

## **6. The External Relations of the European Community: Legal Aspects of the Relationships with Foreign States and International Organizations**

**Dott.Ssa Paola Goi**  
**Collegio Europeo Diparma**

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### **1. Introduction**

At this time, it is possible to argue that international law is especially concerned with relations between States and international organizations. International organizations, which involve different States, get a new *status* in international law based on international personality. The statement of legal personality is made in each of the founding treaties, but it is not explicitly directed at international relations. The international personality of organizations is the result of an accumulation of attributes, the most important of which is probably the capacity to enter into international agreements.

In the case of the European Community, article 210 of the founding Treaty provides simply: "The Community shall have legal personality". It is also established that the Community has the same legal capacity of juridical person in national law in each Member State. Although the formal attributes claimed by the European Community, such as treaty making, are much the same as those of organizations such as the United Nations, the range of subjects to which they relate is much wider. It has acquired powers over such matters as trade and movements of persons which were previously exercised only by sovereign states. The Community power to participate in multilateral and bilateral agreements, the role obtained in diplomatic relations and the system of responsibility create a new category of personality, that of a supernational entity.

Community treaty making power is the basis of the Community external relations with third countries and international organizations. Thus it may be necessary to define the Community's external competence and the level of authority to conclude treaties. It follows from the Court of Justice case-law that when the EC Treaty mentions "agreement" this includes "any undertaking into by entities subject to international law which has binding force, whatever its formal designation"<sup>1</sup>. The capacity of the Community to enter into binding agreements is founded on articles of the constitutive

Treaty as interpreted by judgements and opinions of the Court of Justice. The EC Treaty expressly provides three cases in which the Community has the competence in making international agreements: treaties in the field of commercial policy (article 113.3), associations with third countries (article 238) and relations with the international organizations (article 229). The founding Treaty restricted the Community competence in international matters to those cases.

Later, important judgements of the Court of Justice broadened Community treaty making competence. In the ERTA case<sup>2</sup>, the European Commission challenged the right of Member States to conclude the *European agreement on road transport*. The view of the Council is that the Community has the power to conclude only the types of agreements expressly provided by Treaty, such as commercial and association agreements. In the opinion of the Commission, after the end of the transitional period the Member States transferred their competence in the field of transport policy to the Community, which has now the exclusive power to enter into international agreements concerning transport. The Court bases the capacity of the Community to conclude binding agreements with other international subjects over the fields set out in the EC Treaty on article 210, which confers legal personality to the Community. The Community has the power to enter into agreements in a particular case if a Treaty provision expressly or implicitly provides the power. Such an implied power may result from the actions performed by the Community Institutions in the context of the provisions concerned.

In a different case concerning the same point<sup>3</sup>, the Court concluded that whenever the Institutions have the powers to attain a specific objective laid down by the Treaty within the internal system of Community law, the Community has the authority to enter into international commitments necessary for the attainment of that objective in the external field even in the absence of an express provision in that connection. Thus it is possible to speak of derived or implied powers in the sense of the so called *theory of implied powers*.

The mere existence of an expressly conferred or derived external competence does not mean that this competence is also exclusive<sup>4</sup>. A derived external power will have an exclusive character if power has also been ceded in the internal sphere. The exercise of internal competence may lead to the exclusivity of the derived external competence linked to it if the internal measures taken contain a cession of competence to the Community in the matter concerned. More specifically, Member States are deprived of the right to undertake obligations towards third countries whenever the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules.

Since the eighties, when the Community treaty making competence was enlarged by the judgements of the Court of Justice, the Community started to conclude different

types of international agreements in those areas in which its external power is not provided by the Treaty. The most important of these agreements involved the fishery policy, such as the treaty between the Community and United States of America stipulated in 1977 and followed by agreements with Sweden, Norway and Canada. The development of the external competence of the Community derived also from the capacity to take part in international conventions: this is the case of some commodity agreements, which expressly provided the Community participation in the treaty like a sovereign state ("Reference to a Government shall be construed as including a reference to the European Economic Community" is established in the Coffee Agreement of 1976 and in the Corn Agreement of 1974).

Article 228 of the EC Treaty lays down a general procedure for negotiating and concluding Community treaties. This procedure has to be adopted in those cases of stipulation of Community agreements with foreign States or international organizations expressly provided by the EC Treaty. However, the Court of Justice said that general rules of article 228 have to be applied not only in cases in which a Treaty provision expressly contains a treaty - making power for the Community, but also in cases in which it is implied<sup>5</sup>.

According to article 228, agreements are to be negotiated by the European Commission under the supervision of the Council. During negotiation, the Commission is supported by a special committee and it must follow Council directives. Treaties are concluded by the Council taking a majority decision. There are some specific cases in which the Council decides with one consent: this is when the Community concludes association agreements and also in those fields which are regulated internally by the same voting system (article 228.2). This method reinforces the principle of parallelism between Community external and internal competence, such as the power to act externally under the limits which the Community has to respect internally performing activities in the same field.

To stipulate an agreement, the Treaty requires consultation with the European Parliament, without considering its opinion as a binding act, also in those fields which are regulated internally with the co-decision procedure<sup>6</sup> and the co-operation procedure<sup>7</sup>. A binding opinion of the Parliament would be necessary when the Community stipulates association agreements, treaties which define a new institutional framework, treaties with financial consequences for the Community and agreements which change binding acts adopted with co-decision procedure (article 228.3).

Exceptionally, article 113 sets out a specific procedure for agreements dealing with trade matters, which does not involve the Parliament.

Although the power to conclude agreements is reserved for the Council, the Commission, if authorized, could participate in amendments relating to the treaty. In spite of this power, the Commission does not have the competence to conclude

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international agreements in policy of competition, in which it could take internally individual decision. In this case, the doctrine has strongly criticised the provision of article 228. Because of the absence in the Treaty of the express attribution to the Community of the treaty - making power, it would be better if the competence to contract international obligations was transferred to the same institutions which exercise this competence within the internal Community law<sup>8</sup>.

According to article 228.6, the Court of Justice may be called upon by a Member State or by a Community Institution to give an opinion on the compatibility with the EC Treaty of a proposed agreement between the Community and a third state or international organization. If the Court finds the agreement to be inconsistent with the treaty, the Community may proceed only if the agreement is altered in accordance with the Court's opinion or the treaty is amended.

International treaties made by the Community can be distinguished between *pure Community agreements* and *mixed agreements*, negotiated also by Member States relating to the matters in which they have kept their own competence.

Pure Community agreements are especially commercial agreements. The common commercial policy (CCP) provisions in article 113 of the EC Treaty are the only ones originally designed to confer treaty - making powers in regard to a particular sector and they have provided the basis for many international agreements, both bilateral and multilateral. Article 113 establishes that external Community trade is based upon "uniform principles", "particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies". Here Community policies to control external trade by measures taken independently and by commercial or tariff agreements are mentioned.

Under article 113 the initiative for opening negotiations on such agreements is in the hands of the Commission which makes recommendations to the Council. The Council's authorisation is required before negotiations may be opened. The procedure of stipulation follows the provisions of article 228 of the Treaty, which expressly excludes the consultation of the European Parliament.

Relating to the division of powers between the Community and Member States in the field of commercial policy, the case - law of the Court of Justice demonstrates that the Community has exclusive competence for conventional as well as autonomous measures. National trade policy measures are only permissible by virtue of specific authorisation by the Commission. In Opinion 1/75<sup>9</sup> the Court based this exclusivity on the grounds that the common commercial policy was conceived "in the context of the operation of the Common Market, for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other".

Article 113 of the Treaty does not specifically define the limits of trade policy: in fact not only the measures relating to the flow of trade fall within the scope of commercial policy, but also other different instruments can be adopted in this area. The importance of this definition is that commercial agreements can be stipulated by the Community with effects also in the sphere of action of member States, without their participation. The Court of Justice has had to define the controversy between the Council and the Commission on the Community competence to conclude commercial agreements several times. The Court has never expressly taken a position, but has contributed to detailing the scope of the field covered by the common commercial policy. In fact, the Court has held that “although it may be thought that at the time when the Treaty was drafted liberalisation of trade was the dominant idea, the Treaty nevertheless does not form a barrier to the possibility of the Community’s developing a commercial policy aiming at a regulation of the world market for certain products rather than at a mere liberalisation of trade”<sup>10</sup>. In Opinion 1/78 which concerned the Community’s competence relating to an International Natural Rubber Agreement to be concluded under the auspices of UNCTAD<sup>11</sup>, the Court saw no reason to exclude the agreement from the domain of the common commercial policy because of its repercussions on certain sectors of economic policy such as the supply of certain raw materials to the Community.

In the first years after the constitutive Treaty came into force, the Community made a number of bilateral and multilateral agreements which were intended to increase its international role in world trade. Thus at the end of 1979 an agreement was concluded with the five ASEAN<sup>12</sup> countries (Indonesia, Malaysia, The Philippines, Singapore and Thailand), which also provides for commercial and economic co-operation. In 1979 China also concluded a commercial agreement with the Community: the importance of this treaty was that it produced positive effects in diplomatic relations and made trade between two partners grow.

In the trade area, most of the agreements concluded by the Community are on fisheries, such as the treaties between the Community and United States or Canada, which laid the basis for the fishermen of each party to have access to the others’ surplus stocks.

The practice by which both the Community and its Member States appear as contracting parties in an international agreement (so called *mixed agreement*) with third countries has become a common feature of the external relations of the Community. The reason for the frequent conclusion of mixed agreements has to be founded on the fact that the division of external competence between the Community and its Member States is not so clear. With regard to certain policy matters (foreign trade, fisheries), Member States possess no autonomous legislative capacity because they are restricted in the exercise of their power by the exclusivity of the Community’s sphere of action. In spite of the Community’s exclusive competence, Member States can still be authorized to

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undertake norm - setting activity in appropriate cases. In the fields of concurrent competence, when power is transferred through the establishment of common rules, internal rules of Member States affecting the common rules must be withdrawn.

Because of the difficulty in defining the division of norm - setting power, mixed agreements have significant advantages. A mixed agreement allows Member States to maintain a sphere of action in fields where the division of power is not well-established. If Member States were to participate to the conclusion of an agreement, they would subsequently take part in treaty amendments or implementing measures relating to it.

Mixed agreements, like other agreements stipulated by the Community, are subject to the jurisdiction of the Court of Justice. The extent of the competence of the Court in matters regarding application of these agreements is based on the possibility of arriving at a uniform interpretation.

Although mixed agreements involve different international subjects, they are often considered as bilateral agreements because they create international obligations between the Community, reinforced by the participation of Member States, and a foreign partner. The most important mixed agreement in these years was the creation of the World Trade Organization (WTO) with a treaty signed both directly by the Community and by each Member State.

Article 238 of the Treaty explicitly accords the Community the power to conclude agreements establishing an association, common actions and special procedures with a third state, a union of states or an international organization.

In Community law, this kind of agreements is applied in practice to reinforce economic ties with third countries. Three types of association should be distinguished: association as a special form of development assistance, association as a preliminary to membership of the EC and association as a substitute for membership<sup>13</sup>.

Associations are ruled by a Council of Association, which is composed of members of the European Council and members of the Commission on the one hand and as a rule of members of the governments of the associated states on the other hand. Decisions are taken by unanimity of the constituent parties.

According to the Community's competence to conclude association agreements, from the case - law of the Court of Justice it appears arguable that in an association the Community may deal with all matters falling within its commercial policy or which can be regarded as being included in its derived external competence.

The procedure which must be followed in the establishment of association agreements is described in general provisions concerning the conclusion of treaties by the Community<sup>14</sup>. It is provided that the Commission conducts negotiations, but the agreements are to be concluded by the Council, acting unanimously. The assent of the European Parliament is now required. Also in this case the Council, the Commission and a Member State may obtain the opinion of the Court of Justice on the compatibility of

the contemplated agreement with the EC Treaty.

It was under the provision of article 238 that the Community entered into the Agreement establishing the European Economic Area (EEA) with Iceland, Liechtenstein and Norway and into the Lomé Agreement with African, Caribbean and Pacific (ACP) countries.

The constitutive agreement of the EEA establishes the implementation of the four freedoms (free movement of goods, of persons, of services and of capital )in all countries involved, without taking the fields of energy and of agriculture into consideration.

The Lomé Conventions, which have been systematically renewed did not contain the principle of free importation of EC products into the ACP States. These States only undertake not to discriminate between the Member States of the Community in commercial policy and to afford them most favoured nation treatment. The Community grants products originating in the ACP States freedom from customs duties and undertakes not to apply any quantitative restrictions. For agricultural products, the Community adopts the necessary measures to be applied which are more favourable than those applied for other third countries. Contracting parties have also obligations in the field of human rights.

Association as a preliminary to membership of the EC resembles association as a special form of assistance characterized by financial, technical and commercial aid to the associated State. The only countries qualifying for an association of this kind are European countries which on account of their backward economic development cannot bear the burden of EC membership. Such an association is created with the countries of Eastern European area. At the moment, this opening to Eastern Europe represents the most burdensome undertaking of the Community. In this case the association agreements are the first level of future membership. After the great changes that have occurred in the political and economic institutions of these countries, the relations between them and the Community are based on the so called "European agreements", which provide for the creation of a free - trade area and for the development of technical and scientific co-operation.

In these years, the Community has enlarged its area of external relations. Thus, we are going to take part in a process of evolving the traditional models of international agreements. The solution would be to make large use of the implied powers to let the Community participate actively in the process of globalization.

## **Notes**

1. Opinion 1/75 (1975) ECR 1355 at 1360.
2. Case 22/70 *Commission v. Council* (1971) ECR 263 at 274.

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3. Case 3, 4 & 6/76 *Kramer et al.* (1976) ECR 1279 at 1308.
4. See KLUWER GRAHAM E TEOTMAN, 773.
5. Case 22/70 *Commission v. Council* (1971) ECR 263 at 281.
6. EC Treaty, article 189b; procedure instituted by the Treaty of the European Union.
7. EC Treaty, article 189c; procedure instituted by the Single European Act and now disappeared after the conclusion on the 18th June 1997 of the new Treaty of Amsterdam.
8. See CANNIZZARO, 669 and FOGLIA - SAGGIO, 1522.
9. Opinion 1/75 (1975) ECR 1355 at 1364.
10. Opinion 1/78 (1979) ECR 2871 at 2913.
11. UNCTAD (United Nations Conference for Trade and Development).
12. ASEAN (Association of Southeast Asian Nations).
13. The latter type has temporarily lost its importance.
14. See article 228.

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