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EDITORIAL COMMENTS

The aftermath of Opinion 1/94 or how to ensure unity of representation for joint competences

The battle is over. Dust is settling down. The Commission against Council, European Parliament and eight Member States. The stakes were high, they involved fundamental questions of a constitutional nature on the allocation of external Community powers, issues which have been vehemently discussed for about the last twenty years in legal doctrine. The Opinion of the Court reflects the extreme constitutional importance and political sensitivity of the issues involved. Leaving aside the legal merits of its reasoning, the Opinion is very much an act of arbitration; in striking a balance between the extreme positions taken it has much of a compromise: far-reaching interpretation of Article 113 EC with regard to goods, including trade related safety, health, sanitary and phytosanitary measures (but not for TRIPS); GATS (apart from the cross frontier supply of services), and TRIPS (apart from rules on counterfeit goods) taken out of the scope of Article 113, their coverage by the external EC competences remaining dependent on the precariousness of the *AETR* effect and the narrowly interpreted necessity test of Opinion 1/76. On the basis of this compromise Community and Member States must now attempt to organize harmoniously their living together in international organizations in which they share membership and competence, first of all the WTO.

Many questions, particularly on the scope of Article 113 EC, have now been answered, new questions arise. A thorough analysis of the

Opinion by Professor Jacques Bourgeois will be published in the forthcoming issue of this Review.

The Court did not explicitly answer the first question put to it by the Commission. That was to know whether the Community had, as such, the *competence* to conclude all parts of the WTO Agreement relating to GATS and TRIPS. Reading its Opinion however leaves little doubt that that is indeed the case. There seems to be no subject for which Member States alone are competent (see for instance para 104 of Opinion 1/94 regarding the TRIPS). Consequently, the Court's conclusions that with regard to GATS and TRIPS Community and Member States have joint competences, must not be understood as signifying a lack of Community competence for parts of the GATS and TRIPS agreement. Competences are joint as yet because Member States prefer not to exercise the, as such available, Community competence, and to preserve their national competence. This approach, which already became apparent in the Court's Opinion 2/91 on the ILO, weakens of course the constitutional position of the Community in the field of external relations. As long as the external competence is not or has not become exclusive, Member States, even acting collectively, remain free to enter into multilateral treaty relations, either by themselves or by acting through the Community. The latter is a mere option. Whether it will be used, is a question of political appreciation and expediency, not a legal one.

Where Community and Member States participate together, each with their own competences, in the action deployed by an international organization, coordination between their positions will be indispensable to prevent inconsistencies or even mutual blockage. The Commission had extensively stressed this point in its request for the Uruguay Round Opinion referring particularly to the possibility of cross-retaliation under the new Dispute Settlement Procedure. How is one to use that instrument effectively either on Community or on Member State level if the competence to do so remains with the other camp? The Court in acknowledging this concern as "quite legitimate" reiterates the principles already stressed in its ILO Opinion 2/91. Member States and Community institutions are under an obligation to cooperate, both in the process of negotiation and conclusion and in the fulfilment of the

commitments entered into. That obligation is said to follow "from the requirement of unity in the international representation of the Community". However, how that cooperation should be organized, according to what procedures and on what legal basis, are questions sidestepped by the Court.

First of all, it should be noted that this "duty to cooperate" is an obligation imposed on Member States and Community institutions under *Community law*. Formerly, Article 116 EEC was available for that purpose. It obliged Member States to proceed within the framework of international organizations of an economic character on matters of particular interest to the common market only by common action. Moreover it empowered the Council to take the necessary decisions by qualified majority upon a proposal of the Commission. Article 116 has been deleted at Maastricht. Regretfully so. It had proven to be a useful legal basis for coordination of actions of Member States and the Community in the no-man's-land of dubious demarcation between Community and national competences or where the exercise of these competences was inextricably linked (for instance the international commodities agreements in application of the so-called Proba 20). On the other hand, Article 116, it should be admitted, was not one of the most transparent provisions of the Treaty. Commercial policy being an exclusive Community competence, Member State action was to be excluded in that field. Where the Community was not able to act, e.g. for not being a member of the relevant organization, Member States would have to act on its behalf, the necessary Community action having to be decided on the basis of Article 113 and not Article 116 EEC. But as a legal basis for coordinating the exercise of national competence on matters of "particular interest to the common market" Article 116 EEC had a useful role to play. It met, however, its untimely burial at Maastricht. One of the reasons for Member States' dislike of this article was that it allowed Community decisions on the exercise of national competence by qualified majority, even in cases where unanimity was required for Community action in the same field (e.g. Article 130S EEC).

Could not the drafters of the Maastricht Treaty be deemed to have intended as an alternative for Article 116 EEC the new provisions on CFSP? Could not coordination be achieved by establishing a common

position under Article J.2 or a common action under Article J.3 of that Treaty? That requires first of all such action to be brought within the scope of the CFSP. Does it cover all external actions of Member States outside the framework of the Communities and that of the cooperation on Justice and Home Affairs (Art. K etc. EU Treaty)? The scope of its predecessor, European Political Cooperation, as developed in practice, did not seem to be as broad as that. It related much more to classic foreign policy not including external economic, social, environmental, energy etc. policy issues falling outside Community competences.

These notions are however far from precise. If these matters could be brought, perhaps after some efforts of creative interpretation, under the CFSP, is not much to be said in favour of that, because it would make it possible to benefit from the new disciplines under this regime? The requirements of systematic cooperation, loyalty to the Union (Article J.1 (4)), of concerted and convergent action (Article J.2 (1)) would apply. Not only that, but also the necessary coordination could be imposed by Council decisions enacting common positions or common actions. These are legally binding acts. The CFSP mechanism is undeniably a step forward in comparison to the earlier EPC procedures, particularly by entrusting decision-making to the institutions, albeit halfway only, as it ousts the Court and keeps the European Parliament at a distance. Could it not be said that in terms of enhancing the discipline of coordination by using the CFSP framework for that purpose, one could foresee only gains?

There is one fundamental objection to this approach. The requirement of coordination between Member States and Community institutions in these cases of joint external competences is an obligation under Community law. This coordination does not relate to Member States' action outside the EC framework. The national action is interlinked with Community action. In the type of situation considered by the Court in the ILO or the Uruguay Round Opinion, Community and Member States are each others' prisoners. The one cannot act without the other. The need for coordination here is much more stringent than the criterion used by the former Article 116 EEC. Achieving a common position of Member States is a *sine qua non* for Community action. Precisely for that reason, one might assume, the Court has put so much

emphasis on the need for coordination and phrased this in the imperative terms of a legal obligation under the Treaty.

That being so, the option of falling back on the CFSP framework to carry out these obligations seems to be excluded.

At least, it should first be considered whether a legal basis for this coordination could not be found in the EC Treaty itself in spite of the disappearance of Article 116 EEC. An easy answer to that would be to invoke Article 235 EC. The link with the common market as well as the need for action to realize a Community objective can easily be demonstrated. That it should be the *Community* which is to achieve the coordination by Council Decision under the 235 procedure and not the Member States within the CFSP framework, results from the level at which the underlying obligations originate. It would be perverse indeed to use CFSP procedures to carry out an obligation arising under the EC Treaty.

A more sophisticated answer to this problem of the legal basis could be found by resorting to the "implied power" method of interpretation. As was said already, in a situation of joint competences (contrary to that of parallel powers as in the field of cooperation policy), the Community external competence can only be exercised if the Member States exercise theirs. So, to attain the objective for which the external Community competence has been granted, that competence must imply, always referring to a situation of joint competences, the competence to coordinate Community and Member States' action. That interpretation is particularly cogent with regard to the WTO. Indeed, the issues under joint competence are not in themselves withdrawn from Community competence. Opinion 1/94 refers to a number of examples in the transport field but also in that of the right of establishment and the freedom of services which confirm that the existing Community competences for these sectors can be used to coordinate Member States' position in the external field.

On the other hand, this solution to use as a legal basis for the imperative coordination between Member States and the Community institutions the Treaty provisions granting the external Community power, would at the same time allow a more balanced result than the former Article 116 EEC. The latter admitted a qualified majority decision even

where the exercise of the Community competence required unanimity. Following an "implied power" approach would make it possible to use the same decision-making procedure for both purposes.

Of course such coordination to ensure a common position of Member States by virtue of a Community procedure will not affect the national competence in itself. It will remain Member States which, unless decided otherwise, negotiate, conclude and execute the international agreements in question. Community coordination will only regard the contents of or the parameters for their position to the extent that this is necessary to achieve coherence and compatibility with the Community position. But, and that is more far-reaching, it would also be in the logic of this reasoning to accept that such a coordination decision could eventually oblige the Member States to effectively conclude the agreement under consideration.

This solution would have the advantage of preserving access to the Court of Justice to settle institutional disputes in this regard between Member States and institutions. In situations of joint competence, where Community and Member States can only act together and are thus fully dependent on each other, it would also prevent the Community becoming the hostage of the less effective CFSP procedures in order to be able to exercise its competence.