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Common Commercial Policy and the Determination of Exclusivity: Opinion 1/75 (Local Cost Standard)

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Opinion 1/75, Draft understanding on a local cost standard, ECLI:EU:C:1975:145, delivered 11 November 1975.

KEYWORDS

External competence – Exclusive competence – CCP – Common Commercial Policy – Prior opinion procedure – Teleology – Export policy – Export credits.

I. INTRODUCTION

On 14 July 1975, the European Commission submitted a request for an Opinion of the Court on the compatibility of an 'envisaged agreement' with the EEC Treaty, in accordance with what was then the second subparagraph of Article 228(1) EEC (now, as amended, Article 218(11) TFEU).[1] The agreement was a draft 'Understanding', negotiated within the OECD, on a local cost standard for export credit schemes. *Opinion 1/75*, handed down barely four months later in November 1975, represented a number of 'firsts': it was the first time that this prior compatibility (Opinion) procedure for international agreements had been used; it was the first case in which the Court assessed the scope of the Community's treaty-making powers in the field of trade; and in this ruling, the Court first decided that the conclusion of international agreements in the field of trade policy (the Common Commercial Policy, CCP) was an exclusive Community competence. Indeed, for the first time, the Court clearly separated the issues of *existence* and *exclusivity* of external competence. However, the case is not only an important historical marker: several of its dicta are still regularly cited and the underlying rationale of *Opinion 1/75* is still current, visible in contemporary debates on trade policy, on exclusivity and on the function of the Opinion procedure itself.

[1] According to Art 228(1) EEC, second subparagraph, 'The Council, the Commission or a Member State may obtain beforehand the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 236.' This procedure, with amendments, is now found in Art 218(11) TFEU.

Although the importance of *Opinion 1/75* has always been recognised, comparatively little was known of the background of the case until recently. The published report is limited to the Opinion itself, and the text of the Opinion is limited to the Court's own reasoning. It does not, unlike subsequent Opinions,[2] contain a summary of the arguments of the Commission or of other observations taken from the report of the *juge rapporteur*. While the report tells us that observations were received from the Council, Ireland, Italy, the Netherlands and the UK, it has been impossible to read the arguments they made. Since 2017, however, the archives of the Court, including the *dossiers de procédure* of cases decided between 1952 and 1982, have been available in the Historical Archives of the European Union in Florence.[3] A study of the *dossier de procédure* of *Opinion 1/75*[4] gives us the text of the Commission's Request for an Opinion, as well as the observations of the Council and Member States, and adds considerably to our understanding of the case, the arguments presented to the Court, and the context in which the Court shaped this first, landmark Opinion.[5]

Like the *ERTA* case and other cases of this early period,[6] *Opinion 1/75* captures a moment when the Community was starting to play an active role in international negotiations, including those which had been started by the Member States. In fact, the relationship between the Community's participation in negotiations and the recognition of its external competence was an issue in both *ERTA* and *Opinion 1/75*, although with differing outcomes. This is not simply a matter of the recognition of competence internally, by and amongst the Community institutions and Member States. *Opinion 1/75* marked an important step in the gradual acceptance by the international community of the EEC as an autonomous actor and treaty partner.[7]

II. FACTS

Article 112 of the EEC Treaty (now repealed) provided for the 'progressive harmonisation' of Member State export credit systems by the end of the transitional period,[8] but by 1974 this had not been fully achieved. According to the Commission, 'differences still persist[ed] between the export credit systems of the Member States'.[9] Simultaneously work was proceeding

[2] For discussion of the evolution of the Opinion procedure, see further S Adam, *La procédure d'avis devant la Cour de justice de l'Union européennes* (Bruylant, 2011); M Cremona, 'Opinion: European Court of Justice (ECJ)' *Max Planck Encyclopedia of International Procedural Law* (2018); G Butler, 'Pre-ratification Judicial Review of International Agreements to Be Concluded by the European Union' in M Derlén and J Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Oxford, Hart Publishing, 2018) 61.

[3] Dossiers can be consulted at archives.eui.eu/en/fonds/230050?item=CJUE.

[4] Opinion 1/75 *dossier de procédure*, Historical Archives of the European Union, CJUE-2383.

[5] There is no space here to discuss the contents of the dossier in detail; see further J Kukavica, 'The Court of Justice in the Archives Project: Analysis of the Opinion of the Court of 11 November 1995 (Opinion 1/75)' (2021) Academy of European Law Working Paper 2021/11; J Kukavica, 'The Garden Grows Lusher: Completing the Narratives on Opinion 1/75' (2021) 6 *European Papers* 621.

[6] See, eg Case 22/70, *Commission v Council*, ECLI:EU:C:1975:145 (*ERTA*). See this volume, ch 1; *Opinion 1/76*, ECLI:EU:C:1977:63. See this volume, ch 9; Ruling 1/78 of 14 November 1978. See this volume, ch 10; *Opinion 1/78*, ECLI:EU:C:1979:224. See this volume, ch 11.

[7] For more on 'international personality' and the 'external actorness' of the Community as manifested in *Opinion 1/75*, see P Pescatore, 'External Relations in the Case-Law of the Court of Justice of the European Communities' (1979) 16 *CML Rev* 615, 639–42; R Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Alphen aan den Rijn, Kluwer Law International, 2008) 378, 442.

[8] The transitional period ended on 31 December 1969.

[9] Request for an Opinion submitted by the Commission of the European Communities to the Court of Justice pursuant to the second subparagraph of Art 228(1) of the EEC Treaty, JUR/73/75, 4 in Opinion 1/75 *dossier de procédure* (n 4).

within the OECD on a number of sectoral Understandings, as well as on the Understanding on a Local Cost Standard at issue in *Opinion 1/75*. This latter Understanding had been negotiated within the OECD's Group on Export Credits and Credit Guarantees, and a report of that group in February 1974 recommended its adoption by way of a Resolution of the OECD Council. According to the Understanding, the signatories would agree to a common standard for financing 'local costs', ie costs incurred in the buyer's state. The standard included both the percentage of local costs that could be covered by credit finance (no more than 100 per cent of the value of the goods or services exported) and the interest rate payable, together with exclusions and derogations. The original proposal to adopt an OECD standard was made by the Community and was based on norms contained in its own legislation, the final Understanding representing a compromise with alternative proposals from the USA. Although there appears to be some disagreement about the extent to which the Commission was involved in the negotiations,[10] the possibility of EEC participation had clearly been discussed. The Chair of the Group on Export Credits and Credit Guarantees reported to the OECD Council that the text of the Understanding had been agreed by all delegations and that 'As regards the Draft as a whole, there only remains to be clarified the form of the participation in the Understanding by the European Economic Community, whose decision on the subject is to be made very soon'.[11]

The European Commission submitted to the Council a Recommendation for a Council Decision on the Community's position in relation to the Understanding.[12] The Commission Recommendation was that the Understanding should be adopted by the EEC alone, on the basis of Article 113 EEC (now, after amendment, Article 207 TFEU),[13] and that the Community position should be expressed by the Commission. According to the Commission Request for an Opinion, there was disagreement in the Council over the existence and the extent of Community competence to adopt the Understanding: while only one of the (then) nine Member States disputed Community competence, another two took the view that while the Community had competence this did not exclude participation by the Member States. In light of this disagreement, the Commission decided to request an Opinion from the Court under Article 228(1) EEC 'In order that the Council might have information on the legal questions confronting it which would be necessary for it to resume useful discussion'.[14]

The Commission's formal request to the Court was for 'a prior Opinion on the compatibility with the Treaty of a draft Understanding on a Local Cost Standard drawn up by

[10] See Commission Request (n 9), 9; Written Observations by the United Kingdom, 5 in Opinion 1/75 *dossier de procedure* (n 4). Jean Groux, the Agent of the Commission in the *Opinion 1/75* proceedings, argued in one of his post hoc writings that the Community did not participate in the negotiations, contrary to the arguments he made for the Commission in the Request for an Opinion.

[11] *Opinion 1/75*, ECLI:EU:C:1975:145, 1358. Indeed, Protocol No 1 to the OECD Convention provides that 'representation in [the OECD] of the European Communities established by the Treaties of Paris and Rome of 18 April 1951 and 25 March 1957 shall be governed in accordance with the provisions on institutions contained in those Treaties'. Commission Request (n 9) 26. The UK argued in its observations that although EEC participation may have been foreseen, the participation by the Member States over many years of negotiations would have led to an expectation from other OECD members that EEC participation would not exclude that of the Member States. See Observations by the UK (n 10) 16.

[12] Commission Recommendation for a Council Decision Concerning the Community's position within the Organisation for Economic Cooperation and Development in the Matter of a Local Costs Standard, COM (1974) 2238, 18 December 1974.

[13] Under Art 113 EEC the Community had competence to conclude agreements with third countries in the field of commercial policy, which explicitly included export policy; the equivalent current provision (much amended) is Art 207 TFEU.

[14] Commission Request (n 9), 2.

the O.E.C.D. … and more especially on the power of the Community to conclude this agreement'.[15] Later in its Request, the Commission was more specific in framing the question of Community competence as concerning 'in the first instance, whether the Community even has power to negotiate and conclude the proposed agreement and, should the reply to this question be in the affirmative, whether or not such power is exclusive'.[16]

III. THE COURT

The Court's Opinion is divided into two main parts, dealing first with the admissibility of the Request and then with the issue of substance. Following the structure of the Commission's Request, it subdivided the substantive issue into two: the existence of Community competence to conclude the Understanding, and whether that competence is exclusive.

As the archival material reveals, both the Council and the UK raised questions in their observations relating to the scope of the prior Opinion procedure, which – it will be recalled – had not been used before, and the Court partially addressed these under the head of admissibility. In line with the wording of Article 228(1) EEC, which enabled the Court to determine 'whether an agreement envisaged is compatible with the provisions of this Treaty', the Court discussed three aspects of the procedure: (i) the interpretation of 'agreement'; (ii) the interpretation of 'envisaged'; and (iii) what is covered by 'compatibility with the Treaty'. Guiding its interpretation of the provision was its view of the purpose and rationale of the procedure, something that was addressed in the observations of both the Council and the UK. While the Court essentially adopted their positions on the purpose of the procedure, it drew very different conclusions. The purpose of this 'exceptional' procedure, the Court held, is to 'forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community', since a finding of incompatibility would 'provoke, not only in a Community context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries'.[17]

From this perspective, it is the fact that an agreement is binding that is important, not its formal designation. The Court held that 'agreement' covers 'Any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation', and thus covered the projected Understanding.[18] The Court then held that the agreement was indeed 'envisaged': the procedure had not been invoked too early or too late. On the one hand, it was not necessary to wait, as had been argued by both the Council and the UK, for the Council (the institution that would formally conclude the agreement) to decide that the Community should participate.[19] It was sufficient that the text had been agreed, and that the Commission had formally recommended Community participation. On the other hand, contrary to the arguments made by the UK, the fact that 'discussions concerning the substance of the Understanding in question are now at an end' was no barrier to asking for an Opinion.

[15] ibid 1.
[16] ibid 2.
[17] *Opinion 1/75* (n 11) 1360–61.
[18] In this ruling, but without referring to the UK's views, the Court disagreed with the UK, which had argued that the Understanding was not intended to be legally binding. See Observations by the UK (n 10) 9.
[19] The Council argued that the Opinion procedure would not achieve its purpose if the Court were to give opinions on 'mere projects' instead of agreements that the Council actually intends to conclude. See Observations by the Council on the Request for an Opinion, 2–3 in Opinion 1/75 *dossier de procedure* (n 4).

In interpreting the concept of 'compatibility with the Treaty', the Court again started from its perception of the purpose of the procedure, that is, to forestall the difficulties that would be provoked by a finding of incompatibility of an internationally binding agreement. This requires that the Court should be able to assess any aspect of the agreement and the Community's participation that might give rise to a (subsequent) legal challenge. Thus, the Court must be able to address

> all questions capable of submission for judicial consideration, either by the Court of Justice or possibly by national courts, in so far as such questions give rise to doubt either as to the substantive or formal validity of the agreement with regard to the Treaty.[20]

This included compatibility with rules determining the powers of the institutions and with the substantive rules, and thus may include questions of competence.[21] In concluding that 'compatibility' encompasses Community competence, the Court impliedly rejected – but did not directly address – an argument made by both the Council and the UK in their observations. In their view, while the Opinion procedure could be used to address questions of Community competence, it did not give the Court jurisdiction to determine whether that competence is exclusive. That – they argued – would in effect be to rule on the competence of the Member States (whether they are entitled to conclude the agreement alongside the Community).[22] The Court, in contrast, simply concluded that the Commission's request was admissible, and went on to discuss the question of exclusivity without raising it as an admissibility issue. It thereby assumed that 'Community competence' included the nature of that competence.

Turning to the first issue of substance, the Court held that the Understanding fell within the scope of the CCP, and thus the express treaty-making power granted by Article 113 EEC. It pointed to the fact that the Treaty envisaged internal Community rules on export credits (then Article 112 EEC) and to the mention of export policy in Article 113 EEC.[23] Two aspects of the Court's reasoning here stand out, from the perspective of the wider and longer-term significance of the case. First, the Court did not rely solely on these textual arguments but adopted a purposive approach to defining the concept of commercial policy, holding that it had 'the same content whether it is applied in the context of the international action of a State or to that of the Community'.[24] Second, the Court held that the Community's external powers in the field of commercial policy do not depend on the prior exercise of its internal powers; the Community had the competence to agree to rules on export credits within the OECD, even though it had not yet adopted internal legislation on the matter.[25]

The second substantive issue concerned the exclusivity of Community power to conclude the Understanding. Against the arguments that its power was not exclusive, whether because no internal common rules for export credits had been adopted (and so the *ERTA* rationale for exclusivity did not apply),[26] because export credits were not a core element of commercial policy[27] or because export credit schemes are managed and financed by Member States,[28] the

[20] *Opinion 1/75* (n 11) 1361.
[21] ibid.
[22] Observations by the Council (n 19) 4–5; Observations by the UK (n 10) paras 21–24.
[23] The Court here silently rejected an argument which had been advanced in the literature, to the effect that export credits fall within the Community's state aid policy, not the CCP. See further HH Maas, 'The External Powers of the EEC With Regard to Commercial Policy, Comment on Opinion 1/75' (1976) 13 *CML Rev* 379, 384, citing Ipsen.
[24] *Opinion 1/75* (n 11) 1362.
[25] ibid 1363.
[26] Observations by the UK (n 10) para 30.
[27] ibid para 29.
[28] ibid paras 33–34; *Opinion 1/75* (n 11) 1364.

Court accepted the Commission's contention that the Community's powers were exclusive. In doing so, it made it clear that the *ERTA* reasoning, based on the need to protect an existing Community *acquis*, did not apply to the CCP. Instead, the Court's rationale for exclusivity was based upon a teleological understanding of the nature of the CCP, and had both an internal and an external dimension. From an external perspective, the Court relied on the need for an 'effective defence' of the common interests of the Community, which would be compromised if Member States were to pursue their own interests individually. From an internal perspective, unilateral Member State action would be incompatible with the 'uniform principles' envisaged by the Treaty to govern commercial policy so as to avoid the distortions of competition between Community traders operating in external markets. Thus, the Court formulated its reasoning on exclusivity with reference to the Community's commercial policy generally, not only export credits, basing itself on fundamental principles, including mutual trust within the Community, and the need for unity to ensure defence of the common interest externally.

The reasoning of the Court in *Opinion 1/75* is typical of cases in this early period in being didactic rather than forensic. The Court did not engage directly with the arguments put forward, but presented its conclusions as if they were the only possible answer to the questions asked. Its reasoning was framed in structural and purposive terms, both in relation to the scope of the procedure and in relation to the CCP. As a result, the significance of the Opinion is not limited to the specific question at issue, but is a foundation for the development of the CCP and EU external policy more generally.

IV. THE IMPORTANCE OF THE CASE

A. Defining the Scope and Function of the Prior Opinion Procedure

Opinion 1/75 represented the first use of the prior opinion procedure, and as such the Court's statements about the rationale and scope of the procedure are important, especially in the light of the difference of views revealed in the Commission's Request, the observations of the Council and those of the Member States. Indeed, the statement of that rationale quoted above has been repeated in many subsequent cases and has become a standard 'formula'.[29]

Thus, in subsequent cases, this rationale was used by the Court to support its conclusion that the prior Opinion procedure could be used in cases where there was a dispute as to legal basis, since conclusion on an incorrect legal basis may result in the decision concluding an international agreement being invalidated.[30] It has also been used to justify the use of the Opinion procedure at an early stage, before the text of the agreement has been finalised.[31] As expressed in *Opinion 2/94*,

> where a question of competence has to be decided, it is in the interests of the Community institutions and of the States concerned, including non-member countries, to have that question clarified from the outset of negotiations and even before the main points of the agreement are negotiated.[32]

[29] See, eg *Opinion 2/94*, ECLI:EU:C:1996:140, paras 3–6. See this volume, ch 32; *Opinion 1/13*, ECLI:EU:C:2014:2303, paras 47–48. See this volume, ch 69; *Opinion 2/13*, ECLI:EU:C:2014:2454, paras 145–46. See this volume, ch 70; *Opinion 1/15*, ECLI:EU:C:2016:656, para 69. See this volume, ch 83.

[30] See, eg *Opinion 2/00*, ECLI:EU:C:2001:664, paras 5–6. See this volume, ch 39.

[31] *Opinion 1/78* (n 6) paras 34–35; *Opinion 2/94* (n 29) paras 3–10.

[32] *Opinion 2/94* (n 29) para 10.

At the other extreme, the rationale for the Opinion procedure expressed in *Opinion 1/75*, based on the need to forestall potential problems before international commitments are entered into, has also influenced the determination of when it is too late to request an Opinion. Once an agreement has been concluded, the 'preventive intent' of the procedure can no longer be achieved and the request becomes 'devoid of purpose'.[33]

The Court's willingness in *Opinion 1/75* to accept that an agreement may be 'envisaged' on the basis of a Commission proposal, even though the Council had not yet taken any decision to conclude it, has also been reflected in subsequent practice. In *Opinion 1/13*, for example, the Court rejected a similar argument, holding that the procedure may be initiated where the agreement is 'envisaged' by one of the actors capable of requesting an Opinion under Article 218(11) TFEU (here, again, the Commission), and that it was not necessary for the Council to have demonstrated its intention to conclude the agreement.[34] As Maas pointed out in an early comment on the case, although it might have been stretching a point to regard an agreement as 'envisaged' before any decision to that effect had been taken in the Council, the Court's approach provided a way of resolving competence disputes for international agreements which does not exist for internal legislation.[35]

When it comes to the concept of 'agreement', the Court's ruling in *Opinion 1/75* has broader implications since this term applies to Article 218 TFEU as a whole, and thus defines when this general procedural provision should apply. The broad interpretation adopted in *Opinion 1/75* has been used in other cases where the application of Article 218 TFEU was at issue.[36] In this early case, therefore, the Court established the centrality of this fundamental procedural provision for EU external action, and its constitutional significance in determining the institutional balance of power.

However, it is perhaps in its acceptance of the idea that the Opinion procedure may be used to determine Community competence and – even more – whether that competence is exclusive that *Opinion 1/75* has been most influential. The argument that this procedure was not designed to determine the balance of competence, and that other procedures (institutional and judicial) were more appropriate, has from time to time been revived, but without success. The Court, in later cases, is more explicit in referring to 'questions concerning the division between the Community and the Member States of competence to conclude a given agreement',[37] engaging more directly with the arguments put forward, but its conclusion is the same. And, indeed, establishing the boundaries of external competence has proved to be a dominant issue in subsequent Opinions: of the 22 Opinions handed down to date, as of the end of 2020,[38] 14 have concerned questions of competence, of which all except one[39] involved determining whether or not competence was exclusive.[40]

The purpose of this non-contentious procedure in pre-empting legal and political problems, and the fact that it can be called upon to settle issues of competence, legal basis and participation at any time from a relatively early stage up to formal conclusion of an agreement, has,

[33] *Opinion 3/94*, ECLI:EU:C:1995:436, paras 14–23.

[34] *Opinion 1/13* (n 29) paras 45–46.

[35] Maas (n 23) 382.

[36] See, eg Case C-327/91, *France v Commission*, ECLI:EU:C:1994:305, para 27 See this volume, ch 26; Joined Cases C-103/12 and C-165/12, *European Parliament and Commission v Council*, ECLI:EU:C:2014:2400, para 83.

[37] See, eg *Opinion 1/78* (n 6) para 31; *Opinion 2/00* (n 30) para 3; *Opinion 1/13* (n 29) para 35.

[38] Two cases are pending at the time of writing: *Opinion 1/19* and *Opinion 1/20*.

[39] *Opinion 2/94* (n 29).

[40] The other dominant issue has been that of institutional compatibility (seven Opinions to date); substantive compatibility has been considered only rarely so far, although there are signs that this may change: see, eg *Opinion 1/15* (n 29); *Opinion 1/17*, ECLI:EU:C:2019:341.

since *Opinion 1/75*, enabled it to play an important role in establishing fundamental constitutional principles not limited to EU external relations.[41]

B. Defining the Scope of the Common Commercial Policy

Opinion 1/75 also established an approach to defining the scope of the CCP which has been crucial not only in subsequent debates on the CCP, but also in establishing the EU as an international actor. Put simply, the Court rejected a task-based approach, which would define the CCP in terms of a specific list of activities. Instead, in holding that commercial policy has 'the same content whether it is applied in the context of the international action of a State or to that of the Community',[42] it adopted a policy-based approach. This is not just a matter of giving the CCP an expansive interpretation by suggesting that Article 113 EEC did not establish a closed list.[43] For the first time, the Court recognised that the Treaty granted the EEC policy-making powers in a specific field (the CCP) that are not tied to specific Treaty objectives.[44] The CCP is a policy field in which the Community – and now the Union – may act to achieve objectives set by its own institutions. And by holding that the Community's treaty-making power in the field of CCP did not depend on first adopting internal rules on the matter in question, the Court recognised the ability of its institutions to choose the appropriate level at which to act (Community or international) and the type of policy instrument (legislation or treaty) to use.

Given that the textual references in the Treaty to export credits and export policy would have provided an answer to the question of competence (the real point of dispute being the question of exclusivity), the Court – despite starting with these provisions – deliberately chose to open up the question of the scope of the CCP. This move set the stage for a long-standing and still ongoing debate about the limits of that policy field (sharpened, of course, by its parallel finding of exclusivity) through litigation and at moments of Treaty amendment. It is only in recent case law that we have been offered general criteria by which to judge whether a measure falls within the CCP.[45]

In the background to this case, we can also see an emerging appreciation of the implications for Member States as the Community started to develop its own autonomous commercial policy and gained acceptance in international bodies such as the OECD. Community participation would mean a Community-level obligation on the Member States, derived from Article 228(2) EEC (now Article 216(2) TFEU) and, as some interveners recognised, this would

[41] See further Cremona (n 2).

[42] See n 24 above.

[43] Thus paving the way for *Opinion 1/78* (n 6). See this volume, ch 11. For an earlier judgment affirming that the Treaty provisions on the customs union and CCP need to be given a wide interpretation, see Case 8/73, *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH*, ECLI:EU:C:1973:90, para 4.

[44] The adoption of a CCP was itself listed as among the Community's activities in Art 3(b) EEC, but apart from the references to 'uniform principles' in Art 113 EEC and to the progressive elimination of trade restrictions in Art 110 EEC, its objectives were not defined.

[45] See, eg Case C-414/11, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, ECLI:EU:C:2013:520, paras 50–52. See this volume, ch 64; *Opinion 2/15*, ECLI:EU:C:2017:376, paras 35–36. See this volume, ch 82. The formulation adopted here is derived from earlier case law on the relationship between trade and environmental policy (eg *Opinion 2/00* (n 30) para 37. See this volume, ch 39; Case C-411/06, *Commission v European Parliament and Council*, ECLI:EU:C:2009:189, para 71, but has recently been applied to the CCP more generally. See further M Cremona, 'Defining the Scope of the Common Commercial Policy' in M Hahn and G van der Loo (eds), *Law and Practice of the Common Commercial Policy: The First 10 years after the Treaty of Lisbon* (Brill, 2020).

constrain Member States in their implementation of the agreement.[46] Fulfilment of obligations under the agreement becomes a matter of Community as well as international law.[47] Effectively, as the Court itself pointed out, the common rules that had not yet been adopted in the form of internal legislation may be created for the Community and its Member States as international norms.[48]

C. The Rationales for Exclusive Competence

Opinion 1/75 is probably best known for its ruling that EEC competence in the field of commercial policy is exclusive. It is a ruling that has had immense implications for the future development of that policy. Although the exclusivity of Community competence over the CCP was by no means unanimously accepted by either the Member States or scholarship at the time,[49] the Court's reasoning has never been challenged and is now enshrined in Article 3(1) TFEU. The following year, the Court was to declare that as full responsibility for the CCP had been transferred to the Community, national commercial policy measures 'are only permissible after the end of the transitional period by virtue of specific authorization by the Community'.[50] The application of exclusivity to autonomous CCP measures as well as international agreements can indeed be derived from the breadth of the language used in *Opinion 1/75*,[51] although some authors had argued that CCP exclusivity applied only to treaty-making.[52] Again, the exclusivity of the CCP applied even in the absence of common rules regulating imports.

A few years earlier, the Court had decided the *ERTA* case,[53] and this judgment, explicitly or impliedly, hovers in the background of several of the submissions of the institutions and Member States.[54] Given that the concept of exclusivity in external relations was in its infancy, it is not surprising that they were engaged in working out the implications of *ERTA* – in particular, whether exclusivity could be conceived in the absence of 'common rules' which need protection from unilateral Member State action. In deciding that exclusivity in the CCP did not depend on the prior adoption of common rules, and indeed that the common rules may derive from (exclusive) external action, the Court elaborated a rationale for exclusivity very different from pre-emption: the importance of external unity to defend the Community

[46] Observations by the UK (n 10) 20–21.

[47] Case 104/81, *Hauptzollamt Mainz v CA Kupferberg & Cie KG aA*, ECLI:EU:C:1982:362, paras 11–13. See this volume, ch 14.

[48] For a recognition of the tension that this may create between legislative and treaty-making procedures and institutional balance, see *Daiichi Sankyo* (n 45) para 59; *Opinion 2/15* (n 45) paras 164–5.

[49] For a discussion, see PJG Kapteyn, 'The Common Commercial Policy of the European Economic Community: Delimitation of the Community's Power and the European Court of Justice's Opinion of November 11, 1975' [1976] *Texas International Law Journal* 485, 492.

[50] Case 41/76, *Donckerwolke and Others v Procureur de la République and Others*, ECLI:EU:C:1976:182, para 32. See this volume, ch 8.

[51] See, eg the Court's reference to action 'in the Community sphere and in the international sphere', *Opinion 1/75* (n 11) 1364.

[52] See, eg Sasse, cited by Kapteyn (n 49) 493. Some early commentators were not convinced that *Opinion 1/75* had settled the question of exclusivity for all aspects of the CCP: see Kapteyn (n 49) 502.

[53] *ERTA* (n 6).

[54] The Commission, in its request, argued that *ERTA* did not apply to express treaty-making powers. See Commission Request (n 9) 22. The UK, on the other hand, cited *ERTA* in support of its argument that there could be no exclusivity until common rules had been adopted. See Observations by the UK (n 10) para 30. A similar position was taken by Italy in its observations. See Opinion 1/75 *dossier de procédure* (n 4) Observations of the Italian Government regarding the Request of the Commission for an Opinion, 2.

interest and the need for uniform rules to avoid distortions within the common market.[55] This is exclusivity which derives a priori from the very nature of the policy field rather than the specific character of internal legislation. As such, it applies to the whole of the CCP,[56] and its scope has expanded with that of the CCP itself.[57] Interestingly, as Schütze has pointed out (and as is now evidenced in Article 3(1) TFEU), this type of exclusivity has turned out to be rare.[58]

The Court's reasoning on exclusivity also affirmed the prominent position of teleology in the interpretative arsenal of the Court. As already noted, the conclusion in the Opinion as to the exclusivity of Community competence was heavily predicated on a teleological exposition of the Treaty and of the policy field. Notably, however, the Court's almost exclusive reliance on purposive interpretation was not triggered by the observations submitted by the Council or the Member States. Other than a brief mention by the Commission in its Request for an Opinion, no teleological arguments were advanced on the exclusivity of Community competence. Purposive reasoning was introduced by the Court itself, irrespective of the content of the submissions. Conversely, the Court ignored outright many practical policy arguments that were advanced by the UK in its observations, signalling their lesser relevance to the interpretation of the Treaty.[59] In between these two approaches was the Court's treatment of many textual arguments made by the UK, pertaining to the wording of Articles 113 and 114 EEC and Article 71 of the ECSC Treaty. These were not ignored by the Court, unlike most policy arguments, but were explicitly rejected in the Opinion.

At the time that *Opinion 1/75* was decided, the EEC was gradually assuming a role in international trade negotiations, and the implications of this transfer of competence for the Member States was being assessed in both practical and legal terms. In *ERTA*, the Court had accepted that since the relevant international negotiations had been taken almost to conclusion by the Member States, it would be disruptive at such a late stage to request that the Community should substitute the Member States; it thus accepted that the Member States could represent the Community notwithstanding exclusive competence. It is striking that this argument, though made, was given no weight in *Opinion 1/75*, the Court merely noting that the OECD was waiting to be informed about the form that Community participation would take.

The transfer of commercial policy competence also carried implications for the Member States' pre-existing international commitments, especially under the General Agreement on Tariffs and Trade (GATT) and other multilateral trade agreements. *Opinion 1/75* falls between two cases, *International Fruit* and *Nederlandse Spoorwegen*, in which the operation in this context of what has become known as 'functional succession' was discussed, and helps to shed light on the development of that concept.[60] In *International Fruit*, the Court emphasised that the Member States had transferred powers in the field covered by the GATT (and thus the CCP) to the Community, which had 'assumed the functions inherent in the tariff and trade policy', at least from the end of the transitional period.[61] As Petti and Scott point out, the Court

[55] On the incompleteness of the CCP at the time of *Opinion 1/75*, see Kapteyn (n 49) 487–92.

[56] The Court rejected an argument that exclusivity may be limited to certain 'core' elements: see n 27 above.

[57] Notwithstanding the introduction for a time following the Treaty of Nice amendments of the possibility of shared competence for certain aspects of the CCP.

[58] R Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press, 2014) ch 6.

[59] For a complete list of arguments made across all the submissions, and the Court's response to each of them, see Kukavica, 'Court of Justice in the Archives' (n 5) 41.

[60] Joined Cases 21–24/72, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115. See this volume, ch 2; Case 38/75, *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrechten en accijnzen*, ECLI:EU:C:1975:154. See this volume, ch 5.

[61] *International Fruit* (n 60) para 14.

was not explicit in this case that the Community had acquired *exclusive* competence over the CCP, but its reasoning on the transfer of powers might be seen as foreshadowing this aspect of *Opinion 1/75*. Then, following *Opinion 1/75*, the Court in *Nederlandse Spoorwegen* was more explicit that the Community had *replaced* the Member States in terms of GATT commitments, thereby consolidating the functional succession doctrine.[62] *Nederlandse Spoorwegen* was decided a few days after *Opinion 1/75*, and is perhaps evidence of the Opinion's initial impact. Certainly, it has subsequently been accepted that exclusive competence is a necessary prerequisite for functional succession.[63]

Opinion 1/75 is a key building block in the decade of seminal judgments on the external relations of the Community that started with *ERTA*. In *Opinion 1/75*, the Court articulated basic institutional and substantive principles that are still foundational today. It also, in its mode of reasoning, established the prior Opinion procedure as a significant mechanism in the development, over subsequent decades, of the constitutional framework of EU external relations.

V. ADDITIONAL READING

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[62] *Nederlandse Spoorwegen* (n 60) para 16.

[63] See, eg Case C-308/06 *Intertanko and others*, ECLI:EU:C:2008:312, paras 48–49. See this volume, ch 52.