negotiating powers for future agreements in the Commission[181]. Later, the subject of bilateral agreements was once more brought to the EU's attention in a report on many aspects of the European aviation industry. The so-called "Committee of Wise Men"[182] gave recommendations analyzing the problems of the air transport sector. The root of that time problems was that air transport depended on state support and it developed as "highly protected area of national economies, an integral part of government policy"[183]. States in the whole world "exercised their right of sovereignty over airspace and their privilege to set up national carriers" [184]. Almost regularly, these carriers "were used by governments as an instrument to promote trade, or foreign political links or domestic employment - all without regard to the economic implications or commercial significance" [185]. As a result, national air transport systems emerged, causing much inefficiency[186]. The Europe was not an exception. So the Committee des Sages stated that bilateral agreements ignore the new realities of the unified European aviation market and should be replaced by multilateral regime directed by the EU rather than the MSs[187]. The Commission paid attention to this recommendation and warned MSs that individual MSs would have stand before the CJEU if they continued to negotiate bilateral agreements with other nations[188],

[178] Bartlik, M., *supra* note 12, p. 16.
[179] Dempsey, S., *supra* note 11, p. 80
[180] *Ibid.*
[181] *Ibid.*
[182] The Committee des Sages is the high level reflection group on bringing Europe's cultural heritage on line (*author's comment*).
[183] European Commission, Commissioner Matutes receives report of Committee des Sages for air transport – IP/94/54, 1994, [last accession on 2013-12-07].
<http://europa.eu/rapid/press-release_IP-94-54_en.htm>
[184] *Ibid.*
[185] *Ibid.*
[186] *Ibid.*
[187] *Ibid.*
[188] EC Goal: All-or-nothing bilateral with US, *Aviation Week & Space Technology*; 3/6/1995, Vol. 142 Issue 10, p. 26, [last accession on 2013-12-07].
<http://connection.ebscohost.com/c/articles/9503272290/ec-goal-all-or-nothing-bilaterals-u-s>

especially third-country nations such as the USA. The then-Transport Commissioner Neil Kinnock expressed his opinion for "giving the EC (now the EU – *author's comment*) the 'exclusive competence' to forge block open-skies agreements with the USA and, subsequently, other non-EU states"[189] and called air transport bilateral agreements as "the most serious obstacle to competition"[190].

The then-senior aide to the Commission Philip Lowe had different opinion and stated that the Commission is „ [...] duty bound under European Law to carry out infringement proceedings"[191] and added that proceedings "relate to the fundamentali issue of the competence of individual countries to negotiate such a bilateral agreement under EC (now the EU – *author's comment*) law"[192]. This battle of opinions did not lead to the final solution, but put basics for further examination to what extent the EU applies existing rules of international treaty law concerning air transportation agreements.

Finally, the transport ministers agreed to give negotiating powers to the Commission and then MSs required the Commission to "conduct any such negotiations in two phases – the first phase was to give the Commission the power to negotiate 'soft issues', such as computer reservations systems, slot allocation, ground handling and air carrier ownership, while the second phase would give the rights to 'hard issues', such as traffic rights and pricing"[193]. Furthermore, the Commission would not receive the rights to negotiate air transport agreements on the 'hard issues', unless "it could show that it had achieved substantial results in the first phase"[194].

While everything seemed to be discussed and divided, the US government said that "it would refuse to participate in any sort of limited negotiations"[195]. In this matter, the application of international treaty law had to be discussed again in the light of the EU responsibility to conclude air transport agreements. Then-commissioner Karel van Miert in the case of air transport considered that "bilateral open skies agreements do not constitute the right answer"[196] and moreover for the establishment of the fair competition conditions between the EU and the US (as non-EU country – *author's comment*), the best solution is "to conclude a global agreement between the EU and the US"[197]. He added that it is necessary "to develop a common policy giving the EU carriers the possibility to compete on fair and equal terms"[198]. In order to

[189] Moxon, J., *supra* note 19.
[190] *Ibid.*
[191] *Ibid.*
[192] *Ibid.*
[193] Dempsey, S., *supra* note 11, p. 82.
[194] *Ibid.*
[195] Commission's Multilateralism Mandate Comes in Phases, May be Too Late, *Aviation Daily*, 14 March 1996, at 1,2 (cited by: Dempsey, S. European Aviation Law. The Hague: Kluwer Law International, 2004, p.82).
[196] Van Miert, K., *supra* note 20.
[197] *Ibid.*
[198] *Ibid.*

reduce number of bilateral agreements, the Commission announced that bilateral agreements "do not safeguard the long-term interests of the European air transport industry"[199]. Nonetheless, the US had negotiated *Open skies* bilateral air transport agreements, which provided "free access to all city-pairs between the two nations by airlines flying the flag either, unlimited 'fifth freedom' rights and a requirement that computer reservations systems be non-discriminatory"[200].

What is more, the development of the responsibility of the EU to conclude air transportation agreements is closely related to liberalization of internal air transport market, because it cannot function without "distortion of competition as long as individual MS continue to determine external traffic rights by concluding bilateral aviation agreements with non-EU states."[201] In this matter, the *Open Skies* cases have raisin up the question, whether the EU can conclude air service agreements with third-countries, particularly with the US.

Further, concerning the first question, as it was mentioned in the Section 1.2, the Commission argued that the MS did not have the necessary treaty-making power to conclude these agreements and only the EU had this power[202]. Oppositely, the MS considered a treaty-making power of EU only as justified if existing secondary law and the application were really in danger due to an international agreement of the MS[203]. The CJEU came to the decision that neither the EU nor the MS had all the necessary treaty-making powers to conclude air service agreements alone, but the *Open skies* case gave a right to operate air services between any point in the EU and any point in the US, as well as to connect those flights to points in third countries[204]. In respect of air traffic rights, this agreement authorizes every US and the EU registered airline to fly between any city in the EU and any city in the US, to enter into cooperative agreements, etc[205]. On the other hand, the doctrine of implied powers did not solve the problems concerning the distribution and allocation of international air traffic rights and responsibility of the EU to conclude air transport agreements.

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[199] European Commission, Commission takes further legal action against Member States 'Open Skies' agreements with the United States, Press release database, Brussels, IP/98/231, 1998, [last accession on 2013-12-07].
< http://europa.eu/rapid/press-release_IP-98-231_en.htm>

[200] Dempsey, S., *supra* note 11, p. 88

[201] Eeckhout, P., *supra* note 14, p. 101.

[202] Bartlik, M., *supra* note 12, p. 29 (cited by: Joined cases C-466/98, *Commission v. United Kingdom* [2002] ECR I-9427; C-467/98, *Commission v. Denmark* [2002] ECR I-9519; C-468/98, *Commission v. Sweden* [2002] ECR I-9575; C-469/98, *Commission v. Finland* [2002] ECR I-9627; C-471/98, *Commission v. Belgium* [2002] ECR I-9681; C-472/98, *Commission v. Luxembourg* [2002] ECR I-9741; C-475/98 *Commission v. Austria* [2002] ECR I-9797; C-476/98, *Commission v. Germany*, [2002] ECR I-9855).

[203] *Ibid.*, p. 30.

[204] *Ibid.*, p. 38 (cited by: Commission of the European Communities, Communication from the commission on relations between the community and third countries in the field of air transport, Brussels, 26.2.2003, COM (2003) 94 final, 2003/0044 (COD)).

[205] Commission of the European Communities, *supra* note 35.

Later the *Kramer* case ruled that external legal authority arises not only from an express conferment by the TFEU but "may equally flow implicitly from other provisions of the TFEU"[206]. In *Opinion 1/76* the CJEU said that the EU has exclusive external competence even in cases where it has not adopted secondary legislation in the certain field, for example the international air transport area, as long as the MS actions pose a threat to achievement of the objectives of the EU.[207] In other words, for the EU to have external competence in a certain field it is not necessary for it to have exercised its internal competence in that field. The *Open skies* cases found out that "the nationality clauses in the agreements, which restrict international traffic rights to the national flag carriers of the countries concerned, are contrary to the Treaty."[208]

As regard to the first question, Article 217 of the TFEU expresses explicit treaty-making power concerning international agreements. These agreements must be understood as association agreements. The main goal of it is to contribute to sustainable development of the EU and to establish close relations with non-EU states. Here the second question about the responsibility of the EU to regulate international aviation arises, and also about the obligation of the EU to adopt acts that are binding on the MS and ability to conclude an international agreement with a non-EU country.

As regard to the second problem, it is necessary to mention that association agreements are linked to establish close relations, even privileged ones, between the EU and third countries, but they require the establishment of common institutions with the same treatment representation, which must be entitled to adopt legally binding decisions under their responsibility[209]. The conclusion of the air service agreements in the form of association agreements lacks close relations, and in author's opinion, because of that it is difficult to conclude air service agreements. On the other hand, it is possible for the EU to conclude an agreement with a third country in the matters of air transportation, but then these association air service agreements are "concluded separately without establishing a particularly close relationship with the EU"[210]. Moreover, such a conclusion of these agreements cannot be based on Article 217 of the TFEU[211].

[206] Joined cases 3, 4 and 6/76, *Kramer and others*, *supra* note 109, para 19/20.
[207] Opinion 1/76, *supra* note 111.
[208] Open Sky agreements: Commission welcomes European Court of Justice ruling, Press release database, Brussels, 5 November, 2002, IP/02.1609, [last accession on 2013-10-15].
<http://europa.eu/rapid/press-release_IP-02-1609_en.htm>
[209] Bartlik, M., *supra* note 12, p. 20.
[210] *Ibid.*
[211] *Ibid.*

Concerning the prerogative right of the Commission to conclude air transport agreements, further it is necessary to discuss wider the CJEU *Open Skies* decision[212], taken in 2002. In its decision the CJEU rejected the argument of the Commission that "it had exclusive external competence to negotiate air transport trade agreements but held that the EU was exclusively competent to fares and rates on intra-EU routes"[213]. Further, the CJEU found out that some of the provisions in bilateral agreements are incompatible with the EU law, for example, "the 'effective ownership and control' violate the right of establishment guaranteed under Article 43 (now Article 49 TFEU – *author's comment*)"[214]. It also held that areas of exclusive EU competence, such as airfares and rates on intra-EU routes, computer reservations systems were also inconsistent with the EU law[215]. This decision holds that "whether the EU has promulgated regulations that affect nationals of non-EU countries, the EU acquires exclusive competence over subject matters on an issue-by-issue basis, rather than on an industry-sector basis"[216].

According to doctor Stephen Dempsey, "the Council has given the Commission authority only to negotiate 'softrights' with the US, but not traffic rights; without such authorization, the Commission does not have authority to conclude a new bilateral agreement with the US or any other nation (non-EU – *author's comment*), except arguably, on those matters over which it has exclusive competence"[217]. Also neither do MSs have legal authority to enter into bilateral agreements on matters about which the Commission has exclusive competence[218].

What is more, this CJEU decision made it clear that "no EU MS could lawfully enter into bilateral air transport agreement that included an 'effective ownership and control' clause unless access to routes was open to all EU air carriers"[219]. Since the existing bilateral agreements are not null and void and since they are unlawful under the EU law, under international law their provisions are still binding upon signatory states[220]. The Commission has conceded that"neither the EU nor the MSs have a free rein to conclude air transport agreements"[221].

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[212] Joined cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, *Commission of the European Communities v. Republic of Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the United Kingdom* [2002].
[213] Dempsey, S., *supra* note 11, p. 88.
[214] *Ibid.*
[215] *Ibid.*
[216] *Ibid.*, p. 89.
[217] *Ibid.*
[218] Dean, W., The European Court of Justice Decision on Bilateral Agreements: Impact and Implications, *Air &Space Law*, 2003 (cited by: Dempsey, S. European Aviation Law. The Hague: Kluwer Law International, 2004, p. 89).
[219] Dempsey, S., *op.cit.*, p. 89.
[220] *Ibid.*
[221] Commission of the European Communities, *supra* note 36.

First recognized by the CJEU in *AETR* case and further refined in *Open Skies* cases[222], this manner of acquiring exclusive external competences is the result of the fact that the MS are not to enter into international obligations concerning the international air transportation outside the framework of the EU institutions if these obligations fall within the scope of the common rules or within an area which is already largely covered by such rules, even if there is no contradiction between those commitments and common rules[223]. So the essence of *AETR* case is that the MS are not allowed to act internationally in a way that would affect existing EU law because the situation cannot be remedied by disapplying the infringing national rule[224].

Following what has been determined above in this Section, it is necessary to mention one of the most important nowadays international agreement concluded by the EU and the non-EU country the US – the EU-US agreement on the transfer of passenger name record data[225], concluded in 2011, entered into force in 2012. The agreement describes in detailsthe purposes the PNR is used for (such as the protection of safety of the public, prevention of terrorism and certain transnational crimes – *author's comment*). According to the Agreement, PNR means the record created by air carriers or their authorized agents for each journey booked by or on behalf of any passenger and contained in carriers' reservation systems, departure control systems, or other reservation systems and consists of number of data types, which the EU can transfer to the US and oppositely[226]. Here the question arises whether EU citizens' data is being collected by following competences of each party of the Agreement or contrary to Agreement. As member of the European Parliament Claude Moraes says that, "the US may be requesting data which falls

[222] Joined cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, Commission of the European Communities v. Republic of Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the United Kingdom [2002].

[223] Joined cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, Commission of the European Communities v. Republic of Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the United Kingdom [2002] (cited by: Dempsey, S. European Aviation Law. The Hague: Kluwer Law International, 2004).

[224] Syrpis, P. The judiciary, the legislature and the EU internal market, *Cambridge university press*, 2012, p. 255, [last accession on 2013-12-02].
<http://books.google.lt/books?id=8VRyT4yb7KEC&pg=PA255&lpg=PA255&dq=are+not+allowed+to+act+internationally+in+a+way+that+would+affect+existing+EU+law+because+the+situation+cannot+be+remedied+by+disapplying+the+infringing+national+rule&source=bl&ots=jK7QHXbc_M&sig=nl_UQOK8nHt8cVLP8ah1wby3P30&hl=en&sa=X&ei=qqwYU9LyOcboywPrmQE&ved=0CCcQ6AEwAA#v=onepage&q=are%20not%20allowed%20to%20act%20internationally%20in%20a%20way%20that%20would%20affect%20existing%20EU%20law%20because%20the%20situation%20cannot%20be%20remedied%20by%20disapplying%20the%20infringing%20national%20rule&f=false>

[225] Agreement between the United States of America and the European Union, *supra* note 38.

[226] Annex to Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, *Official Journal L 0215 , 11/08/2012 P. 5 – 0014,* [last accession on 2014-03-08].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22012A0811(01):EN:HTML>

outside the scope of the EU-US PNR agreement and if our citizens' data is being collected for flights simply going through US airspace, then this could be against EU data protection laws"[227].

Analyzing the Agreement, it states that "in consideration of this Agreement and its implementation, DHS shall be deemed to ensure an adequate level of data protection for the processing and use of PNR transferred to DHS"[228]. This exposes the conflict of interest because the EU has two responsibilities, first of all it negotiates the terms of the Agreement to facilitate the transfer of PNR data, and secondly, it also decides whether the privacy protection in the USA is adequate[229]. As the EU has a vested interest in getting PNR data from the US to support European law enforcement bodies, the suspicion is that it has compromised on data protection standards to get these data[230]. Although, the Agreement set up the review mechanism[231], it does not mention a role for any data protection authority[232]. Further, the Agreement sets up provision concerning the PNR data review and evaluation[233]. According to dr. Chris Pounder, "this allows for a review and evaluation of an Agreement that involves the processing of personal data but not include any European data protection authority or the EDPS"[234].

From the perspective of the European Commission, it concludes that DHS is complying with the terms of the Agreement and notes that DHS has an effective mechanism to filter out PNR data which have no clear connection to the US or which go beyond the categories of PNR data listed in the Agreement[235]. Basically, it means that the way in which DHS uses PNR is consistent with the use of such data by other countries deploying PNR systems[236]. The use of PNR data allows "an approach allowing DHS to maximize the added value of using PNR for law enforcement purposes"[237]. The European Commission also notes that the sharing of PNR data with other domestic US agencies or its onward transfer to other third countries remains limited[238]. It also notes that"DHS has exceeded the requirements of the Agreement by introducing a quarterly review of its passenger targeting strategies to ensure that they are

[227] Alberti, P. S&D Group reacts to unlimited transfer of flight passengers' data, 2012, [last accession on 2014-03-08].
<http://www.socialistsanddemocrats.eu/newsroom/sd-group-reacts-unlimited-transfer-flight-passengers-data#1>
[228] Agreement between the United States of America and the European Union, *supra* note 38.
[229] Pounder, Ch. A review of the annexes to the EU-USA PNR agreement and related press release, *Amberhawk training limited*, 2011, [last accession on 2014-03-08].
< http://www.statewatch.org/news/2011/dec/eu-usa-pnr-deal-amberhawk-analysis.pdf >
[230] *Ibid.*
[231] Agreement between the United States of America and the European Union, *op. cit.*
[232] Pounder, Ch., *op. cit.*
[233] Agreement between the United States of America and the European Union, *op. cit.*, Article 25.
[234] Pounder, Ch., *op. cit.*
[235] European Commission, *supra* note 39.
[236] European Commission, *supa* note 40.
[237] European Commission, *op. cit.* (cited by: Review of the implementation of the EU-US Passenger Name Record (PNR) agreement), [last accession on 2014-03-08].
< http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxvii/8314.htm>
[238] *Ibid.*

proportionate and minimize the impact on the civil rights, liberties and privacy of *bona fide* travelers"[239].

What is more, the European Commission concludes that "DHS has a filtering mechanism in place to filter out flights with no clear US nexus using flight numbers and airport"[240]. DHS also deploys user access controls and a reviewmechanism 24 hours after the override occurred to see if this mechanism was used correctly, so according to it, the number of cases in which the override mechanism was used, show a limited use[241]. Taking into account the complex interaction between differentprograms using PNR data, the European Commission sees "a need to provide more transparency on thepossible interrelation of the various programs and in particular on the redress mechanismsavailable under US law"[242]. According to it, this transparency "should allow passengers who are not US citizens or legal residents to challenge DHS decisions related to the use of PNR data, in particular when the use of such data has led to a decision to recommend the denial of boarding by carriers"[243].

To sum up, the CJEU judgments establish the application of so-called 'AETR' principle in air transportation by which the EU acquires an external competence by reason of the exercise of its internal competence, "where the international commitments fall within the scope of common rules"[244], or "in any event within an area that is already covered by such rules"[245]. The CJEU specifies that "whenever the EU had included in its internal legislative acts provisions relating to the treatment of national of non-member countries, it acquires an exclusive external competence in the spheres covered by those acts"[246]. One the one hand, the decision recognized that "the Commission has no exclusive competence to negotiate air agreements with third

[239] European Commission, *supa* note 40. (cited by: Review of the implementation of the EU-US Passenger Name Record (PNR) agreement).
[240] *Ibid.*
[241] *Ibid.*
[242] *Ibid.*
[243] *Ibid.*
[244] Commission of the European Communities, *supra* note 36.
[245] *Ibid.*
[246] Follesdal A., Wessel R. A., Wouters J. Multilevel regulation and the EU: the Interplay between Global, European and National Normative Processess, *Martinus Nijhoff Publishers*, 2008, [last accession on 2013-12-08]. <http://books.google.lt/books?id=4Qz3KdYFZxUC&pg=PA192&lpg=PA192&dq=whenever+the+EU+had+included+in+its+internal+legislative+acts+provisions+relating+to+the+treatment+of+national+of+non-member+countries,+it+acquires+an+exclusive+external+competence+in+the+spheres+covered+by+those+acts&source=bl&ots=Jo1_DqSAWK&sig=8UAtKpYFmORNTqlvG0WtIxBMNP8&hl=en&sa=X&ei=CrZKU63dBtDe7AbFuYCAAw&ved=0CCsQ6AEwAA#v=onepage&q=whenever%20the%20EU%20had%20included%20in%20its%20internal%20legislative%20acts%20provisions%20relating%20to%20the%20treatment%20of%20national%20of%20non-member%20countries%2C%20it%20acquires%20an%20exclusive%20external%20competence%20in%20the%20spheres%20covered%20by%20those%20acts&f=false>

countries"[247], but on the other hand, it states that "it has limited external exclusive powers e. g. with respect to fares and rates of non-EU air carriers on internal EU-routes"[248].

Basically, this decision reduces the ability of the MSs "to negotiate air agreements with non-EU countries without the Commission, at least if exclusive competence is understood as to take away the possibility for individual MS to make arrangements in areas in respect whereof the Commission claims exclusive competence"[249], for example, the competence of the MS to grant traffic rights to non-EU air carriers is worthless if MS cannot also agree on arrangements in respect of above-mentioned 'softrights'. Inauthor'sopinion, theexample of the EU and the US air transportation agreement on PNR data exactly showed the need of the European Commission to gain an exclusive competence to negotiate air transport agreements. However, this leads to the issue of the responsibility of MSs and the EU towards each other for the fulfillment of air transportation agreement and the influence of the European Commission to it. It will further be discussed in the following Section 2.3.

2.3. Responsibility of MSs and the EU towards each other for the fulfillment of international agreements

According to Montreal Convention, provisions of it applies to all international carriage of persons, baggage or cargo performed by aircraft for reward and equally to gratuitous carriage by aircraft performed by an air transport undertaking[250]. So this means that provisions of the Convention are common and equally applies to all members of the Convention. Here the question what are responsibilities of MSs towards each other for the fulfillment of international agreements and whether the decisions of the CJEU are binding to all MS of the EU or only to whose which have signed the air transportation agreement. All these questions will be discussed in the following Section.

State sovereignty over its airspace is the basic principle of international air law, because all aviation system and relations are built upon it. MSs have sovereignty to participate in international law regimen and they have not lost it. According to Chicago Convention "every State has complete and exclusive sovereignty over the airspace above its territory" [251]. Sovereignty is still expressed by the need to comply with the requirements of national ownership

[247] Wassenbergh, H. Decision of the ECJ of 5 November 2002 in the Open Skies Agreements Cases, *Air and Space* law, VOl. 28, Issue 1, 2003, p. 19-31, [last accession on 2013-12-08]. <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=AILA2003003>
[248] *Ibid.*
[249] *Ibid.*
[250] The Montreal Convention, *supra* note 3.
[251] Convention on International Civil Aviation, *supra* note 32, Article 11.

and effective control[252]. The fact that the EU is not itself a contracting party to the Chicago Convention does not preclude it from being bound by the customary international law principle of sovereignty of States over their air space, which is codified in that Convention, because a principle of customary international law retains a separate existence alongside the international agreement in which it is codified, so here should be given glance back to previousSection 1.2, where the CJEU in *Kramer* case stated that "the taking of action by the EU in a particular area of competence deprives national authorities of their powers to act independently"[253]. Obviously, the CJEU ruled "against MS's sovereignty in favor of greater supranational authority"[254]. What is important, "although the internal Community (now the EU – *author's comment*) measures are adopted only when the international agreement is concluded and made enforceable […] the power to bind the EU *vis-à-vis* third countries nevertheless flows by implication from the provisions of the Treaty (the TFEU – *author's comment*) […] creating the internal power and in so far as the participation of the Community (now the EU – *author's comment*) in the international agreement is […] necessary for the attainment of one of the objectives of the EU"[255]. So this means that the EU has legal personality to conclude or enter into international (concerning air transportation issues as well - *author's comment*) commitments.

Further, in the previously examined *Open Skies* agreements, the Commission argued that it has the exclusive competence to negotiate air transport agreements with non-EU countries on behalf of the MS.[256] The TFEU itself does not establish an external EU competence in the field of air transport, which allows the EU institutions to conclude international agreements binding the EU[257]. There is therefore no express external EU competence in that regard. But the CJEU in the *Open Skies* case noted that the EU competence to conclude international agreements may result by implications from the TFEU[258]. Moreover, the CJEU there pointed out, in accordance with its case law, that, where the EU lays down common rules, the MSs are no longer competent

[252] Erotokritou, Ch., *supra* note 21.
[253] Joined cases 3, 4 and 6/76, *Kramer and others*, supra note 109 (cited by: Bier, S. The European Court of Justice and member state relations: a constructivist analysis of the European legal order, University of Maryland, The Department of Government and Politics, 2008).
[254] Bier, S. The European Court of Justice and member state relations: a constructivist analysis of the European legal order, University of Maryland, The Department of Government and Politics, 2008, [last accession on 2013-12-14].
<http://www.gvpt.umd.edu/irconf/papers/bier.pdf>
[255] Eeckhout, P., *supra* note 14, p. 79 (cited by: Joined cases 3, 4 and 6/76, *Comelis Kramer and others*).
[256] Yo, G. U.S. – E.U. Open Skies Deal and Its Implications for the Liberalization of International Air Transport Services: A Chinese Perspectice, 2009, [last accession on 2013-12-14].
<http://www.csiel.org/upFj/Yu%20GONG.pdf>
[257] Press release No. 89/02 in Joined cases C-466/98, *Commission v. United Kingdom* [2002] ECR I-9427; C-467/98, *Commission v. Denmark* [2002] ECR I-9519; C-468/98,*Commission v. Sweden* [2002] ECR I-9575; C-469/98, *Commission v. Finland* [2002] ECR I-9627; C-471/98, *Commission v. Belgium* [2002] ECR I-9681; C-472/98, *Commission v. Luxembourg* [2002] ECR I-9741; C-475/98 *Commission v. Austria* [2002] ECR I-9797; C-476/98, *Commission v. Germany*, [2002] ECR I-9855, [last accession on 2013-12-14].
< http://curia.europa.eu/en/actu/communiques/cp02/aff/cp0289en.htm>
[258] *Ibid.*

to enter into obligations towards non-member countries if those obligations affect the common rules and that the EU alone is entitled to assume such obligations[259]. That is the case where the international commitments fall within the scope of the common rules, within an area which is already covered by such rules or where the EU has included in its internal legislative acts provisions relating to nationals, for example - air carriers, of non-member countries[260].

Firstly, the CJEU examined the scope of the regulations relating to the granting by the MSs of operating licenses in relation to air carriers established in the EU and the access of the EU air carriers to intra-EU routes and found that "the bilateral agreements do not fall within an area already covered by those regulations since they contain rules directed to American air carriers"[261]. Consequently, those regulations cannot establish an external competence of the EU. Finally, the CJEU held that "the Council had not granted the Commission expressed competence over external aviation agreements, nor did there exist such implied competence"[262].

Talking about the responsibility of MSs towards each other for the fulfillment of international agreement, it is necessary to examine the question why and whether decisions of the CJEU are binding to all MSs of the EU and whether the CJEU is approaching as national court for the EU. According to routine of the CJEU, international agreements concluded by the EU are integral part of the EU law[263]. According to this statement, it is clear that in pursuance the uniformity of interpretation and application of the EU law, obligation to interpret such international treaties should exclusively belong to the CJEU[264]. It is not as easy as it looks at first glance. Firstly, it means that every dispute concerning international agreement between MSs should be solved at the CJEU; otherwise the Article 344 of the TFEU, which gives exclusive jurisdiction to the CJEU to solve disputes between MSs concerning the interpretation and application of the EU law, would be infringed[265]. Secondly, this statement does not agree with right of the MSs to freely choose means of dispute settlement, which are guaranteed under international law and stated in the international agreement[266]. In the point of view of international law, "the solution of disputes between MSs in the international court, settled by international treaty, would be lawful, but according to the EU law, it can be approaching as infringement of exclusive competence of the CJEU according to Article 344 of the TFEU"[267].

[259] Press release No. 89/02, *supra* note 257.
[260] Case 22/70, *Commission of the European Communities v. Council of the European Communities*, *supra* note 104, para 30.
[261] Press release No 89/257, *op. cit.*
[262] *Ibid.*
[263] Case181/73, *R. & V. Haegeman v Belgian State*, *supra* note 127, paras 5, 6.
[264] Daukšienė, I. Disputes between member states of the European Union and jurisdiction of the court of justice of the European Union, *supra* note 8, p. 1350
[265] *Ibid.*
[266] *Ibid.*
[267] *Ibid.*

Examining the solutions of disputes, which touch the question why and whether decisions of the CJEU are binding upon all MSs of the EU, it is necessary to find out the place of international agreements in the EU system of the law as well.

According to Article 216 of the TFEU, "all international agreements are binding to institutions of the EU and MSs of the EU"[268]. This norm convey *pacta sunt servanda* – principle of international law, which is settled in the Article 26 of VCLT[269]. This VCLT"prescribes a certain presumption as to the validity and continuance in force of a treaty" [270] and this presumption may be based upon this principle, which means that"a treaty in force is binding upon the parties and must be performed by them in good faith.[271]. Also according to Article 27 of above-mentioned VCLT, an international agreement party may not invoke the provisions of its internal law as justification for its failure to perform a treaty[272]. This means that a party of international agreement must "obey provisions of international treaty in its national law and cannot invoke its national law, which is not consistent with provisions of international agreement"[273].

In the EU law, application of *pacta sunt servanda* principle is broaden in the aspect of MSs. It means that "international agreements concluded by the EU create obligations and duties to its MSs"[274]. As it was mentioned, according to the CJEU, "the provisions of the agreement form an integral part of the EU law"[275] and moreover "international agreements concluded by the EU and entered into force prevail over provisions of secondary the EU legislation"[276]. Does this mean that the CJEU can be treated as national court for the EU and whether it has jurisdiction to interpret provisions of the international treaties which are concluded by the EU? Mostly yes, taking into account that the CJEU has jurisdiction to interpret provisions of such international agreements and to take a decision only in the matter, if MSs do not fulfill their obligations under provisions of those agreements[277].

Nevertheless, following the practice of the CJEU, there are some aspects, where not all provisions of international agreements concluded by the EU fall under jurisdiction of the CJEU

[268] Treaty on the Functioning of the European Union, *supra* note 31, Article 216 (2).
[269] Daukšienė, I., *supra* note 8, p. 1350.
[270] Brownlie, I. Principles of public international law, 6th edition, Oxford university press, 2003, p. 591.
[271] *Ibid.*
[272] International Vienna Convention on the Law of Treaties, *supra* note 33, Article 27.
[273] Jakulevičienė, L. Tarptautinių sutarčių teisė. VĮ Registrų centras, Vilnius, 2011, p. 213.
[274] Daukšienė, I., *op. cit.*
[275] Case 181/73, *R. & V. Haegeman v Belgian State supra* note 127, paras 5,6.
[276] Case C-344/04, *IATA and ELFAA* [2006] ECR I-403, para 35, [last accession on 2013-1204].
<http://curia.europa.eu/juris/liste.jsf?language=en&num=c-344/04>
[277] Opinion 1/91 of the ECJ. Draft agreement between the European Community and the countries of the European Free Trade Association relating to the creation of the European Economic Area [1991] ECR I-6079, [last accession on 2013-12-04].
<http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61991V0001>

as national court of the EU. The main problem arises in the aspect of mixed international agreements, which parties are the EU, MSs of the EU and states, which are not MSs of the EU. Mixed international agreements in the EU system of law have the same legal status as other agreements concluded by the ES as much as their provisions fall under the competence of the EU[278]. This means that when a provision of international agreement referable to exclusive competence of MS, then the CJEU has no jurisdiction in the aspect of such agreements[279]. Further, the exclusive and shared competence of the EU and the MSs concerning the provisions of respective agreement will be discussed.

Concerning the competences of MSs and the EU towards each other for the fulfillment of international agreements, it is important to mention again the *AETR* rule, according to which, the EU acquires exclusive external competence by determining internal rules[280]. Then the external competence of MSs is restricted, because they cannot assume any international obligations, which could affect such rules of the EU[281]. The problem of responsibility of MSs and the EU towards each other for the fulfillment of international agreement, according to assoc. dr. Inga Daukšienė, could be solved if the agreement between the EU and its MSs concerning distribution of internal powers and competences, which could be attached as appendix to mixed international agreement, would be concluded[282]. The author agrees with this opinion and thinks that it would make clear, where is the responsibility of the EU, the MSs, or other party. This also means that the EU and MSs are only obligate and responsible only according to the provisions, which are attributed to them[283]. If there is no distribution of competences, then concerning the international law, both the EU and the MSs are obligated to fulfill all provisions of international treaty[284].

What is more, the Article 46 of VCLT defines the rule that "a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent"[285]. This provision also expresses the necessity to determine the distribution of competences.

In regard to the EU law and as a regard to the first problem, MSs must solve all disputes, which are based upon international agreements concluded with third countries and where the EU has competence, in accordance with Article 259 of the TFEU. This provision is applicable

[278] Case 12/86, *Demirel v Stadt Schwabisch Gmund* [1987] ECR 3719, para 9, [last accession on 2013-12-04]. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61986J0012:EN:HTML>
[279] Daukšienė, I., *supra* note 8, p. 1350.
[280] Case 22/70, *Commission of the European Communities v. Council of the European Communities supra* note 104.
[281] Daukšienė, I., op cit., p. 1355.
[282] *Ibid.*
[283] *Ibid.*, p. 1350.
[284] *Ibid.*
[285] International Vienna Convention on the Law of Treaties, *supra* note 33, Article 46.

independently whether such international agreement sets out dispute settlement procedures[286]. It also means that the CJEU accepts its jurisdiction supremacy against other dispute settlement institutions envisaged in such mixed international agreements[287].

As regard to the second problem, when the CJEU considers its exclusive competence, it takes into account basically, whether the EU has competence in the dispute in regard to mixed international agreements. The core of this action is that the owning the competence of the EU is related to existing of legislation of the EU, independently, whether provisions of agreement make the influence or not[288]. Such a provision is also applicable when considering the separation of competences between the CJEU and national courts in regard to interpret provisions of international agreements concluded with third countries.

To sum up, the responsibility of MSs and the EU towards each other for the fulfillment of international agreements depends on sovereingity of each MS, the EU's legal personality to conclude air transportation agreements and the distribution of competences between MSs and the EU. Since the *Open Skies* decision was issued, the EU is competent to enter into obligations towards non-member countries and the MSs are allowed to enter into international agreements only where their obligations do not affect the common rules of the EU. The analyze also showed that international agreements concluded by the EU create obligations to its MSs, however, if there is no distribution of competences between MSs and the EU, then both the EU and the MSs are obliged to fulfill provisions of air transportation agreement.

[286] Daukšienė, I., *supra* note 8, p. 1354.
[287] *Ibid.*
[288] *Ibid.*

3. THE RELATION BETWEEN THE MONTREAL CONVENTION AND EU REGULATIONS ON AIR TRAFFIC RIGHTS

Regulation 261/2004 was designed to provide passengers with more rights against air carriers in cases of delay, cancellation and denied boarding of their flight. It applies to passengers departing from an airport located in the territory of a MS to which the TFEU applies and also to passengers departing from an airport located in a third country to an airport situated in the territory of MS to which the TFEU applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is an EU carrier[289]. The Montreal Convention is a multilateral treaty, which governs the liability of air carriers in the transportation of passengers, baggage, and cargo. It is applicable to all "international carriage of person or goods performed by aircraft for reward"[290]. The Section 3.1 is going to determine problematic aspects of the notions of 'delay' and 'cancellation', of compensation for passengers in the event of flight delay, the compatibility between the Regulation 261/2004 and the Montreal Convention in view of the cancellation and denied boarding, the airlines' liability for delays, cancellations and denied boarding in the light of the Regulation 261/2004 and the Montreal Convention as well. The author will examine the necessity to change the Regulation 261/2006 by taking into account the *Nelson and others*[291] decision and resent comments and reports of the European Commission in Section 3.2. Finally, the Section 3.3 will cover the legal analysis of the Regulation 1107/2006, discuss the compatibility of these provisions with the agreed goals, and finally, to determine the relationship between the Regulation 1107/2006 and the Montreal Convention and the necessity to changes or amendments.

[289] Regulation No.261/2004, *supra* note 6, Article 3.
[290] The Montreal Convention, *supra* note 3, Article 1.
[291] Joined cases C-581/10, and C-629/10, *Emeka Nelson and others v. Deutche Lutfansa AG* [2012] ECR I-0000, [last accession on 2014-01-24]. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=128861&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2619611>

3.1. Passengers right to compensation due to delay, cancellation and denied boarding

Although the Regulation 261/2004 was adopted for the purpose to protect passengers who face delay, cancellation and denied boarding of flights, national courts are confused about the interpretation of Regulation's provisions, its unclear terminology, inconsistent use of terms, mainly because of the different decisions of the CJEU (for example, different approach of similar issues in the *Sturgeon and others* and *Nelson and others* cases). This Section will discuss the notions of 'delay' and 'flight', will consider passengers' right to compensation due to cancellation, delay and denied boarding and air carrier liability in the light of the Regulation 261/2004 and the Montreal Convention.

3.1.1. The notion of 'flight' under Regulation 261/2004

To begin with, the definition of the 'flight' is important because of the applicability of the Regulation 261/2004 and the compensation due to passengers in case of denied boarding, cancellation and delay. Secondly, this is important for the air carrier liability, because normally in the event of flight cancellation, under which passengers "are not given another opportunity to reach their destination with the air carrier, are not considered delays and thus do not fall within the substantive scope of Article 19 or any other provision within the Montreal Convention"[292].

The CJEU described a situation, "where an aircraft departs on time, but then for technical reasons, such as unexpected technical failure, the aircraft lands at another airport or even returns to the airport of departure"[293]. In *Sturgeon and others* case, the CJEU clarified, that "the distinction between cancellation and delay relates to whether the flight was conducted according to the original planning of the carrier."[294] Therefore, the cancellation is only if "the air carrier arranges for the passengers to be carried on another flight whose original planning is different from that of the flight for which the booking was made"[295].

Concerning the concept of delay, the CJEU stated that a flight is delayed rather than cancelled, "if it is operated in accordance with the 'original planning' even if its actual departure time is later than the scheduled departure time"[296]. Thus, where a delayed flight is

[292] Cotter Ch, E. Recent case law addressing three contentious issues in the Montreal Convention. *Air &Space* Lawyer, 2012, Vol. 24 Issue 4, p9-13. 5p., [last accession on 2014-01-23].
<http://web.ebscohost.com/ehost/detail?sid=0ad91f55-3458
4914a0b5ee21e8b125d8%40sessionmgr10&vid=8&hid=22&bdata=JnNpdGU9ZWhvc3QtbGl2ZQ%3d%3d#db=a9
h&AN=74648855>
[293] Chatzipanagiotis. M., *supra* note 23, p. 250.
[294] *Ibid.*
[295] Joined cases C-402/07, *Sturgeon and others v. Condor FlugdienstGmbH and Bock and Lepuschitz v. Air France SA* [2009] ECR I-10923, para 35, [last accession on 2014-01-23].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0402:EN:HTML>
[296] *Ibid.*, para 32.

extended into another flight, which was also planned, the original flight will be concidered as cancelled[297]. Here, the first uncertainty arises. Although the CJEU introduced new terms, such as 'original planning' into the Regulation 261/2004, it does not explain them, so naturally, it becomes difficult to decide where is the delayed flight and where is cancelled flight. Analyzing the term 'original planning', the CJEU has held that it refers to operational arrangements of the air carrier[298] and they include the aircraft's registration number, crew members and the rout and if all these elements are not satisfied, then the flight is concerned as cancelled[299]. According to Kinga Arnold and Pablo Mendes de Leon, this interpretation is too strict and the CJEU fails "to clarify when a flight is not operated and it is not obvious whether the CJEU refers to all passengers booked on flight or any of them"[300]. The Regulation 261/2004 defines cancellation as non-operation of the flight[301] and the CJEU declares that the flight is delayed if it is operated in accordance with the air carrier's original planning[302]; it still is unclear under which category the flight will fall if it is operated.[303] Taking into account what has been analyzed above and to answer the question what is the notion of 'flight', it is necessary to take into consideration words of M. Chatzipanagiotis - a 'flight' under the Regulation 261/2004 is "a transportation unit which begins with a scheduled departure and ends with a scheduled landing after which passengers disembark"[304].

3.1.2. Passengers right to the compensation in the event of the delay and the cancellation

Talking about the compensation for passengers in the event of flight delay and cancellation, the case-law of the CJEU and the Regulation 261/2004 must be examined. The Regulation 261/2004 itself raises several questions. First of all, whether the passengers have a right to claim for the compensation only in the event of the cancellation or by delay as well; secondly, whether air carrier is always obliged to pay compensation when cancellation is due to extraordinary circumstances and is the Regulation 261/2004 consistent to the Montreal Convention?

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[297] Balfour, J. Airline liability for delays: The European Court of Justice of the EU rewrites EC Regulation 261/2004. *Air and Space law* 35, no 1, p. 71 [2010]:71-75, [last accession on 2014-01-26]. <http://heinonline.org/HOL/Page?handle=hein.kluwer/airlaw0035&div=10&collection=kluwer&set_as_cursor=2&men_tab=srchresults#73>

[298] Joined cases C-402/07, *Sturgeon and others*, *supra* note 295, para 31.

[299] Arnold, K. and Mendes de Leon, P. Regulation (EC) 261/2004 in the light of the recent decisions of the European Court of Justice: time for a change?!. *Air and Space law* 35, no 2, p. 96 [2010]: 91-112.

[300] *Ibid.*, p. 97.

[301] Regulation No.261/2004, *supra* note 6, Article 2 (l).

[302] Joined cases C-402/07, *Sturgeon and others*, *op. cit.*, para 32.

[303] Arnold, K. and Mendes de Leon, P. *op. cit.*, p. 98.

[304] Chatzipanagiotis, M., *supra* note 23, p. 257.

As regard to the first question, according to case law of the CJEU (*Sturgeon and others case –author's comment*), the Montreal Convention "comprises the claim for compensation as individual compensation of a concrete damage, whereby the claims according to Regulation 261/2004 comprise a standardized general and uniform compensation for nuisance and inconvenience caused to the air passengers"[305]. Explicitly, the Regulation 261/2004 provides for a right to compensation only in case of cancelation.[306] Based on this provision, it appears that passengers have a claim for compensation when their flight has been cancelled but not when the flight has been delayed. With regard to delay a right to compensation follows from the wording, as the CJEU states "it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part"[307]. Respecting the principle of equal treatment, the right to compensation should apply in a case of delay as well[308]. As a practical matter, delay and cancellation may cause the same damage to the passengers, namely loss of time "which, given that it is irreversible, can be redressed only by compensation."[309] Finally, the CJEU came to a decision that for flights delayed for more than three hours, the same compensation scheme had to be applied as for cancelled flights[310].

Further, it is necessary to mention *Air France SA v. Folkerts*[311] case, where the CJEU considered the question whether passenger have a right to compensation under the Regulation 261/2004 in situations where departure of his flight was delayed for a period which is below the limits settled in the Article 6 of the Regulation 261/2004, but arrival at the final destination was above three hours later than the scheduled arrival time[312]. Answering this question, the CJEU referred to the *Sturgeon and others* case and held that provision of the Regulation 261/2004 concerning the passenger's right to compensation must have the meaning that air carrier has to pay the compensation to a passenger on directly connecting flights who has been delayed at departure for a period determined in the provision of the Regulation 261/2004 concerning the delay, but has arrived at the final destination at least three hours later than scheduled arrival time[313]. This is so because such compensation is not concerned with a delay, as well as with the conditions settled in the Article 6 of the Regulation 261/2004[314]. In Articles 4 and 7 the Regulation 261/2004 expressly provides for compensation in the event of cancellation – EUR

[305] Giesberts, L. & Kleve, *supra* note 25, p. 294.
[306] Convention for the Unification of Certain Rules for International Carriage by Air, *supra* note 3, Article 7.
[307] Joined cases C-402/07 and C-432/07, *Sturgeon and others*, *supra* note 295, para 41.
[308] *Ibid.*, para 48.
[309] *Ibid.*, para 52.
[310] *Ibid.*, para 69.
[311] Case C-11/11, *Air France SA v Heinz-Gerke Folkerts and Luz-Tereza Folkerts* [2013], [last accession on 2014-03-10].
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0011:EN:HTML>
[312] *Ibid.*, para 25.
[313] *Ibid.*, para 49.
[314] *Ibid.*

250 for flights of 1,500 km or less, EUR 400 for intra-EC flights of more than 1,500 km and for other flights between 1,500 and 3,500 km, and EUR 600 for all other flights[315]. According to John Balfour, "the CJEU's reasoning was essentially based on an interpretation of the Regulation 261/2004 in the light of protection for passengers and EU law principle of equal treatment, which requires that comparable situations would not be treated differently"[316]. So the CJEU expressed its view that passengers whose flights were delayed and passengers whose flights were cancelled have the same right to compensation. After the CJEU's decisions concerning compensation for the delay and the cancellation it became unclear to interpret Regulation's 261/2004 provisions, which was quite clear before the CJEU's judgments. Also the CJEU sometimes fails to take into consideration purposes of the European Commission when it was proposing the Regulation 261/2004. For example, when proposing the Regulation 261/2004, the European Commission had purpose to reduce the number flight cancellations, but they did not intend to penalize aircrafts for technical problems of aircraft[317].

Lithuanian case law shows that passengers can claim for compensation not only due to cancelled or delayed flight in the light of the Regulation 261/2004, but also to ask for additional compensation to claim for non-pecuniary damages in accordance with national law[318]. In the case *V. K. v. Wizzair Hungary kft* the claimant asked for the compensation in the event of delayed flight. The flight from Barcelona to Vilnius was delayed and the claimant with his family members flew back only the next day. According to the claimant, the right to accommodation or other basic assistant in the event of flight delay was not offered to him and his family members; the *Wizzair* crew was also not paying attention to the family and did not ensure passengers right to be informed[319]. In the judgment, Lithuanian court referred to *Sturgeon and others* case, by stating that provision of the Regulation 261/2004 concerning passengers' right to compensation due to cancellation, must be interpreted similarly to denied flights (for flights delayed for more than three hours - *the author's comment*)[320]. However, such a delay does not give a right to passengers if the air carrier proves that such flight for more than three hours was delayed due to extraordinary circumstances (it will be discussed further – *the author's comment*). Finally in the light of the CJEU decisions, the Lithuanian court concluded that passengers which suffered long flight delay had a right to compensation[321].

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[315] Regulation No. 261/2004, *supra* note 6, Articles 4 and 7.
[316] Balfour, J., *supra* note 297, p.72.
[317] Arnold, K. and Mendes de Leon, P., *supra* note 299, p. 105.
[318] Vilniaus miesto pirmojo apylinkės teismo 2012 m. birželio14 d sprendimas už akių civilinėje byloje *V. K. v. Wizzair Hungary kft.* (No. of case 2-6302-790/2012) , [last accession on 2014-03-10].
<http://e-teismai.lt/byla/159082599771092/2-6302-790/2012?word=wizzair>
[319] *Ibid.*
[320] *Ibid.*
[321] *Ibid.*

What is more, as it was mentioned previously in *V. K. v. Wizzair Hungary kft case,* the CJEU touched the question of air carrier liability in the event of delay and cancellation in the regard with extraordinary circumstances. According to Regulation 261/2004, "an operating air carrier is not obliged to pay compensation, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken"[322]. This means that air carrier is not obliged to pay compensation for the passenger if it proves that circumstances are really extraordinary and not reasonably avoidable. This provision calls a question, whether technical problems with a plane and the resulting changes to the flight schedule represent extraordinary circumstances?

Again, the Regulation 261/2004 does not define the term 'extraordinary circumstances'. The CJEU stated that extraordinary circumstances "may be regarded as covering only circumstances which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond the actual control of that carrier on account of its nature or origin"[323].

The CJEU also defined two examples of circumstances, in which technical problem could be considered as extraordinary. One is the situation, "where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect, which impinges on flight safety"[324] and the other when a damage for air carrier is caused by terrorism or cabotage[325].

On the one hand it seems clear that air carrier is not is not obliged to pay compensation for passenger if it proves that all reasonable measures had been taken to avoid the cancellation, but on the other hand it raises a question whether air carrier really took all 'reasonable measures' according to Regulation 261/2004 to prove, that all minimal legal requirements were satisfied and whether such an evidence is sufficient enough in order to relieve the air carrier from the obligation to pay compensation for the passenger[326]. For this question, the CJEU took negative answer and added that "even if air carrier has deployed all its recourses in terms of staff and equipments and the financial means, it would clearly have not been able [...] to prevent the extraordinary circumstances"[327]. According to professor A. Milner, the Regulation 261/2004 concerning the extraordinary circumstances "operates independently from Article 19 of the

[322] Regulation No. 261/2004, *supra* note 6, Article 5.
[323] Case C-549/07, *Friederike Wallentin-Hermann v. Alitalia-Linee Aeree Italiane SpA* 2008 ECR I-11061, para 34, [last accession on 2014-01-24].
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=73223&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=394047>
[324] *Ibid.*, para 26.
[325] *Ibid.*
[326] Milner, A., *supra* note 26, p. 218-219.
[327] Case C-549/07, *Wallentin-Hermann, op. cit.*, para 41.

Montreal Convention, which exonerates the carrier from liability for damage occasioned by delay if it proves that it took all measures that could reasonably be required to avoid the damage"[328].

Taking into consideration that the Regulation 261/2004 does not give explicit meaning of 'extraordinary circumstances', it would be logical turn to provisions of the international treaty – the Montreal Convention. What do we see, it is that the Montreal Concention also does not determine the definition of the 'extraordinary circumstances'. It only provides that an air carrier may not be liable "for damage occasioned by delay if it proves that it and its servants took all measures that could reasonably be required to avoid the damage"[329]. The CJEU held that the Montreal Convention is not the essential, and cannot be basement for interpretation of the extraordinary circumstances, because the Montreal Convention deals with delays as opposed to cancellations [330] and the concept of 'extraordinary circumstances' does not appear in the Montreal Convention[331]. One more reason why the Montreal Convention cannot be the essential of interpretation for air carrier compensation is that, according to the CJEU, "the Regulation 261/2004 provides for standardised and immediate compensatory measures, [...] thus intervene at an earlier stage than the provisions of the Montreal Convention (which permit passengers to bring actions for damages on an individual basis – *the author's comment*)" [332]. This argumentation raises the question about the compatibility of the provisions of the Regulation 261/2004 concerning the compensation for damages with the Montreal Convention provisions in a regard with liability of air carrier for damages caused to the passenger.

3.1.3. Air carrier liability due to the delay and the cancellation in the light of the Regulation 261/2004 and the Montreal Convention

The Montreal Convention provides that air carriers shall be "liable for the damage occasioned by delay" [333] but that any action for damage "can only be brought subject to conditions and such limits of liability as are set out in this Convention"[334]. These provisions leads to thinking what is the relationship between the right to compensation based on Article 7 of the Regulation 261/2004 which a passenger has, according to *Sturgeon and others* case, if he reaches his final destination three hours or more after the scheduled arrival time and the right to compensation in respect of delay provided in Articles 19 and 29 of the Montreal Convention?

[328] Milner, A. *supra* note 26, p. 219.
[329] The Montreal Convention, *supra* note 3, Article 19.
[330] Case C-549/07, *Wallentin-Hermann*, *supra* note 323, para 32.
[331] *Ibid.*, para 30.
[332] *Ibid.*, para 32.
[333] The Montreal Convention, *op. cit.*, Article 19.
[334] *Ibid.*, Article 29.

What is the compatibility between those provisions, on one hand the EU with the Regulation 261/2004 and on the other hand, the rest countries with the Montreal Convention?

The CJEU in its case law held that "the Regulation 261/2004 is consistent with the Montreal Convention by drawing a distinction between individual damage and identical damage"[335], is it? The applicability of the Regulation 261/2004 extends to all flights departing the EU airports on any airline[336]. So, according to this provision, the application of the Regulation 261/2004 has an effect not only on the EU air carriers but also on non-EU air carriers whose flights start in the EU airport. This is an example, where the Regulation 261/2004 confronts with the Montreal Convention. Naturally, a question about the priority of one of the documents appears.

In *Nelson and others* case concerning the compatibility of the Regulation 261/2004 and the Montreal Convention the main questions were whether the Article 7 of the Regulation 261/2004 has the same meaning as the Article 29 of the Montreal Convention[337] and "whether Article 7 of the Regulation 261/2004 are valid in the light of the Article 29 of the Montreal Convention if it is interpreted as meaning that passengers whose flights are delayed and who reach their final destination three hours or more after the arrival time originally scheduled by the air carrier are entitled to compensation under that Regulation"[338].

In *IATA and ELFAA* case, the CJEU held that the above-mentioned Articles of the Montreal Convention "do not show that the authors of the Montreal Convention intended to shield air carriers from any other form of intervention other, in particular action which could be envisaged by the public authorities to redress, [...], the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages"[339]. In that connection, those inconveniences because of the loss of time "cannot be categorised as 'damage occasioned by delay' within the meaning of Article 19 of the Montreal Convention, and, for that reason, it falls outside the scope of Article 29 of that Convention"[340]. Differently than the Regulation 261/2004, the Article 19 of the Montreal Convention concerning the liability to compensate damages means that "the damage arises as a result of delay, that there is a causal link between the delay and the damage and that the damage is individual to passengers depending on the various losses sustained by them"[341].

[335] Van Dam, C. *supra* note 24, p. 268.
[336] Regulation No.261/2004, *supra* note 6, Article 3.
[337] Joined cases C-581/10, and C-629/10, *Emeka Nelson and others*, *supra* note 291, para 20.
[338] *Ibid.*, para 41.
[339] Case C-344/04, *IATA and ELFAA*, *supra* note 276, para 45.
[340] Joined cases C-581/10 and C-629/10, *Emeka Nelson and others*, *op. cit.*, para 49.
[341] *Ibid.*, para 50.

What is more, a loss of time is identical for all the passengers whose flights are delayed and it is possible to redress damage without the necessity to value every individual situation of each passenger[342]. As it was mentioned, the obligation for air carrier to pay compensation under Regulation 261/2004 does not arise from each delay, but only from a delay which entails a loss of time equal or in access of three hours. In those circumstances, the loss of time in a flight delay, which "constitutes an inconvenience with the meaning of the Regulation 261/2004 and cannot be categorised as 'damage occasioned by delay' within the meaning of the Article 19 of the Montreal Convention cannot come within the scope of Article 29 of that Convention"[343], so the conclusion concerning this issue is that obligation under Regulation 261/2004 to pay compensation for passengers whose flight are subject to a long delay is compatible with the Montreal Convention[344].

According to Sonja Radoševič, the decision in *Nelson and others* case is incorrect, unlawful, contravenes international air carrier liability for damage caused by delay and is incompatible with the provisions of the Montreal Convention[345]. According to the Montreal Convention, Articles 19 and 29, regulates the subject matter of damage caused as a result of delay in international carriage by air[346]. Firstly, as Sonja Radoševič delivers, Regulation 261/2004, "regulating the same cause of action in an area which is explicitly regulated under the Montreal Convention, infringes wording of the Montreal Convention and its exclusivity"[347]. Secondly, although the CJEU does not contrevene the applicability of the Montreal Convention, it delivers decisions by grounding them only from interpreting internal EU air law, and put the international law obligations into the second plan[348]. Thirdly, according to her, the CJEU gave "an artificial differentiation between the subject matter by the Montreal Convention and that covered by the Regulation 261/2004"[349]. Nor the Regulation 261/2004, neither the Montreal Convention "does not define what a compensable 'delay' is or what 'damage' is recoverable for a delay in international carriage by air"[350]. According to G. N. Tompkins, this is so because the courts had not evidenced any difficulty in interpreting and applying the substantially same 'delay' liability rule in the Montreal Convention[351].

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[342] Joined cases C-581/10, and C-629/10, *Emeka Nelson and others*, *supra* note 291, para 52.
[343] *Ibid.*, para 55.
[344] *Ibid.*, para 56.
[345] Radoševič, S., *supra* note 28, p. 102.
[346] The Montreal Convention, *supra* note 3, Articles 19, 29.
[347] Radoševič, S., *op. cit.*
[348] *Ibid.*, p. 102.
[349] *Ibid.*, p. 103.
[350] *Ibid.*
[351] *Ibid.,* p. 104. (cited by:Tompkins, G. N. Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States, p. 229 (Wolters Kluwer 2010)).

Although the CJEU in *Nelson and others* case argues the loss of time as an inconvenience and not as a result of delay, according to Sonja Radoševič, this statement can be described as '*reductio ad absurdum*'[352]. She grounds her opinion by several arguments. Firstly, loss of time, as even being as an inconvenience, arises a result of delay and because of that could give rise to recoverable damage for inconvenience under the Montreal Convention[353]. Secondly, the CJEU use of terms such as damage and inconvenience as legal concepts shows the absurdity of its conclusions[354]. Furthermore, some authors (such as JW Lee – *the author's comment*) do not agree with the CJEU decision that loss of time is identical to each passenger. They contravene to it that "loss of time is identical for each passenger only in terms of objective temporal delay, but the extent of inconvenience each passenger faces is significantly different"[355]. Finally, the CJEU's effort to create two levels of air carrier liability for delay in international air carriage amounts to complete misinterpretation of the provisions of the Montreal Convention[356]. The author does not agree with Sonja's Radoševič opinion that the loss of time is a result of delay and adds that loss of time is rather the inconvenience than the result of delay, because the delay is always the cause of passenger's lost time, mainly the cause of the inconvenience.

In *Nelson and others* case, the CJEU expresses that the compensation for the delay under Regulation 261/2004, as opposed to the Montreal Convention, is non-causal and that there "is not necessarily a causal link between the delay and loss of time considered relevant for the purpose of giving rise to the right to compensation"[357]. As opposite to the Regulation 261/2004, under the Montreal Convention if the delay does not result in any legally recognized damage to the passenger, then there is no liability only because of the fact of a 'delay'[358]. Taking into account what ws mentioned above, concerning the compensation for the passengers both the Regulation 261/2004 and the Montreal Convention, the Regulation 261/2004 provides for a right to compensation in cases of denied boarding and cancellation and does not provide for compensation in case of delay in order not to infringe the Montreal Convention's exclusivity [359]. However, in the author's point of view, both the Montreal Convention and the Regulation 261/2004 provides for the compensation of damages in the event of delay, but the Regulation 261/2004 does not specify it explicitly and it is necessary parallelly to take into consideration the case law of the CJEU.

[352] Radoševič, S., *supra* note 28, p. 105.
[353] *Ibid.*
[354] *Ibid.*
[355] *Ibid.,* p. 105. (cited by: JW Lee & JC Wheeler, Air Carrier Liability For Delay: A Plea To Return To International Uniformity, 77 J. Air L. & Com. 43, 44 (2012)).
[356] *Ibid.,* p. 106.
[357] *Ibid.*
[358] *Ibid.*
[359] *Ibid.,* p. 108.

Considering the compatibility question between the Regulation 261/2004 and the Montreal Convention, particularly, whether Article 6 of the Regulation 261/2004 is inconsistent with Article 19 of the Montreal Convention, the CJEU explained that delay causes two types of damages, the first is identical to all passengers and the second is individual inherent in the reason of travelling[360]. Also, according to the CJEU, the Montreal Convention deals only with damages for which passengers ask compensation on an individual basis, while the Regulation 261/2004 deals with damages which are identical to all passengers[361]. So, in the view of the CJEU, the Regulation 261/2004 is consistent with the Montreal Convention, because it applies before departure of the flight, and the Montreal Convention applies after the flight has been operated, but several authors do not agree with this statement of the CJEU and considers that the CJEU adopted wrong view on the relationship between the Regulation 261/2004 on the one hand and the Montreal Convention, because it ignored the exclusivity and primacy of international law in relation to EU regulations[362]. It is well-established in the case law that neither the EU, nor the institutions, including MSs, can act in breach of their international obligations[363].

Furthermore, all these recent decisions of the CJEU, instead of making clear the provisions of the Regulation 261/2004, complicate their application, because of its interpretation, which disregards to the provisions of the Montreal Convention. Also in the light of the liability to pay compensation for damages to the passengers, the Montreal Convention provides for an exclusive liability wherever the air carrier shows it took all the measures to avoid damage or it could not take such measures at all, while under the Regulation 261/2004, the air carrier is obliged to assume the cost of 'care' losses irrespective of the cause of delay or its unavoidability[364]. Nonetheless, the author thinks that the Montreal Convention is loosing its applicability when the CJEU is interpreting the Regulation 261/2004.

3.1.4. The denied boarding: passengers right to the compensation

According to Regulation 261/2004 the 'denied boarding' means "a refusal to carry passengers on a flight, although they have presented themselves for boarding"[365]. The Regulation 261/2004 also determines air carrier liability and compensation for passengers in the event of denied boarding. First of all, when air carrier expects to deny boarding on a flight, the expectation of it must be reasonable (such as reasons of health, safety, security or inadequate

[360] Case C-344/04, *IATA and ELFAA, supra* note 276, para 43.
[361] Van Dam, C., *supra* note 24, p. 268.
[362] Arnold, K. and Mendes de Leon, P., *supra* note 299, p. 100.
[363]Case T-306/01, *Ahmed Ali Yusuf and others v. the Council* [2005] ECR II-3533, para 231, [last accession on 2014-01-27].
<http://curia.europa.eu/juris/liste.jsf?num=T-306/01>
[364] Dempsey, S. and Johansson, S., *supra* note 27, p. 223.
[365] Regulation No.261/2004, *supra* note 6, Article 2 (j).

travel documentation – *author's comment*) and it must offer volunteers to surrender their reservations in exchange for benefits under conditions agreed between the passenger and the air carrier, which calls for denied boarding[366]. Logically, for persons who have presented themselves for boarding but had been called to surrender their reservation in exchange for benefits, have to be offered right to reimbursement or re-routing. Further, the Regulation 261/2004 determines situation when air carrier denies boarding against passengers' will. According to it, in cases where boarding is denied to passengers against their will, the immediate compensation and necessary assist must be offered to passengers from the air carrier[367].

These provisions of the Regulation 261/2004 look clear, but only at first glance. Going into deeper consideration, firstly, it leads to question such as "whether the concept of 'denied boarding' within the meaning of the Regulation 261/2004, must be interpreted as relating to cases where boarding is denied because of overbooking or whether it applies also to cases where boarding is denied on other grounds, such as operational reasons"[368]. Also, secondly, it is unclear from the provisions of the Regulation 261/2004 and leads to a question related to rescheduling flights in extraordinary circumstances, for example, "whether the event of extraordinary circumstances resulting in an air carrier rescheduling flights after those circumstances occurred can be basis for denying boarding to a passenger on one of those later flights and for absolving that air carrier from its obligation to pay compensation for a passenger who denies boarding on such a flight"[369]. In order to answer these questions, it is necessary to analyze the case law of the CJEU, mainly the case of *Finnair Oyj v Timy Lassooy*[370] issued in 2012.

Following the strike by staff at Barcelona airport, the scheduled flight from Barcelona to Helsinki operated by *Finnair* was cancelled[371]. In order that the passengers on that flight should not have too long a waiting time, *Finnair* chose to reschedule its subsequent flights from Barcelona to Helsinki in order to accommodate and minimize delay to passengers booked on the earlier flights[372]. The claimant, who was scheduled to depart with *Finnair* stated himself for boarding but was unable to take his flight due to the operational rescheduling, which led to the

[366] Regulation No.261/2004, *supra* note 6, Article 4.
[367] *Ibid.*
[368] Case C22/11, *Finnair Oyj v Timy Lassooy* [2012], para 18, [last accession on 2014-03-10]. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=128005&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=484361>
[369] *Ibid.*, para 27.
[370] *Ibid.*
[371] *Ibid.*, para 12.
[372] DLA Piper, Denied boarding and extraordinary circumstances: Judgment of the Court of Justice of the European Union, the Article of a law firm, 2012 , | OCT12 | LONDP: UKG/MA/14310432, [last accession on 2014-03-10]. <http://www.dlapiper.com/files/Publication/a2c06b31-20b2-42db-9b66-fcc47465c20c/Presentation/PublicationAttachment/bbc2281b-6e9e-4f7b-94e4-13a3390017c2/Denied_boarding_and_extraordinary_circumstances.pdf>

situation that his flight was over booked[373]. Taking into account that *Finnair* had no valid reason denied him boarding; Mr. Lassooy brought an action before *Finnai r*in order to claim for compensation[374]. *Finnair*, on the other hand, claimed that the denied boarding had been on reasonable grounds on the basis that it had been required as a result of previous extraordinary circumstances[375].

As regard to first question, the CJEU gave an interesting explanation towards its answer. Firstly, it noted that "the wording of Article 2 (j) of Regulation No 261/2004, which defines the concept of 'denied boarding', does not link that concept to an air carrier's overbooking the flight concerned for economic reasons"[376]. Further, it gave a reference to Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport (hereinafter – the Regulation 295/91), by noticing that this Regulation had gaps concerning this issue[377]. In end of the explanation, the CJEU concluded that the notion of 'denied boarding' in the light of the Regulation 261/2006 has to be interpreted broadly as covering "not only cases where boeading is denied because of overbooking, but also to whose where boarding is denied on other grounds, such as operational reasons"[378].

As regard to second question, the CJEU considered "whether a previous cancellation due to extraordinary circumstances would give carriers reasonable grounds for denying boarding to passengers on a later flight rescheduled as a consequence of the original extraordinary circumstance, thereby exempting them from the obligation to pay compensation under Article 4(3) (of the Regulation 261/2004 – *the author's comment*)"[379]. The CJEU notes that the Regulation 261/2004 does not explicitly express all possible situations in which the reasonable grounds for denied boarding could be stated [380]. Therefore, "it cannot be accepted that an air carrier may, relying on the interest of other passengers in being transported within a reasonable time, increase considerably the situations in which it would have reasonable grounds for denying a passenger boarding"[381].

Furthermore, the CJEU considered whether an air carrier could be absolved from the responsibility to pay a passenger compensation for denied boarding under Regulation 261/2004 on grounds for extraordinary circumstances (as it was mentioned above, the Regulation 261/2004

[373] DLA Piper, *supra* note 372.
[374] Case C22/11, *Finnair Oyj v Timy Lassooy*, *supra* note 368, para 14.
[375] DLA Piper, *op. cit.*
[376] Case C22/11, *Finnair Oyj v Timy Lassooy*, *op. cit.*, para 19.
[377] *Ibid.*, para 20.
[378] *Ibid.*, para 26.
[379] DLA Piper, *op. cit.* 372.
[380] Case C22/11, *Finnair Oyj v Timy Lassooy op. cit.*, para 26.
[381] *Ibid*., para 34.

provides this right only in events of the cancellation – *the author's comment*)[382]. Additionally, the CJEU stated that " 'extraordinary circumstances' may relate only to 'a particular aircraft on a particular day', which cannot apply to a passenger denied boarding because of the rescheduling of flights as a result of extraordinary circumstances affecting an earlier flight"[383]. The concept of 'extraordinary circumstances' is tend to limit obligations of air carriers' in the event of respective flight, where was imposible to avoid extraordinary circumstance even if all reasonable measures had been taken[384].

What is more, it is necessary to pay attention to the Opinion of the Advocate General, where it stated that "if such a carrier is obliged to cancel a scheduled flight on the day of a strike by airport staff and then takes the decision to reschedule its later flights, that carrier cannot in any way be considered to be constrained by that strike to deny boarding to a passenger who has duly presented himself for boarding two days after the flight's cancellation"[385]. Finally, as regard to the second question, the CJEU came to a conclusion that an air carrier cannot be exempted from its obligation to pay compensation in the event of 'denied boarding' on the ground that its flights were rescheduled as a result of 'extraordinary circumstances'[386].

As regard to passenger's right to compensation due to event of the denied boarding, the author concludes that the explanation of the CJEU concerning the extraordinary circumstances in the event of denied boarding is unclear and does not give clear answer to questions arising in Section 3.1.3. As Scotland solicitors (such as K. Ward, L. Payne – *the author's comment*) conclude, it is not clear "why the ECJ (now CJEU – *author's comment*) opined on the scope of extraordinary circumstances in the context of the strike in Barcelona Airport, since it had already rejected the availability of extraordinary circumstances as a defense to a denied boarding claim"[387]. The author sees the necessity to change the Regulation 261/2004 in order to set up clear definition, provisions of compensation in the event of delay, cancellation and denied boarding as well.

Taking into account what was analyzed above, the author concludes that the amendment of the Regulation is necessary because of changeable aviation industry during past years. According to explanatory statement of the European Parliament in the Report, "incomplete and inconsistent implementation of the existing Regulation (Regulation 261/2004 – *author's*

[382] DLA Piper, *supra* note 372.
[383] Case C22/11, *Finnair Oyj v Timy Lassooy*, *supra* note 368, para 37.
[384] *Ibid.*
[385] *Ibid.*, para 40 (cited by: Opinion of Advocate General Bot delivered on April 19 2012 Case C22/11, *Finnair Oyj v Timy Lassooy*,[last accession on 2014-03-10]).
< http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CC0022:EN:HTML>
[386] *Ibid.*
[387] DLA Piper, *op. cit.* 372.

comment) […] causes confusion for passengers"[388]. Moreover, in the author's opinion, the CJEU has concluded numbers of cases, which create legal uncertainty and due to that the CJEU intervenes too much by interpreting the text of the Regulation 261/2004.

3.2. The Regulation 261/2004 – time for a change?

The necessity to amend the Regulation 261/2004, first of all, came into the light of the consideration, because according to Kinga Arnold and Pablo Mendes de Leon, it does not effectively protect rights of passengers on one side, and of air carriers on the other side; the inconsistent treatment of passengers whose flight is delayed and those, whose flight is cancelled and due to such issue arising inequality; further, the lack of the explanations of terminology and poor drafting, which creates difficulties for the air carriers and passengers, because if we can say so, it depends on the mood of the CJEU to make different decisions on very similar issues[389]. Due to all these aspects, the ministers of the European Commission agree to change the text of the Regulation 261/2004.

The European Commission issued a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (hereinafter – Proposal of the European Commission or the Proposal) in 2013, where it aims "to promote the interest of air passengers by ensuring that air carriers comply with a high level of air passenger protection during travel disruptions, […] and ensuring that air carriers operate under harmonized conditions in a liberalized market"[390]. The European Commission by amending the Regulation 261/2004 wants to ensure effective enforcement of passenger rights, also to clarify passengers' rights that have caused serious debates between air carriers and passengers since the amendments of the Regulation 261/2004 had been taken into consideration.

First of all, the European Commission in the Proposal gives clear definition of the 'extraordinary circumstances'. The Proposal defines the notion in accordance with the CJEU decision in *Wallentin-Herman* case, where the CJEU held that extraordinary circumstances are circumstances, "which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control"[391]. Moreover, the European Commission initiates to adopt a non-exhaustive list of circumstances which would

[388] European Parliament, *supra* note 42.
[389] Arnold, K. and Mendes de Leon, P., *supra* note 299, p. 110.
[390] European Commission, *supra* note 41, para 1.2.
[391] Case C-549/07, *Wallentin-Hermann*, *supra* note 323, para 34.

consist of extraordinary and non-extraordinary circumstances[392] (in the Annex I – *author's comment*), while Regulation 261/2004 before amendment did not have such a list at all.

Secondly, concerning the right to compensation in long delays, the Proposal of the European Commission introduces it as announced by the CJEU in the *Sturgeon* case (see Section 3.1.3 – *author's comment*). However, to avoid an increase in delays, the time threshold after which the right to compensation arises is proposed to be increased from three to five hours for all journeys within the EU[393].

Further, the Proposal of the European Commission, concerning the missed connecting flight, confirms that "passengers that miss a flight connection because their previous flight was delayed have a right to care […] and, under certain circumstances, a right to compensation"[394]. But, this right is applicable only where the connecting flights are part of a single contract of carriage as in that case air carriers concerned have committed to and are aware of the intended connection between flights"[395].

Concerning the right of passengers to re-routing and rescheduling, the Proposal states that "if air carrier cannot reroute the passenger on its own services within 12 hours, it must consider other carriers or other transport methods, subject to seat availability" [396] and confirms that "passengers of flights rescheduled with a notice of period of less than two weeks in advance of the originally scheduled time have similar rights to delayed passengers"[397]. This means that air carriers should cooperate and reduce as much as possible the impact on passengers of flight delays or cancellations[398]. According to the European Commission, passengers while waiting for rerouting, in accordance with principle of equal treatment, should be able to claim for compensation on similar basis to passengers whose flights are delayed or cancelled[399].

Further, in the perspective of the Proposal of the European Commission, the European Parliament issued the Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (hereinafter – the Report of the European Parliament or the Report) in 2014, where it stated its point of view to necessary amendments for the Regulation 261/2004 in order to provide more effective protection of passenger rights.

[392] European Commission, *supra* note 41, para 3.3.1.1.
[393] *Ibid.*, para 2.2.
[394] *Ibid.*, para 3.3.1.1.
[395] *Ibid.*
[396] *Ibid.*
[397] *Ibid.*
[398] *Ibid.*, Recital 10.
[399] *Ibid.*, Recital 13.

Firstly, the European Parliament suggests different formulation of the amendment than the European Commission concerning the 'extraordinary circumstances'. It agrees with the opinion of the European Commission due to the notion[400]. However, it states that such definition has to be clarified in exhaustive list of circumstances that are clearly categorised as extraordinary and the European Commission should be responsible for the addition to the list if it is necessary[401]. This means that the list have to be exhausted in order to guarantee the legal certainty of the notion of 'extraordinary circumstances'[402]. The author agrees with the European Parliament's suggestion to set a list of exhaustive list of circumstances, because it would cause less problems when the difficulties to decide whether the air carrier is liable to compensate damages for the passenger appear. In author's opinion, the revision of the European Commission of the exhaustive list of extraordinary circumstances is necessary because of the changing needs of the passengers and increasing effective protection of their rights.

Secondly, oppositely to the European Commission's view concerning the passenger right to compensation in the events of long delays, the European Parliament adds that not only as regard to *Sturgeon* case, but as well in accordance with principle of equal treatment, which requires that comparable situations must not be treated differently, should be clearly defined the right to compensation to these passenger suffering long delays in the amendment of the Regulation 261/2004[403]. Additionally, the European Parliament suggests involving the provision about the amount of compensation for such delays, which means that "the same rate should always be applied to the same distance of flight involved"[404]. The author agrees with the suggestion of the European Parliament and in the author's opinion, the equalization of the amount of the compensation for the same distance flights will secure application of equal treatment and will reduce number of disputes between air carrier and passengers' in the event of monetary compensation for damages. Moreover, it would protect passengers' rights more effectively than it is protected nowadays.

Furthermore, although the European Commission sets up the provision for the proper care for passengers missing a connecting flight due to a change of schedule or delay only (the additional provision of the European Parliament – *author's comment*) while waiting for rerouting, the European Parliament in its Report adds that not only in the line with principle of equal treatment but also in accordance with the judgment of the CJEU in *Air France v. Folkerts* case "such passengers should be able to claim for compensation on a similar basis to passengers whose flights are delayed or cancelled in light of the delay upon reaching the final

[400] European Parliament, *supra* note 42, Amendment 2, Recital 3.
[401] *Ibid.*
[402] *Ibid.*
[403] *Ibid.,* Amendment 15, Recital 11.
[404] *Ibid.*

destination"[405]. The author thinks that the proposal of the European Parliament is more precise and appropriate than European Commission's because it gives a clear explanation due to what circumstances passengers missing a connecting flight should be properly cared. In accordance with that, the author concludes that the settlement of the exact circumstances would help for the CJEU to give more efficient decisions in the claims of passengers' for the compensation.

Last but not least, the European Commission and the European Parliament give remarks on current provisions of the Regulation 261/2004 concerning the denied boarding. In the European Parliament Report, it states that the new Regulation 261/2004 has to clarify cases concerning the denied boarding in which "the scheduled time of departure has been moved forward with the consequence that a passenger misses the flight, unless the passenger was informed at least 24 hours in advance"[406]. What is important, the European Parliament suggests that passengers whose suffered denied boarding against their will, must get necessary assistance, for example right to care, immediately and not, as the European Commission suggests in its Proposal, after waiting for period of two hours[407]. The author maintains that the European Parliament's position is more rational than the Commission's because the assistance for a passenger to whom boarding is denied against their will is necessary immediately, they also suffer emotional distress and waiting for two hours can cause even serious health problems.

To sum up, the aforementioned provisions of the European Commission's proposal and of the Report of the European Parliament must be considered seriously and effectively enforced into national enforcement bodies in the light for more understandable definitions of protected passengers' rights. The author concludes that the proposes of the European Parliament is more acceptable and reasonable than the Commission's because, for example, a non-exhaustive catalogue of extraordinary circumstances has been created in order to clarify cases in which air carriers are not obliged to pay compensation for passengers. Also the European Parliament's suggestion to introduce new provisions with relation to cases of denied boarding, missed connecting flights protect passengers' rights more effectively than those suggested by the European Commission.

3.3. Passengers with reduced mobility in the European and international level: legal issues important nowadays

Within the EU, it is the responsibility of the air carrier and the airport to assist disabled persons and passengers with reduced mobility (hereinafter – PRM). In order to protect such

[405] European Parliament, *supra* note 42, Amendment 17, Recital 13.
[406] *Ibid.,* Amendment 61.
[407] *Ibid.,* Amendment 59.

persons and reduce the discrimination of them, the Regulation 1107/2006 of the European Parliament and of the Council concerning the rights of disabled persons and PRM when travelling by air (hereinafter – the Regulation 1107/2006). Its aim is to allow disabled persons and PRM to have the same possibility to travel by air in the same circumstances as passengers without mobility limitations, also that they would have right to dignity, equal treatment and all other rights that they could participate in the society as any other citizen of the EU. This Section will analyze the legal treatment of the provisions of the Regulation 1107/2006, discuss whether these provisions fit their aims, and especially whether PRMs always get the necessary assistance in the airports, and if not, is that limitation is justified and in what circumstances. The Section will also deal with the right of assistance not only at airports, but on board the aircraft as well. Furthermore, the Section will determine the relationship between the Regulation 1107/2006 and the provisions of the Montreal Convention and the necessity of efficient amendments to this Regulation 1107/2006.

To begin with, considering the scope of the Regulation 1107/2006, it is necessary to find out what does the term 'disabled persons' and PRM include and how broadly it should be applied. According to it, 'disabled person' or PRM means "any person whose mobility when using transport is reduced due to any physical disability, intellectual disability or impairment, or any other cause of disability, or age, and whose situation needs appropriate attention"[408]. This definition corresponds to the Annex 9 of the Chicago Convention[409]. Such a definition gives variety of the approaches to prove the meaning of the PRM. Many MSs of the EU have taken broad approach and analyze every individual situation, others have more restrictive definitions, so it raises a problem of the uniformity of this definition in MSs of the EU. This means that if a passenger which is disabled in one MS, in the other he or she can be treated oppositely, for example, obesity in Greece is not treated as a reason itself for a passenger to be considered as PRM, only if this condition reduces the person's mobility it can be taken into consideration[410].

Another problematic aspect is unaccompanied minors. A number of air carriers provide it, although such passengers are not covered under the Regulation 107/2006. For example, in France unaccompanied minors are determined as PRMs[411]. All these examples lead to a problem how to avoid different definitions among the countries. In order to avoid different interpretations of the definition of the PRMs, European Civil Aviation Conference (hereinafter – ECAC) has

[408] Regulation No 1107/2006, *supra* note 10, Article 2 (q).
[409] Annex 9 to the Convention on International Civil Aviation, 2005, [last accession on 2014-01-28]. <http://www.ifrc.org/docs/IDRL/Chicago%20Convention%20Annex%209.pdf>
[410] European Commission, the Report on the assessment on rules on penalties applicable to infringements to Regulation (EC) 1107/2006, concerning the rights of disabled persons and persons with reduced mobility when travelling by air, 2010, para 2.1.1.1, [last accession on 201401-28]. <http://ec.europa.eu/transport/themes/passengers/air/prm_en.htm >
[411] *Ibid.*

argued that MSs should encourage airlines, airports to use a common definition of the PRMs and disabled persons in order to reach common practice[412].

No common definition of the 'disabled persons' and the PRM lead to the lack of another definition – 'right to assistance'. What assistance should be provided to disabled persons and PRM on-board an air carrier? According to Article 7 of the Regulation 1107/2006, services, which the disabled person or PRM needs to get inside the airport are provided by the 'managing body' of the airport authority, which is responsible for ensuring the necessary assistance, while the assistance inside the air carrier has to be ensured by the air carrier[413]. According to Maria Jose Viegas, the duality of service providers is that "the EU legislators deemed that most services should be provided by a central entity, which would be the managing body of the airport since it plays a central role in the provision of services throughout the infrastructure"[414]. Although the list of assistance under the responsibility of the managing bodies of airports is added to the Regulation 1107/2006[415], it gives few question to answer – whether only the managing body of the airport is the exclusive entity able to provide listed services, or it can be a third party, who satisfies the competences and obligations of the managing body[416].

In regard with this question, there is no answer in the Regulation 1107/2006. According to the European Commission, managing bodies are responsible to guarantee appropriate assistance to passengers since they enter into the area of the airport till they reach the cabin[417]. Taking into account the aims and goals of the Regulation 1107/2006, there is no reason "to hinder freedom of choice by the PRMs and to compel him to hire the managing authority of the airport in order to provide services"[418]. As the main goal of the Regulation 1107/2006 is to guarantee the right to assistance of the disabled person, Maria Jose Viegas does not consider that this right of passenger should be restricted and that services for such persons can also be provided by a third parties, however with one condition – they have to fulfill the quality

[412] ECAC policy statement in the field of civil aviation facilitation, The policy laundering project, 2003, para 5.2.2.1, [last accession on 2014-01-28].
<http://www.policylaundering.org/archives/ICAO/ECAC_Document_30.pdf>
[413] Regulation No 1107/2006, *supra* note 10, Article 7.
[414] Viegas, J. M., *supra* note 29, p. 52.
[415] Annex I to the Regulation (EC) No 1107/2006 of the European Parliament and of the Council concerning the rights of disabled persons and persons with reduced mobility when travelling by air, OJEU L 204/1, [last accession on 2014-01-28].
<http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_204/l_20420060726en00010009.pdf >
[416] Viegas, J. M., *op. cit*., p. 52.
[417] Report from the Commission to the European Parliament and the Council on the functioning and effect of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, 2011, para 2.2.1, [last accession on 2014-01-28].
<http://ec.europa.eu/transport/themes/passengers/doc/com_2011_166_report.pdf>
[418] Viegas, J. M. *op. cit*, p. 52.

requirements for assistance, settled in the Regulation 1107/2006 (the list in the Annex I of the Regulation 1107/2006 – *the author's comment*)[419].

Further, Article 7 of the Regulation 1107/2006 determines right to assistance in at the airport and inside the aircraft. According to it, a request for assistance at the airport must be presented "to the air carrier, its agents or the tour operator at least forty-eight hours before the published time of departure of the flight"[420]. Reading further this Article, some conditions are met in order to provide such assistance. This means that "in order to obtain assistance, the PRM whose carriage was not refused by the carrier must request it in due time and must present himself on time for check-in"[421].

But what is if the disabled person or PRM does not make the request for assistance on appointed time? At the first glance, it seems that appointment of the time for the request to assistance at the airport is compulsory, but taking a look more carefully, the Regulation 1107/2006 itself gives different prerequisites. Further, if we take a look to Article 6 of the Regulation 1107/2006, it provides that in cases other than where air carrier receives a notification of the need for assistance at least 48 hours before the published departure time for the flight, it has to transmit information as soon as possible[422]. Nevertheless, turning into deeper interpretations of this situation, Article 7 of the Regulation 1107/2006 states that in the absence of the notification from the disabled person or the PRM, the managing body has to make all reasonable efforts to provide the assistance in order such person would be able to take a flight.[423] Analyze of these two provisions, leads to conclusion that even if the assistance is not provided in appointed time, the disabled person and PRM still has the right to assistance and, as it was mentioned, the managing body of the airport has to take all reasonable efforts to provide it.

But what are those 'reasonable measures', when they are considered as unreasonable, where is the line between them? As an example of unreasonable measures, Maria Jose Viegas considers providing assistance when it compromises the flight schedule or when it puts into danger application of safety rules[424]. Safety rules she considers as, for example, operations of the ramp, when flight is almost has started.[425] Moreover, not to violate principles of equality and non-discrimination, right to assistance has to be provided equally to all disabled and PRM passengers, not taking into account that some of them had asked for the same service on time, and others did not apply for the assistance on time[426]. Oppositely, the European Commission

[419] Viegas, J. M., *supra* note 29, p. 52.
[420] Regulation No 1107/2006, *supra* note 10, Article 7 (3).
[421] Viegas, J. M., *op. cit.*, p. 59.
[422] Regulation No 1107/2006, *op. cit.*, Article 6 (3).
[423] *Ibid.*, Article 7 (3).
[424] Viegas, J. M. *op. cit.*, p. 60.
[425] *Ibid.*
[426] *Ibid.*

points out that firstly should be guaranteed the right to assistance of disabled person and PRM who has applied service on time and he will not suffer from actions of another disabled person or PRM that had not fulfilled requirements of the Regulation 1107/2006[427].

Following the text of the Regulation 1107/2006, the last aspect of the paragraph will deal with liability under this Regulation and its relationship with the Montreal Convention and the necessary aspects of changes to this Regulation 1107/2006.

First attempts to liability appear in the beginning of the Regulation 1107/2006, where it is stated that MSs have to "supervise and ensure compliance with this Regulation and designate an appropriate body to carry out enforcement tasks"[428].Anyway, the most important question concerning the relationship between the Regulation 1107/2006 and the Montreal Convention is to define the line of balance of their provisions in order to seek better protection of disabled persons and PRM[429].

Firstly, it is said that under the Montreal Convention liability of the air carrier and damage to passengers are clearly defined and they do not seem similar to rules, which are stated in the Regulation 1107/2006[430]. Indeed, according to the Montreal Convention, liability of the air carrier only arises in cases of death or bodily injury of the passenger caused by an accident on board the aircraft[431]. Notwithstanding provisions of the Montreal Convention, according to the Regulation 1107/2006 the disabled person and the PRM can seek legal redress for the violation of his rights and there is no provision which would provide for what kind of damage he seeks the compensation, so the reason to give a claim for compensation can be both physical or mental injury[432].

Moreover, the legal doctrine considered that the Montreal Convention contains the exclusive basis for claims, that is, that claim must be brought against the carrier only in accordance with the conditions set out in the Montreal Convention, in that case the disabled person or PRM cannot bring a claim, which does not fall under the scope of the Montreal Convention[433]. This provision confronts with the provision of the Regulation 1107/2006, which allows for the disabled persons and the PRM to ask for the compensation. What is the relationship due to this inconsistency and how to know which of one legal document to refer while giving a claim to get compensation for the damage?

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[427] European Commission, Interpretative Guidelines on the application of Regulation (EC) No 1107/2006 of the European Parliament and the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, 2012, [last accession on 2014-01-29].
<http://ec.europa.eu/transport/themes/passengers/air/doc/prm/2012-06-11-swd-2012-171_en.pdf>
[428] Regulation No 1107/2006, *supra* note 10., Recital 15.
[429] Viegas, J. M., *supra* note 29, p. 62.
[430] *Ibid.*, p. 62.
[431]The Montreal Convention, *supra* note 3, Article 17.
[432] Viegas, J. M., *op. cit.*, p. 63.
[433] *Ibid.*

The answer of the relationship between the Regulation 1107/2006 and the Montreal Convention was given in the *Hook v. British Airways* case, where it was argued that in order to get compensation under the Regulation 1107/2006, the disabled person or the PRM would have to be on board the aircraft or in the course of embarking or disembarking[434], as it is stated in the Montreal Convention as well. In the *Hook v. British Airways* two disabled passengers had requested for assistance on time and when they did not get it from the air carrier, it caused them emotional distress[435]. Following this situation, the question whether even the disabled person of PRM was on board the aircraft and he did not suffer the bodily injury, only emotional, has still he a right for the compensation of damages?

Although, according to the Montreal Convention, mental distress is not compensable, the Regulation 1107/2006 seems to be at different point of view. When such nonconformity appears and when the Montreal Convention and the Regulation 1107/2006 declares different positions of the same provision, it is necessary to invoke basic rules of the EU law and international law. Firstly, the Montreal Convention was incorporated in the EU law in 2002, so this means that earlier than the Regulation 1107/2006 was issued and it has been recognized by the CJEU as "being supranational law applicable to all EU MSs"[436]. As it appears from the history of the CJEU case law, MSs are obliged to adopt national laws that harmonize EU legislation and to avoid conflicts of legislation, and interpretation of the international conventions.[437] Hence, national law must respect the Montreal Convention as well as the Regulation 1107/2006. For example, all penalties, which requires adoption in national law in accordance with the Regulation 1107/2006 (Article 16 – *author's comment*) "have to comply with the Montreal Convention (Article 17 – *author's comment*), so that liability of the air carrier to a PRM will only take place when an accident occurs and a bodily injury was caused"[438].

Finally, taking into account that the Montreal Convention has no provision concerning the responsibilities and liability of the managing body, we can make a precondition that the assistance of the managing body falls under the Regulation 1107/2006 competence, so in the situation of the managing body's action not to produce necessary service, the disabled person and the PRM can seek for the compensation for emotional and mental injuries at national courts[439].

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[434] Case *Hook v British Airways Plc*, [2011] EWHC 379 (QB), para 17, [last accession on 2014-01-29]. <http://www.bailii.org/ew/cases/EWHC/QB/2011/379.html >
[435] *Ibid.*
[436] Viegas, J. M. *supra* note 29, p. 64.
[437] Viegas, J. M. *op. cit.*, p. 64.
[438] *Ibid.*
[439] *Ibid.*, p. 65.

Last but not least, the protection of the disabled persons and the PRM in the EU is becoming more and more important, especially in the event of their rights such as freedom of movement, non-discrimination protection when travelling by air[440]. Despite of the desires to protect the disabled person and the PRM, there still are some issues that must be taken into account. One of those issues is the definition of the disabled person and the PRM - still it is necessary to come to a common approach of such a definition in order to produce better protection for such people. It is also necessary to develop obligations of the managing body of the airport to produce assistance to a disabled person or PRM.

Concerning these issues, the Proposal of the European Commission and the Report of the European Parliament, jointly with suggestions to amendments of the Regulation 261/2004, arise provisions concerning rights of disabled people, which are necessary to change.

Firstly, the European Commission in its Proposal defines the notion of PRM. According to it, 'PRM' means any person as defined in the Regulation 1107/2006, but the European Parliament does not agree with it and clarifies exact definition of 'PRM', by adding that not only 'PRM', but also 'disabled person' means "any person whose mobility when using transport is reduced due to any physical disability, intellectual disability or impairment, or any other cause of disability, or due to age, and whose situation needs appropriate attention and the adaptation to his or her particular needs of the service made available to all passengers"[441]. As the European Parliament justifies, it is important to have clear notion of it in the amended Regulation 261/2004 rather than to give reference to existing Regulation 1107/2006 and also stresses that notions of 'disabled person' and PRM can be used simultaneously[442].

Further, in its Report the European Commission stresses a new provision for disabled passengers and PRM who miss a connecting flight. According to it, such persons when "miss a connecting flight due to a delay caused by airport assistance services should be adequately cared for while they are waiting for re-routing"[443]. What is important, such passengers are able to claim for compensation from the airport managing body on the same basis to passengers whose flights are delayed or cancelled[444]. The European Commission also suggests a new provision for disabled people and PRM when they are accompanied by a carer. It states that "carers should not be subject to the payment of the relevant airport departure tax"[445]. In author's opinion, this statement appears conscientious and follows non-discriminatory principle.

[440] Viegas, J. M. *supra* note 29, p. 65.
[441] European Parliament, *supra* note 42, Amendment 25.
[442] European Parliament, *supra* note 42, Amendment 25.
[443] *Ibid.*, Amendment 19.
[444] *Ibid.*
[445] *Ibid.*, Amendment 23.

What is more, concerning the right for accommodation of disabled persons and PRM, the Proposal of the European Commission points that such an accommodation has to be arranged in order of flight delay or cancellation circumstances. It also states that "any limitations on the right for accommodation in cases of extraordinary circumstances or for regional operations should not apply to these categories of passenger"[446]. However, the European Parliament in its Report strictly determines that not only in the event of extraordinary circumstances but on no account any limitations on the right for accommodation of such persons should apply[447]. The author supports the suggestion of the European Parliament, because disabled people and people who are in necessity of special care must get appropriate accommodation not only without any limitation but as well on no account, which means that their right to accommodation is non-negotiable.

To conclude, the Section 4.4 showed the problematic legal issues concerning the rights of disabled people and PRM. As regard to the problem of common definition of 'disabled people' and 'PRM', the analyze stresses that although there is nowadays no clear common definition of such people in EU countries, it is going to be amended by the new Regulation 261/2004. However, the Regulation 1107/2006 determines the notion of such category of people, bet when it will be added in the amended Regulation 261/2004; it will be more clear and effective when considering the protection of passenger rights.

As regard to the question, whether only the managing body of the airport is the exclusive entity able to provide listed services, or it can be a third party, who satisfies the competences and obligations of the managing body, the research showed that that there is no clear answer in the Regulation 1107/2006 and in author's opinion it is necessary clearly to determine in it, as well as the proper obligations of the managing body in the event that the passenger has not requested on time for such an assistance.

As regard to problem concerning the liability under Regulation 1107/2006 and its relationship with the Montreal Convention, the research shows that according to Montreal Convention air carrier is liable to pay damages in cases of death or bodily injury of the passenger caused by an accident on board air carrier, while the Regulation 1107/2006 offers the legal redress for disabled persons and PRM for the violation of their rights no matter the sort of injury.

[446] European Parliament, *supra* note 42, Amendment 11, Recital 18.
[447] *Ibid.*

CONCLUSIONS

1. After analysis of the liberalization process towards single market for the air transportation services and the separation of the air transportation services from other areas of the single European market, the research shows that the role of the European institutions has changed and legal motivations towards the liberalization process gave the jurisdiction to the European Commission and the European Council to regulate air transportation.
2. After analysis of the EU treaty-making powers to conclude air transportation agreements, the research provides that from the development of the CJEU case law concerning implied powers of the EU in the area of air transportation, it is still unclear the competence under which the EU may rely upon. It is apparent that the tiny line exists between the explicit and implicit powers of the EU to regulate air transportation services, but the CJEU had concluded that the EU has authority to conclude international agreements in the areas where powers had been conferred in it.
3. Analysis of the role of the EU as a party in international agreement and the responsibility to conclude air transportation agreements with non-EU countries provides that the EU has the prerogative to conclude air transportation agreements against MSs.The CJEU's decision in the *Open Skies* case answered the question whether the EU can conclude air services agreements with non-EU countries in a positive way. The example of the agreement between the US and the EU on PNR data also shows the need of the EU to gain an exclusive competence to negotiate air transport agreements.
4. The case law of the CJEU has done a strong impact on the interpretation of the Regulation 261/2004. Although in the *IATA and ELFA* case the CJEU confirmed that it is compatible with the Montreal Convention and that the Montreal Convention and the Regulation complements each other, however it creates legal questions due to definitions or the essence of the passengers' right to compensation. Although in *Wallentinn-Hermann* case the CJEU clarified when a technical problem in the air carrier is not treated as 'extraordinary circumstance', still the definition of it is not held in the Regulation 261/2004. Also, after analysis of the necessity to amend the Regulation 261/2004 and the examination of the suggestions of the European Commission and the European Parliament, the author gives a conclusion that the amendment of the Regulation 261/2004 is necessary because aviation industry is changing constantly and the CJEU has already concluded number of cases, which create legal uncertainty and that some of the

judgments of the CJEU have gone too far, so as a consequence it is said that the CJEU has created, not interpreted the EU law.

5. The hypotheses of the research are confirmed – the competence of the EU to conclude air transportation agreements with third countries ensures the regulation of air space more effectively than separate MS. Additionally, following the aim of the EU to ensure the protection for passengers' air rights, the research confirms that the EU protects passengers' rights more effectively than international law.

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SUMMARY

This research is relevant first of all because more than 50 years have passed after the first steps towards the creation of the single European market and still it is important to see how effective and necessary this introduction was. The competence of the EU to regulate air transportation area causes many problematic aspects. The lack of reviews in Lithuania shows that this discussion is relevant nowadays, especially in the aspect of the passengers' rights. Although the liberalization process took its time and the development of the agreements on air transportation services is broadening, however areas arise in which the EU is the main actor and covers them, as it was never been covered under ICAO competence. The research seeks to examine the competence of the EU to regulate the scope of the air transportation services, to conclude air transportation agreements and to reason the EU competence to act outside the EU, as well as to analyze aspects of the effective protection of passengers' rights in constantly changing society.

There are few main hypotheses of the research. The first is that the competence of the EU to conclude air transportation agreements with non-EU countries ensures the use of air space more effectively than separate MS. According to the second hypothesis, the EU protects passengers' rights in more effective way than international law. By analysis of the CJEU case law and the recent view of the European Commission and the European Parliament these hypotheses were confirmed. In order to achieve the aim of the hypothesis and to prove goals of the whole research, historical, systematical, comparative and other methods were used.

In the first chapter of this research the importance of the role of the EU in international sphere of the air services is comprehended, as well as historical background towards the liberalization of the European air law was scrutinized. In the second part of the research the competence of the EU to regulate air transport, mainly by concluding air transportation agreements with third countries was scrutinized. The relationship between international and regulations of the EU in the light of the passengers' rights was discussed in the last chapter.

SANTRAUKA

Šis magistro baigiamasis darbas pirmiausiai yra aktualus dėl to, kad netgi praėjus daugiau kaip 50 metų nuo pirmųjų žingsnių vieningos Europos rinkos sukūrimo link, iki šių laikų vis dar yra svarbu analizuoti, kokie efektyvūs ir svarbūs šie žingsniai buvo.ES kompetencija reguliuoti oro transporto erdvę kelią daugybę problemų. Trūkumas apžvalgų šia tema Lietuvoje, ypač tokių, kuriose būtų nagrinėjamos problemos, kylančios dėl pažeistų keleivių teisių, rodo, kad diskusija yra aktuali ir kad toks temos pasirinkimas yra naujas ir originalus. Nors liberalizacijos procesas truko ilgai ir susitarimų tarp šalių dėl oro transporto reguliavimo skaičius auga, tačiau tai kelia klausimą dėl sričių, kuriose būtent ES veikia ir kurios niekada nebuvo TCAO kompetencijos akiratyje. Šio magistro baigiamojo darbo tikslas yra išnagrinėti ES kompetencijos apimtį oro transporto erdvėje, pagrįsti ES kompetenciją veikti už ES ribų, būtent sudarant tarptautines sutartis su trečiosiomis šalimis ir išanalizuoti efektyvią keleivių teisių apsaugą ES aspektu.

Yra iškelta keletas pagrindų hipotezių šiame darbe. Pirmoji yra ta, kad ES kompetencija sudaryti oro transporto sutartis su ne ES šalimis užtikrina žymiai efektyvesnį oro erdvės naudojimą negu kad tokias sutartis sudarytų kiekviena šalis narė atskirai. Antroji hipotezė teigia, kad ES gina keleivių teises daug efektyvesniu būdu negu tarptautinė teisė. ESTT bylų analizė patvirtino šias magistro baigiamojo darbo hipotezes. Taipogi siekiant baigiamajame darbe nustatyto tikslo bei įrodinėjant hipotezes, buvo naudojami šie metodai: istorinis, sisteminės analizės, lyginamasis bei kiti.

Pirmajame šio magistrinio darbo skyriuje buvo ištirta ES svarba tarptautinei oro sferai ir pateiktas istorinis vystymasis link ES oro erdvės atskyrimo ir išskirtinio reguliavimo ES. Antroji dalis ištyrė ES kompetenciją reguliuoti oro transportą, teikiant ypatingą dėmesį susitarimams, sudaromiems su trečiosiomis šalimis. Santykis tarp tarptautinių sutarčių ir ES reglamentų dėl keleivių teisių apsaugos buvo aptartas paskutiniame šio magistro baigiamojo darbo skyriuje.

ANNOTATION

Jakimonytė, D. – Competence of the European Union to regulate air transport / Joint Programme of European Union law and Governance. Supervisor: Assoc. prof. dr. Regina Valutytė. – Institute of International and European Union law, Faculty of Law, MykolasRomeris University, 2014. – 89 pages.

Key words: liberalization process and the separation of air transportation; the treaty-making powers of the EU; EU competence to regulate air transport; EU competence to conclude air transport agreements with non-EU countries; air carrier liability to compensate damages to passenger; denied boarding, delayed and cancelled flights; effective protection of passenger rights in the EU.

This master thesis analyzes the competence of the EU to regulate air transport. The growing importance of the CJEU's competence is explored by analyzing case law since the liberalization process towards the single European market until nowadays. For the comprehensive analysis of the relationship of international treaties and regulations of the EU, the relevant case law in passenger rights has been chosen for this research. The significant attention is paid not only to the protection of passenger rights in the EU, but also to competence of the EU to conclude air transport agreements with third countries and to the responsibilities for the fulfillment of such agreements.

ANOTACIJA

Jakimonytė, D. – Europos Sąjungos kompetencija reguliuoti oro transportą / Jungtinė Europos Sąjungos Teisės ir Valdymo Programa / Vadovė Doc. Dr. Regina Valutytė / Tarptautinės ir Europos Sąjungos teisės institutas, Teisės fakultetas, Mykolo Romerio universitetas, 2014. – 89 puslapiai.

Raktiniai žodžiai: liberalizacijos procesas ir oro transporto atsiskyrimas; sutartiniaiir nesutartiniai ES įgaliojimai; Europos Sąjungos kompetencija reguliuoti oro erdvę; ES kompetenciją sudaryti tarptautinius susitarimus su ne ES šalimis; oro vežėjų atsakomybė kompensuoti žalą už pažeistas keleivių teises; atsisakymas vežti, skrydžių atidėjimas ir atšaukimas; efektyvi keleivių teisių apsauga ES.

Šis magistro baigiamasis darbas analizuoja ES kompetenciją reguliuoti oro transportą. Auganti ESTT įtaka yra ištiriama analizuojant teismo praktiką nuo liberalizacijos proceso ir oro transporto atsiskyrimo nuo bendros Europos rinkos iki šių dienų. Šiame magistro baigiamajame darbe naudojant lyginamąjį metodą analizuojamas tarptautinių sutarčių ir ES reglamentų santykis, aktuali ir svarbi ESTT praktika, susijusi su keleivių teisių apsauga, buvo pasirinkta šiam magistriniam darbui. Reikšmingas dėmesys skiriamas ne tik keleivių teisių apsaugai ES, bet ir ES kompetencijai sudaryti oro transporto sutartis su trečiosiomis šalimis bei ES įsipareigojimams išanalizuoti tokių sutarčių vykdymą.

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