THE COURT

hereby :

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 31 March 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 10 MARCH 1971[1]

Mr President,
Members of the Court,

As the Court is aware this is the first occasion on which a dispute has been brought before it arising out of the curious 'ménage' formed by the Council of Ministers and the Commission of the European Communities.

The unusual and exceptional nature of this dispute indicates the fundamental good relationship which obtains between a couple whose fertility is evinced by some seven thousand Community regulations and the several thousand decisions or directives which they have together engendered.

This dispute arose out of negotiations carried on with third countries on a particularly delicate subject: the working conditions of crews of vehicles engaged in international road transport.

A review of the hitherto fruitless endeavours to settle this matter at the international level shows clearly the difficulties which it presents.

A convention was proposed in 1939 by the International Transport Bureau which was only ratified by two countries and never entered into force.

In 1951 the matter was taken up again by the International Labour Organization which in 1954 succeeded in obtaining an agreement, but this agreement likewise never entered into force since it was not ratified by a sufficient number of States.

Then the United Nations Economic Commission for Europe tackled the problem.

In 1962 it submitted for signature by the governments of several European States an agreement concerning the work of crews of vehicles engaged in international road transport, commonly referred to by the initials AETR. This agree-

1 — Translated from the French

ment was signed by eighteen governments including the six Member States but it, too, failed to enter into force for want of the necessary ratifications.

After 1966, the Community began to consider the question and a draft Community regulation was prepared.

This activity led to the resumption of negotiations in Geneva.

In July 1968 the Council considered a draft Comunity regulation submitted by the Commission and decided on methods for common action by the six countries at Geneva in order to amend the AETR so that it might be ratified by a sufficient number of States and also in order to align the original provisions with those of the draft Community regulation.

In March 1969 the Council finally adopted the draft regulation which it had considered in July 1968 and it became Regulation No 543/69, published on 27 March 1969 and taking effect on 1 April 1969.

This regulation laid down that it should apply to carriage by vehicles registered in a Member State with effect from 1 October 1969 and in the case of vehicles registered in a third country from 1 October 1970.

Meanwhile, at Geneva, generally favourable progress was being made in the negotiations to modify the AETR as desired.

However the Commission had expressed reservations, as early as 1968, as to the manner in which the negotiations in Geneva were being conducted.

Without ever—*and this is important*—claiming the right to take sole charge of those negotiations in the name of the Community, and without ever making formal and detailed proposals to the Council on this matter, the Commission, every time the question was discussed, had indicated its wish to be closely involved in the negotiations, in particular through the presence in Geneva of its own experts together with those of the Member States. It appears, however, that the Council turned a deaf ear.

This divergence of attitude intensified considerably at the time of the meeting of the Council of 20 March 1970, that is to say, some days prior to the meeting which was to be held in Geneva on 2 and 3 April in order to draw up the final text of the AETR as amended.

The Commission expressed its reservations even more forcefully and protested against the procedure followed in the negotiations and conclusion of the agreement. At this point the Council held a deliberation; I shall read to the Court its essential passages as they emerge from the minutes, which have not been disputed although they were drawn up later:

> *'Negotiation procedure*
>
> The Council agrees that in accordance with the course of action decided during its meeting of 18 and 19 July 1968, negotiations with third countries shall be carried on and concluded by the six Member States—which are to become the contracting parties to the AETR. Throughout the negotiations and at the conclusion of the agreement the Member States shall take common action, coordinating their position in accordance with the usual procedures, in close association with the Community institutions, the delegation of the Member State currently occupying the presidency of the Council acting as spokesman.
>
> In confirming its reservations as to this procedure, the Commission declares that it considers that the attitude adopted by the Council does not conform to the Treaty.
>
> . . . . .
>
> With regard to the modification of the regulation to take account of the provisions of the AETR, the Council finds that in order that the Member States may fulfil their obligations arising from the latter, Community Regulation No 543/69 should be amended in sufficient time before 1 October 1970, in order to allow the two bodies of rules to exist concurrently.

Having regard to this requirement and with the object of furthering the implementation of social legislation over the whole of Europe, the Council . . . requests the Commission to submit to it in sufficient time its proposals for the necessary amendments to Regulation No 543/69 in relation to the AETR.'

These are the proceedings which the Commission, by the present application, requests the Court to annul.

Before commencing my consideration of this application I should merely like to note two factors which have come into being since March 1970:

— First, the negotiations in Geneva resulted on 2 and 3 April 1970 in a draft agreement, available for signature by the States until 1 April 1971;

— Secondly, according to information which was recently given before the Court, four Member States have already signed that agreement, and in addition others may also have signed since the hearing of 11 February 1971, but I do not know this.

The Council maintains two preliminary objections of inadmissibility with regard to this application.

It seems to me quite correct that the Commission's application raises a problem of admissibility, but in my opinion it is so closely related to certain aspects of the substance itself of the proceedings that it is separable therefrom only with difficulty.

A — In order to define the problem I consider that the aspects which in my view are less significant should first be disposed of.

There are two such aspects: the objection with regard to the application being out of time and the difficulties in this case in interpreting the term 'act' employed in Article 173 of the Treaty, on which the Commission relies in bringing this matter before the Court.

(1) With regard to the matter of time, it was submitted to the Court that the disputed proceedings of the Council merely confirm earlier proceedings, those of July 1968 and March 1969, and that consequently even if the proceedings of 1970 constitute an act within the meaning of Article 173 of the Treaty, the Commission is now out of time in contesting them.

However, in my view this initial objection of inadmissibility cannot be accepted, for two reasons:

It is in fact doubtful whether the contested proceedings have exactly the same scope and are exactly equivalent to those of 1968 or of 1969. But even if this is conceded, the contested proceedings do not merely confirm the earlier proceedings.

In fact, in the period separating them at least two very important legal factors occurred, altering the situation:

First, the entry into force of Regulation No 543/69.

Secondly, the end (as from 1 January 1970) of the transitional period of the Common Market which, as I shall shortly explain to the Court, may in certain circumstances have a decisive bearing on the solution of the problems to which this case gives rise.

Consequently, I consider that no objection of inadmissibility can be sustained against the Commission's action on the basis that it was out of time.

(2) The second aspect which I consider relatively insignificant in this question of admissibility is a point of interpretation and of semantics.

Article 173 of the Treaty provides that a Member State, the Council or the Commission may bring an action before the Court against the *'acts'* of a Community institution other than recommendations or opinions.

Clearly, this concept of an 'act' may be considered on two levels: first, from the semantic point of view, and secondly from the point of view of the relationship between the provisions of Article 173 and those of Article 189, which latter article lists and defines the various measures which the Council or the Com-

mission are required to take in carrying out their tasks: regulations, directives, decisions, recommendations or opinions.
In the present case consideration of these two questions seems to me to be relatively unimportant: first, from the point of view of semantics, although it is true that the term appearing in the German text, namely, 'Handeln', an infinitive used as a noun, and perhaps to a greater extent the word 'handelingen' in the Dutch text, do perhaps in certain cases have a wider meaning than the word 'actes' appearing in the French text or the word 'atti' appearing in the Italian text, according to my information it is clear that in Dutch or German legal terminology the words used in the Treaty have virtually the same meaning as 'atti' in Italian or 'actes' in French.
Secondly, it seems to me that the problems which could arise from the comparison of Article 173 with Article 189 of the Treaty are already in part resolved.
The Court has already considered them in connexion with the 'decision' taken by Community authorities, and Mr Advocate-General Roemer has analysed them to such good effect in his Opinion in Cases 8 to 11/66 ([1967] ECR 95) that I consider it unnecessary to labour this point today.
The Court's case-law has indeed only covered 'decisions', but nevertheless I consider that it throws into relief a number of general principles.
(a) Articles 173 and 189 of the Treaty form a coherent whole and consequently the word 'act' used in Article 173 cannot extend the power of the Court to taking cognizance of expressions of intent, the content and effect of which cannot be considered or treated as equivalent to regulations, directive or decisions;
(b) On the other hand, it is indeed the substance, the subject-matter, the content and the effects of the disputed expression of intent, not the form selected by its authors, which confer upon it its true nature.
Indeed this matter turns on 'proceedings' and some of the expressions appearing in the minutes, such as: 'the Council agrees . . . the Council invites . . .', might by their form alone, create the impression that these proceedings did not go beyond the Stage of negotiations or of expressions of intent and that they do not constitute a measure having legal effects.
However, according to the case-law which I have just cited to the Court, it is the substance, the nature and scope of the proceedings which determine whether they are an act open to review, and I consider that this question of 'substance and effect' brings us to the heart of the problem in this case regarding admissibility.
B — The power vested in the Court by Article 173 of the Treaty does not make it an arbitrator between the other institutions of the Community, nor does it entrust to the Court the task of giving 'advisory opinions' like those which may be delivered by the International Court of Justice at The Hague. In so far as is relevant here this article confers on the Court authority to assess whether acts of the Council of Ministers *in its capacity as an institution of the Community* are in accordance with the provisions of the Treaty.
I think I may say that a veritable practice, a custom, has grown up in the last twelve years which requires the Council of Ministers of the EEC as a body constantly to perform two types of duty.
The Council of the EEC is first and foremost a Community institution whose existence, powers and procedures are prescribed by the Treaty.
However, it is also the framework within which the Ministers of the Governments of the six Member States work together to settle the principle and means of achieving their common plans. It has been said by several authors that the Council is at times an organ of the *Community* established between the six States, and at others an organ of the *collectivity* formed by

those States. (cf. Judgment of the Court of 18 February 1970, *Commission* v *Italy*, Rec. 1970, p. 57).

This dual nature of its functions gives rise to both advantages and disadvantages.

There are definite advantages with regard to the development of the European structure in general. It is commendable that the Council of Ministers of the six States does not merely exercise the powers conferred on it restrictively by the Treaty but endeavours in the course of its meetings to promote cooperation amongst the Six.

Furthermore, in an historical context, this type of action by the Council has often resulted in considerable 'steps forward' from a European point of view; it will be quite sufficient for me to indicate as examples the various proceedings of 1960, 1962 and 1963 which led to an acceleration of the time-table originally prescribed by the Treaty for the attainment of certain of its objectives.

Nevertheless, the disadvantages must not be ignored.

One of them is relatively slight, although it is troublesome in practice. A clear, formal distinction is almost always lacking between acts of the Council as a Community body and its proceedings as unifying agency of the Member States.

The legal departments endeavour to restrict to the first category of action with words laid down by Article 189 of the Treaty: 'regulations', 'decisions', 'directives' and so on, and to give different names to the second category: 'resolutions', 'declarations of intent', 'protocols' or 'agreements', but there are many cases where the two are completely confused, in particular with regard to certain proceedings described as decisions.

Of course, exaggerated regard for form is unwarranted; it would be absurd, for example, to require the Ministers of the Governments of the Six to withdraw from the Council chamber to the private office of the current President when they cease to act as a Community authority or that a distinct agenda should invariably be drawn up for each function. Nevertheless, rather more clarity in procedure and terminology would be desirable, and in this respect publication of the Rules of Procedure of the Council might help to clarify the matter.

This is all the more desirable since there are good grounds for fearing that behind a confusion of terminology lies a disregard of the powers and procedures prescribed by the Treaty.

Therein lies the second disadvantage of the practices followed and it is much more serious than the first. In fact one may wonder whether sometimes the Council of Ministers does not adopt measures under conditions and in accordance with procedures other than those provided for by the Treaty, which it should have taken as a Community body, that is to say, principally, having regard to the powers of the Commission, the Parliament or the Economic and Social Committee.

It has sometimes been asserted in the Parliament that this is so. In any event it is an issue which the Court should consider each time proceedings of the Council are disputed before it.

This is precisely the essence of the difficulty which arises in the present matter and which, as I have just indicated, requires the concurrent consideration of admissibility and of certain aspects of the substance.

In fact I think that:

— either the negotiation and conclusion of the AETR was already, or after a certain date came to be, within the scope of one of the articles of the Treaty relating to the authority of the Community to negotiate and conclude agreements with third countries;

— or they never were, and at no point have come within that scope.

In the first case the application is admissible, as what is brought before the Court is a deliberation of the Council acting as an institution of the Community.

In the second case the application is inadmissible, since the contested proceedings are not an act of a Community authority but of the Council in its capacity as the unifying agency of the Member States.

The reply to this question will enable the Court to deduce certain principles with regard to the authority of the Community in negotiations with third countries, and this is the question which I wish to consider now.

A — Eleven out of the 248 articles of the Treaty of Rome are particularly devoted to prescribing and arranging a Community authority in relationships with third countries or with international organizations.

These are:

— on the one hand, the six articles appearing in Part Three of the Treaty, Articles 111 to 116, which are written into the chapter on Commercial Policy;

— on the other hand, the five articles appearing in Part Six of the Treaty which is devoted to General and Final Provisions, Articles 228 to 231 and Article 238.

There is in addition a very general provision, but one which may have a certain relevance to the matter: Article 235.

It should be emphasized from the outset that Title IV of Part Two of the Treaty, the only title devoted to transport, has no express provision relating to the Community's 'treaty-making power', to use an expression employed by Anglo-Saxon lawyers.

To vest authority or power in the Community to negotiate and conclude agreements with third countries relating to transport, it is thus necessary:

— either to declare applicable to this matter the provisions appearing in the parts of the Treaty devoted to matters other than transport;

— or to interpret certain of the general provisions of the Treaty as also applying to transport.

For my part I consider that both these solutions would involve the Court in a discretionary construction of the law, or, in other words, a judicial interpretation far exceeding the bounds which the Court has hitherto set regarding its power to interpret the Treaty.

B — The application to the sphere of transport of provisions appearing in parts of the Treaty devoted to other matters.

In my opinion this problem relates only to one article, Article 116 of the Treaty, and by a curious reticence neither the representative of the Commission nor that of the Council has even mentioned it, not even to maintain that it does not apply.

Nevertheless, if this article is considered in isolation its wording could indeed appear at first sight the most readily applicable to the present case.

Article 116 in fact provides that 'From the end of the transitional period onwards, Member States shall, in respect of all matters of particular interest to the common market, proceed within the framework of international organizations of an economic character only by common action'. The other provisions of this article deal with the transitional period and methods of common action after the end of the transitional period.

If this article appeared amongst the general and final provisions of the Treaty it would undoubtedly be applicable to the present case:

(1) The conclusion of the AETR certainly constitutes a matter 'of particular interest to the common market', especially in view of the existence of Regulation No 543/69.

(2) The negotiation and conclusion of this agreement took place within the framework of one of the international organizations undoubtedly referred to by Article 116, the United Nations Economic Commission for Europe, and they certainly constitute 'common action'.

However, the difficulty in applying this provision to the present case arises from its position in the Treaty.

As I have said, this article is in fact incorporated in a part of the Treaty, Part Three, which is not that containing the provisions on transport, and furthermore, it was not written into the general provisions of Part Three but into the special chapter devoted to commercial policy.

These then are special provisions, and to transform them into general provisions clearly involves a very daring exercise in legal construction, which indeed I consider too audacious for reasons of principle which I will shortly elaborate.

C — The application to the sphere of transport of stipulations appearing amongst the general and final provisions of the Treaty.

This question arises essentially in connexion with Article 235.

(a) Article 228 lays down that *where the Treaty provides* for the conclusion of agreements between the Community and one or more States or an international organization, such agreements shall be negotiated by the Commission and concluded by the Council, in certain cases after consulting the Assembly. It is also laid down, in the second subparagraph of Article 228 (1), that the opinion of the Court of Justice may be obtained with regard to the compatibility of the agreement envisaged with the provisions of the Treaty.

In fact the Commission is asking the Court to put a wide interpretation on the first subparagraph of Article 228 (1), which limits its application to the cases provided for by the Treaty, that is to say, to rule that that provision refers not only to the cases expressly laid down by the Treaty (namely, for example, to those referred to in Articles 111 to 116: tariff or trade agreements, Article 238: agreements establishing an association, or even Articles 229 and 230: relations with the United Nations Organization, with the Council of Europe and the OECD) but must be extended to the sphere of transport in view of the existence of Article 75 of the Treaty and of the adoption in 1969 of Community Regulation No 543/69.

I consider that very serious objections may be raised against this line of argument.

(1) Article 75 of the Treaty indeed prescribes that the Council shall lay down 'common rules applicable to international transport' to the territory of a Member State and that it may lay down 'any other appropriate provisions'.

The Commission considers in particular that those four words vest in the Community an authority in external matters established by the Treaty and that this is therefore one of the cases to which Article 228 applies.

It is difficult to accept this argument for two reasons.

The article as a whole shows that the phrase 'international transport' appearing in one of the subparagraphs really refers in essence to intra-Community transport, since it is to that alone that the common rules are directly applicable.

Secondly, it is difficult to concede that so vague an expression as 'any other appropriate provisions' could encompass so precise a power as that of the Community to negotiate and conclude agreements with third countries on behalf of the Member States.

There are several instances in the provisions of the Treaty on commercial policy where there are stipulations as general as those in Article 75 (1) (c).

It is certain that the authors of the Treaty did not consider that such provisions were sufficient to provide a basis for a Community authority in external affairs, since it considered it necessary, in order to confer that authority, to write into the Treaty six articles specifically devoted to this point.

(2) It is much more difficult to ascertain whether the adoption of Regulation No 543/69 or certain of its provisions had the effect of vesting authority in the Community and thus rendering the provisions of Article 228 of the Treaty

applicable to the negotiation and conclusion of the AETR.

In general, the question arises whether, apart from the instances where international authority is expressly vested in the Community by the Treaty, the entry into force of a Community regulation can cause to be transferred to the Community the capacity to negotiate and conclude agreements capable of affecting the implementation of Community provisions.

Various particular aspects of the present case militate strongly in favour of adoption of this view.

In fact it is certain:

— first, that Community Regulation No 543/69 covers the same subject-matter as that covered by the AETR;

— secondly, that on at least one point, namely the date of the entry into force of the provisions concerning the maximum daily driving time, the AETR differs from the Community provision;

— lastly, because Article 3 of that Community regulation appears expressly to sanction this transfer of authority where it reads: 'The Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation'.

I shall not conceal from the Court that I was momentarily persuaded to the view that authority in external matters can be transferred to the Community through the adoption of a Community regulation and it is with some regret that upon reflection I must finally suggest to the Court that this view should not be accepted.

From the point of view of a certain Community 'ethic' there are in fact undoubted advantages in this argument. When, through a regulation, a specific subject-matter is transferred from the national to the Community level it may be maintained that the Member States, acting either individually or collectively, may no longer validly conclude agreements with third countries relating to the same subject-matter.

Thus the Community alone would be capable of concluding such agreements within the ambit of Community law.

Moreover, on a practical level, such a system would probably be best suited to preventing Member States from concluding with third countries agreements which would subsequently prove difficult to reconcile with Community provisions, and finally it would be best suited to maintaining observance of the balance established by the Treaty between the Community institutions.

However, no matter what weight those considerations carry, and I admit that it is considerable, the argument of implied and automatic transfer of authority outside the cases laid down by the Treaty meets with very serious objections quite apart from a general objection relating to the methods of interpreting the Treaty to which I have already referred and to which I shall shortly return.

First of all, in practical terms, it would be impossible to confer such an effect upon all Community regulations, some of which govern matters which by their nature are quite distinct from those to which the provisions of an international treaty could refer.

Moreover, not even the representative of the Commission has asserted this.

It is therefore necessary to discover a means of distinguishing between regulations which result in transferring authority to the Commission in external matters and those which do not.

What should the criterion be? Is one to rely on the fact that a regulation is related more or less directly to one of the common policies provided for in the Treaty? Or must one on the other hand give close consideration to the wording, having regard to the negotiations in question, and at what stage in those negotiations? It will be seen how difficult it is to establish a criterion which avoids ambiguity or legal uncertainty.

I must also put forward a second objection, namely, that it might also confuse the procedures laid down by the Treaty and sometimes even hamper the development of Community law.

With regard to the procedures laid down by the Treaty, it should in fact be noted that in connexion with possible divergences between international agreements with third countries and Community provisions, the Treaty provides two types of procedure:

— *a disciplinary procedure:* this is the action for failure to fulfil an obligation and is initiated only by the Commission, or possibly by a Member State; it is available in *all cases;*

— *a preventive procedure,* implying co-operation between the Council and the Commission but provided for certain cases only, for example those referred to in Articles 111 to 113.

It seems to me certain that if this preventive procedure were applicable in cases other than those for which formal provisions are made in the Treaty, confusion would occur at the point where the authors of the Treaty wished to draw a distinction.

Finally, from the point of view of the development of common policies, are there not grounds for fearing that the Ministers would resist the adoption of regulations which would result in the loss, in cases not provided for by the Treaty, of their authority in international matters?

(3) Let us now consider the argument based on the existence of Article 3 of Regulation No 543/69 which I have just quoted to the Court.

Let us note from the outset that if the Court, contrary to my suggestion, were to take the view that the adoption of Regulation No 543/69 by itself resulted in the transfer to the Community of power to conclude agreements with third countries relating to transport, it would be led to deduce that this provision in Article 3 is purely declaratory and is not of itself capable of having legal effects.

However, if, as I suggest, the Court adopts the contrary view I consider that it must also recognize that although it was in my view wrongly incorporated in an act termed a 'regulation', this provision has no legislative function and is merely a declaration of intent.

Article 3 of Regulation No 543/69 may in fact be construed as a type of contingency plan, as indicating a programme: It was hoped that between 1 April 1969, the date of the entry into force of the regulation, and 1 October 1970, the date when the regulation is to apply to all transport (and thus also to vehicles registered in a third country for journeys made *within the Community*), the current negotiations in Geneva would reduce divergencies and harmonize the draft European Agreement with the Community regulation.

However, should this prove impossible, it would be necessary to initiate *fresh* negotiations with third countries for the purpose of implementing the regulation. It is thus a type of *resolutive* clause, providing for possible revision, which furthermore originated in a modification suggested by the Parliament, worded thus:

> 'Within two years following the entry into force of this regulation (that is to say, 1 January 1970), the Commission shall submit to the Council proposals for the amendment of this regulation'.

Furthermore, the objective of this article is to ensure that, by means of negotiations, driving conditions should be specified for the part of the journey made on the territory of *third countries* both for vehicles of those countries and for Community vehicles. In fact it is clear that the Community cannot claim to fix by its regulation the conditions under which vehicles of third countries are driven on the territory of such countries, except by agreements with those countries.

Furthermore, it was by reason of its non-legislative nature that the Council was

able, without self-contradiction, to draw up this article as early as its meeting of July 1968, when it agreed that the negotiations on the AETR should be conducted by the Member States, and this is the reason for the 'interpretative reservation' appearing in the minutes which refers specifically to this point.

(b) Finally, there remains the problem raised as a subsidiary matter by the Commission in relation to Article 235.

As the Court will recall, this article provides that 'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Community shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures'.

The Commission seems to consider that in the present case this had the effect of obliging the Council to confer on the Community power to negotiate and conclude the AETR, even if this power did not follow from the provisions of the Treaty.

It does not appear to me that Article 235 has this effect.

Even if it is conceded that this article is applicable to the Community's external relations, it only empowers the Council, on a proposal from the Commission, to extend the Community's authority in this sphere.

However, it certainly does not oblige it to do so, and above all the Council may act in this sphere only on a proposal from the Commission, which was never submitted.

Nevertheless, consideration of Article 235 quite naturally brings me to a general consideration of methods of interpreting the Treaty, with which I wish to conclude these observations.

No matter what legal basis the Court finds for it, recognition of the Community's authority in external matters for negotiating and concluding the AETR concedes by implication that the Community authorities exercise, in addition to the powers expressly conferred upon them by the Treaty, those implied powers whereby the Supreme Court of the United States supplements the powers of the federal bodies in relation to those of the confederated States.

I for my part consider that Community powers should be regarded as those termed in European law 'conferred powers' (in French, 'compétences d'attribution')

Such conferred powers may indeed be very widely construed when they are only the direct and necessary extension of powers relating to *intra-Community* questions, as the Court has already ruled with regard to the ECSC.

But can the Community's authority to conclude agreements with third countries in the sphere of transport be so widely construed?

This is not in fact as necessary as has recently been asserted before the Court. Even without according it 'implied powers', with regard to transport the Community is not in a state of 'permanent weakness', to borrow the expression recently employed by the Commission's agent. Article 235 exists precisely to vest in the Community whatever powers it may need.

On the other hand, this is extremely difficult from the legal point of view, on the basis of the provisions at present in force.

It appears clear from the general scheme of the Treaty of Rome that its authors intended strictly to limit the Community's authority in external matters to the cases which they expressly laid down.

In this connexion a comparison between the ECSC Treaty and the Treaty of Rome is instructive. Whereas in the ECSC Treaty the negotiators of 1951 laid down that (Article 6): 'In international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives', the negotiators of the Treaty

of Rome in 1957 merely provided that the Community shall have legal personality (Article 210), although, with regard to external relations, they expressly laid down in Article 228 that the Community's authority in external matters may only be exercised 'where this Treaty [*so*] provides'.

Is it not the case that to recognize that the Community has implied powers with regard to negotiations with third countries would far exceed the intentions of the authors of the Treaty and of the States which signed and accepted it?

This is my view, and it is the principle reason which brings me to propose to the Court a relatively strict interpretation of the Treaty in this sphere.

Such, then, are the reasons why I consider that the contested proceedings of the Council were not conducted within the context of a Community authority established by the Treaty and that consequently they do not constitute a Community act which may be reviewed by the Court under Article 173.

III

Nevertheless, the Court may perhaps consider that a more audacious method of interpretation than that which I advocate could perhaps be adopted despite the objections which I have just emphasized; for this reason I shall briefly consider in the last part of my opinion what problems would face the Court if it were to regard the Commission's application as admissible.

In that event I think the application must be dismissed on the substance, but solely on the grounds of the special features of this case.

A — If the Court were to consider that the negotiation and conclusion of the AETR came within the scope of Article 116 of the Treaty, that is to say, if you were to consider, with regard to assessing its scope, that the general nature of the wording employed in that article prevails over the place at which it appears in the Treaty, I believe that you should nevertheless rule that the contested proceedings do not infringe that article.

In fact Article 116 organizes two systems which differ depending on whether the transitional period of the Treaty has or has not expired.

During the transitional period, 'Member States shall consult each other for the purpose of concerting the action they take and adopting as far as possible a uniform attitude'. They did so at the meeting of the Council in March 1969.

In March 1970 the transitional period had indeed expired almost three months before.

However, the negotiations on the AETR were practically concluded, since on 2 and 3 April 1970, that is less than a fortnight after the contested proceedings, the final text of the AETR was adopted at Geneva.

Did the end of the transitional period render applicable to those negotiations the provisions of the first paragraph of Article 116, in terms of which any common action by the Member States following the end of the transitional period may be decided by the Council only on a proposal from the Commission?

For my part I do not think so, and I consider on the contrary that in such delicate negotiations, since the common action of the Member States had been undertaken and almost brought to a conclusion before the end of the transitional period under the conditions laid down in the second paragraph of Article 116, it had to be continued in the same form, and that the provisions of the first paragraph of Article 116 are applicable only to common action initiated after the end of the transitional period, that is after 1 January 1970, (see in this respect the decision of the Council of 16 December 1969, OJ L 326 of 29 December 1969, p. 39).

B — Similar reasons lead me to suggest that the Court should dismiss the Commission's application with regard to the substance if it were to consider that

Regulation No 543/69 vested in the Community a competence to negotiate and conclude agreements relating to transport with third countries under the conditions laid down in Article 228.

Here again I think that, taking account of the difficulties invariably attendant on the negotiation of such international agreements, the new legal situation constituted, if the Court considers it so, by the adoption of a Community regulation could only affect *future negotiations* and not *current negotiations*.

What stage had the negotiations on the AETR reached when Regulation No 543/69 came into force? Clearly, they were well advanced.

It must not be forgotten in fact that an earlier version of the AETR had been drawn up in 1962 and that the subsequent negotiations did not have as their object the elaboration of a new agreement but only the incorporation of certain alterations intended to allow the number of signatures necessary for the entry into force of the agreement to be obtained and, from July 1968, to harmonize certain provisions destined for this agreement with a draft measure already considered by the Council, which in March 1969 was to become Regulation No 543/69.

In my view, it is thus too much to assert that those negotiations, which were almost concluded, should have been abandoned or thrown into confusion after the adoption in March 1969 of Regulation No 543/69 and that the discussions with third countries and the Member States should have been interrupted at that stage to give way to negotiations between the Commission and the third countries which would clearly have been of an entirely different nature in comparison with the previous negotiations.

Thus the fact that the negotiations were in progress and were indeed at an advanced stage before the end of the transitional period and before the adoption of the Community regulation in my opinion means that on any view the Council could allow negotiations which were almost terminated to be concluded under the conditions obtaining when they were initiated.

This perhaps explains two pecularities of the present case which remain relatively obscure:

— the fact that the Commission never submitted to the Council a proposal relating expressly to the negotiations of the AETR;

— above all, the fact that the Commission never expressly demanded that it alone should negotiate the AETR in the name of the Community but merely requested that it should be more closely associated with those negotiations, in particular through the presence in Geneva of its representatives.

It should finally be noted that if the AETR enters into force in 1970 and if certain of its provisions are incompatible with Community rules in force at that period, the Commission can always avail itself of the powers conferred upon it by Article 169 of the Treaty.

It thus remains to settle the question of costs, which has given me cause for concern.

The Council has not contended that if the application is dismissed the costs should be borne by the Commission.

I think the within the context of the powers conferred upon the Court by Article 69 of its Rules of Procedure, it may concede that the parties have thus tacitly agreed that each shall bear its own costs.

I am therefore of the opinion that:

— the Commission's application should be dismissed as inadmissible or alternatively as unfounded,

— the parties should bear their own costs.