A LEGAL ANALYSIS OF THE POST-OPINION 1/94 VERTICAL DELIMITATION OF COMPETENCES IN EXTERNAL TRADE

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Abstract:

The present paper analyses the post-Opinion vertical delimitation of competences in external trade. Following the insinuation given in Opinion 1/94, the Member States, as the masters of the Treaty, have amended the delimitation of competences under the common commercial policy to enable the Community to effectively adapt to the developments of international trade law especially in respect of the WTO Agreement. Whether they have been successful in their attempts will be examined. In that regard, under the Amsterdam and Nice Treaty, and in order to get a prospect about the possible future of delimitation of competences in external trade, under the Constitutional Treaty, the delimitation issue is scrutinised in terms of the ratione materiae scope of the common commercial policy, the substantive and procedural rules within the ambit of the common commercial policy and the possible effects of these configurations.

Keywords: *Competence, Common Commercial Policy, Treaty amendments.*

Özet:

Makalede, 1/94 sayılı Karar sonrası Avrupa Birliği'nin dış ticaretindeki Avrupa Topluluğu ile üye ülkeler arasındaki yetki bölüşümü (dikey) irdelenmektedir. Bu bağlamda Avrupa Adalet Divanı'nın 1/94 sayılı Kararı'nda da zımni olarak vurgulandığı gibi, eldeki Andlaşma metninin sınırları gözönünde tutularak, üye ülkelerin Avrupa Topluluğu Andlaşması'nın efendileri olarak uluslararası platformda Avrupa Topluluğu'nun etkin bir şekilde yer alabilmesi için Andlaşma'nın ortak dış ticaret politikası başlığı altındaki maddelerine yönelik yaptıkları

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değişiklikler ve bu değişikliklerin muhtemel sonuçları incelenmektedir. Bu çerçevede Amsterdam ve Nice Andlaşması ile, Anayasal Andlaşma'nın dış ticaret politikasında nasıl bir yetki bölüşüm denklemi oluşturdukları detaylı olarak incelenecektir.

Anahtar Kelimeler: *Yetki, Ortak Ticaret Politikası, Anlaşma değişiklikleri.*

I. Introduction

Under the influence of the new trend fed by national sovereignty concerns and so the principle of subsidiarity, the European Court of Justice (the ECJ) restrictively interpreted the ambit of the common commercial policy (the CCP) in Opinion 1/94. Relying on the limits of the concept of the CCP in the EC Treaty, the ECJ left the vast bulk of competences in the external trade as shared (joint) competences in order to protect the *effet utile* of other provisions and the logic of the division of internal competences taking place within the sphere of positive integration. The concept of the CCP so had to stay behind the developments of international trade law. The narrow understanding of the concept of the CCP and the given delimitation of competences and the characteristics of the jurisprudential restrictions on the exclusively exercise of Community competences within the sphere of shared fields remained as obstacles before not only reaching easily a common position and efficiency in the exercise of shared competences, but also presenting a unified front in the external representation with one voice, so taking efficiently a proactive role in the multilateral trade forums. In other words, Article 133 was no longer sufficient to establish an efficient external trade policy that could face the demands of globalisation, under which the dominant role of trade in goods had been challenged by trade in services, intellectual property and foreign direct investments. To avoid these negative implications that could be intensified by the enlargements, the Member States, as constituting power, felt an impetus to resolve the problem, so to revise the Treaty, which was hinted by the ECJ in Opinion 1/94. The Treaty of Amsterdam chased the Commission's initiation for proposal after the demise of negotiations on a code of conduct to adapt the concept of the CCP to international trade law. The post-Opinion history about the division of competences in external trade therefore consists of their attempts to the determination of the content and scope of the CCP by taking over the pre-Opinion mission of the ECJ.

2. The Version of the Amsterdam Treaty

The Treaty of Amsterdam added a new paragraph to Article 133, according to which:

> The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs.

It was significant that this version did not mention a precise authorisation for the Community to conclude agreements on services and intellectual property rights, but just enabled the Council to extend the application of former paragraphs to the new areas under the given procedure. Furthermore, it constrained the application of former paragraphs to the new areas for conventional reasons only. In that regard the emphasis lied on the conventional aspect in trade; if this aspect was missing, there was no exercise of competence based on the new paragraph. (Griller and Gamharter, 2002: 90) Hence, within the new fields the situation for autonomous measures remained unmodified and subject to the other provisions of the Treaty than Article 133. On the other hand, as criticised by Cremona, the most striking aspect of this amendment was the way in which the Treaty left the extension open for future decisions without clarifying on what basis that decision should be made or whether in the extended field the characteristics of the CCP should be maintained(Cremona, 2000: 32). Due to its dual structure regarding conventional and autonomous competences, Dashwood therefore construed this revision not as an extension of the CCP, but as a possibility enabling the ends of the CCP to be served by instruments whose subject had not hitherto fallen within the scope of the CCP under *Opinion 1/94* (Dashwood, 1998:1023). On the other hand, it was also argued that it enabled an autonomous modification of the Treaty, which was independent from IGC and national ratification procedures(Leal-Arcas, 2003:7).[1] Eeckhout considered it as the extension of Community competence, which could be accomplished without any need for approval by the Member States, since it looked to him as the transfer of Kompetenz-

[1] Meunier and Nicolaidis pose the possibility that whereby the Member States would determine the scope of the Community competence at the beginning of a negotiation to provide that the end result could be ratified on a QMV basis without also national ratification processes, which is inspired by the American fast-track. (Meunier and Nicolaidis, 2000: 340)

Kompetenz in this area to the Council by the Member States(Eeckhout, 2004: 49). This process to exclusivity was also perceived by the Member States as the only way to extend the exercise of external Community competences in the new areas. In other words, the understanding of the Member States from *Opinion 1/94* as to the scope of the 'existent' Community competences in external trade seemed restricted to the scope of its exclusive external competences only with the ignorance of the existence of its implied shared competences. If that were correct, even though the amendment was primarily based on an attempt to understand *Opinion 1/94*, I would assert that it was based on its misunderstanding.

The amendment in fact did not extend the scope of the existent Community competences, but just enabled the Community to exercise those competences regardless of jurisprudential constraints arising from the exercise of internal competences. This was because, those competences concerning the new fields were already within the scope of its 'potential' competences and remained to be activated/actualised under the doctrine of implied powers, although remained to be exercised by the Member States in accordance with Community law, unless they are put into exclusivity under the new procedure, i.e. Article 133(5). Therefore, it precisely allowed the Community to put these sectors by unanimity into external exclusivity, irrespective of the prior exercise of concerning internal competences, which was the requirement of *Opinion 1/94*, to enable the external trade policy to adapt to the progress of international trade law. As regards the process to external exclusivity for those competences, the requirement of unanimity now replaced prior internal requirements. Accordingly, it could be regarded as a shifting of the crucial decision from the Court to the Council, in other words from case law to the institutional unanimous decision (Cremona, 1999: 236). Consequently, it could be regarded not as an extension of the scope of the CCP, but just as permission to the Community to apply the procedure of the CCP to the new areas for commercial objectives.

Moreover, Cremona examined whether this option could be used through a once-and-for-all decision for all areas not hitherto covered by the CCP in services and intellectual property rights; whether transfer for individual agreements on a case-by-case basis was more possible[2] (Cremona, 1999:

[2] On the other hand, according to Nicolaïdis and Meunier, "the Amsterdam outcome was, at a minimum, a statement that extension of Community competence should be the result of case-by-case political decisions rather than some uncontrollable spill-over." (Nicolaïdis and Meunier, 2002, 189)

240). I agree with Cremona that although it seemed possible to transfer specific sectors into exclusivity on a case-by-case basis, given the procedure, it seemed difficult to interpret the amendment for individual agreements, so the extension would seemed more reasonable with a once-and-for-all decision for all the domains not hitherto covered by the CCP. The fact that the Council did not dare to take any decision to extend the application of previous paragraphs to the new areas would prove that argument.

3. The Version of the Nice Treaty

The main objective of the Nice amendment before European enlargement was once again to overcome the problem of the delimitation and exercise of external trade competences generated by *Opinion 1/94*, which could not efficiently be resolved in Amsterdam. Having tried to take not only the case law and the demands of the Community's external trade relations, but also the interests of the Member States into consideration, the result was a very complex structure, which was long away from the clarity and simplicity needed for a constitutional document.

3.1 The *Ratione Materiae* Scope of the CCP

As to the new paragraph 5 of Article 133, according to which:

> Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreement in the fields of trade in services and the commercial aspects of intellectual property, in so far as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

The application of Article 133 to the new areas and so the conclusion of international agreements by the Community through QMV in those fields, save for internal constraints, no longer depend unanimous prior decision(s) of the Council, unlike in Amsterdam. However, the scope of new fields is more restricted than that in the Amsterdam Treaty in two ways. On the one hand, intellectual property rights are restricted only to their commercial aspects, on the other this application shall be without prejudice to paragraph 6. However, the restricted extension of the application of paragraphs 1 to 4 to the negotiation and conclusion of agreements regarding those domains, with the exclusion of the autonomous aspects of commercial policy, in other words the dissociation between conventional and implementing competences, remains the same. Accordingly, the implementation of

agreements in the internal market remains based on the provisions other than Article 133. In that regard, it could be argued that the objective of the new Article 133, as in Amsterdam, is to separate the exercise of the competences within the extended fields between the internal and external spheres; preventing strict parallelism in their exercise.

Furthermore, in that paragraph whether the notion of services should be interpreted according to Community law or international trade law remains a controversial issue. In that respect, it is not entirely clear whether the investment is included within the scope of the CCP under Article 133. Some scholars argued that the expression 'services' must be considered to cover the same scope in Community law as that enshrined in Article 49.[3] (Griller and Gamharter, 2002: 92) Accordingly, since the systematic interpretation of the Nice Treaty requires that a term employed in the amendments of Treaty provisions should be interpreted consistently with its pre-existing interpretations, the establishment of a commercial presence is to be considered excluded from the scope of extension on the ground that the notion of services in Community law diverges greatly from the notion of services in GATS (Griller and Gamharter, 2002: 92). The silence of the new Article 133 on foreign direct investment is taken as another indication that commercial presence is not included (Griller and Gamharter, 2002: 92).

On the other hand, according to Cremona, if the following arguments were correct the new CCP should be considered to cover the establishment and aspects of investment as well as traditional services. Firstly, the Treaty drafters based the modes of supply in services, which are articulated in the GATS Agreement, upon the precedent of the ECJ in *Opinion 1/94*. Secondly, given that Article 133(5) only applies to the negotiation and conclusion of international agreements, it would be strange if the term 'trade in services' were not used in the sense of international usage. Thirdly, connected to the previous argument, much of the point of the amendment would be lost if the legal basis and negotiating procedures were only available for limited aspects of the services. Furthermore, the term 'trade in services' used in Article 133(5) reflects exactly the phrasing used in the GATS Agreement, which could be distinguished from the 'freedom to provide services' and 'liberalisation of services' used in Articles 49-55 EC. Lastly, it should be added that Article 133(5)(1) is related to some extent to

[3] Furthermore, Heliskoski argues that this notion in the new provision seems not to entirely cover commercial presence. (Heliskoski, 2002: 1)

the WTO Agreement, as shown below, and the notion of services in the GATS Agreement should have been particularly taken into consideration in the extension (Cremona, 2001: 61).

Moreover, in Article 133 (5) the field of intellectual property rights is divided into two components. One is the field of commercial aspects of intellectual property rights, while the second includes the other aspects of intellectual property rights. Although the term 'commercial aspects of intellectual property' is not defined, the TRIPs Agreement could be taken as a reference for the determination of its scope. Accordingly, while it must cover at least those aspects included in the TRIPs Agreement, other aspects of intellectual property might be included by future unanimous decision of the Council under the procedure of paragraph 7 (Cremona, 2002, 376).[4] In that respect, it is contestable whether its scope is to be determined in accordance with the stance of the TRIPs Agreement at the time of its entry into force, or with its any respective stand at any time by mapping of Article 133 onto a potentially moving target (Krenzler and Pitschas, 2001: 302). Herrmann argues that the existence of Article 133(7) proves its restricted reading with the existing ambit of TRIPs (Herrmann, 2002: 7). However, given the dynamic characteristics of external trade policy and the necessity to adapt to the progress of international trade law, the notion of commercial aspects of intellectual property would be better determined according to the respective stance of the TRIPs Agreement at any time (Krenzler and Pitschas, 2001: 302). It might accordingly be presumed that Article 133(5)(1) fully covers the TRIPs Agreement with respect to its material scope, (Griller and Gamharter, 2002: 105) since it should be considered to encompass those aspects contained within the ambit of TRIPs at any time (Cremona, 2001: 71).

On the other hand, according to Article 133(7):

> Without prejudice to the first subparagraph of paragraph 6, the Council, acting unanimously on a proposal from the Commission and

[4] On the contrary, Heliskoski considers that since the intention behind the expression 'commercial aspects' would seem to be to limit the application of Article 133 to questions such as the trade in and the enforcement of intellectual property rights, the new provision would not enable the Community to negotiate and conclude agreements on the content of intellectual property rights within the WTO under the TRIPs Agreement. Because, "it was proposed that the scope of paragraph 5 would be defined to correspond that of TRIPS, but these proposals were rejected." (Heliskoski, 2002: 10)

> after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property in so far as they are not covered by paragraph 5.

The Council thus has opportunity under the given procedure through a unanimous *ad hoc* decision to communautarise intellectual property rights other than their commercial aspects. It nevertheless remains largely incomprehensible in the field of intellectual property rights as to which agreements could fall under the new category 'not covered by paragraph 5', since paragraph 5 should be encompassing intellectual property (Griller and Gamharter, 2002: 106). It was argued by Cremona in that regard that paragraph 7 might be used to include aspects of intellectual property that are by definition not commercial or trade-related (Cremona, 2001: 87). However, the expression "without prejudice to the first subparagraph of paragraph 6" implies that the limits of the extension regarding intellectual property are the external borders of potential competences of the Community. Furthermore, this paragraph recalls the Amsterdam version of Article 133(5) in the sense that the Council may unanimously extend the ambit of the CCP into new fields regarding intellectual property that are not commercial or trade related.

With regard to Article 133(6)(3), in the field of transport the situation regarding the negotiation and conclusion of agreements will remain unmodified to be governed under the provisions of Title V and Article 300; namely under jurisprudence.

Article 133(6)(1) contains *ultra-vires* prohibition. An agreement may not be concluded, "if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation". It is a matter of competence, rather than compatibility, since the extension is not to be seen as a carte blanche in external trade, which could result in a by-pass of internal competence constraints on services and intellectual property matter (Cremona, 2001: 76). In that regard, this *ultra-vires* prohibition signifies that the limits of the extension are the borders of potential competences of the Community, which are determined under the doctrine of implied powers. Furthermore, paragraph 6 constitutes an exception to paragraph 5, which is already an exception to the core of the CCP. Given that additional limits arising from internal constraints apply only to the new areas under the new Article 133,

the wording of paragraph 5 indicates that paragraph 6 is exclusively conceived as an exemption to the new fields within the scope of extension, not to the core of the CCP (Lukaschek and Weidel , 2002: 137). In that regard, the new version brings ambiguity, since the scope of the core CCP, as a truly explicit external competence, is not determined by the relevant internal competences, unlike the new areas. This ambiguity reflects that it is drafted 'again' under the effect of parallelism, which recalls implied competences arisen from internal competences rather than explicit competences. Moreover, this paragraph has also been criticised as a block to the extension of external Community powers by the evolutionary clause of Article 308 (Gautier and Lianos, 2001 : 194).

Article 133(6)(2) declares the derogation from 133(5)(1). It regulates 'particularly' *ultra-vires* prohibition, which is generally declared in the preceding subparagraph. Since in this subparagraph the exclusivity of external Community competences is linked to a degree of internal harmonisation, [5] (Gautier and Lianos , 2001: 191) which is ruled out, conventional competences relating to trade in cultural and audiovisual services, educational services, and social and human health services will permanently remain within the scope of shared competences. Any external competence that exists in those sectors must then be based on internal competences under the doctrine of implied powers and so be subject to its limitations (Cremona, 2001: 74). In that respect, not only does this subparagraph provide a specific procedural safeguard (unanimity) for the Member States as shared competence, but also substantive safeguard by excluding certain sectoral agreements from the 'express' Community competence enshrined in paragraph 5 by confirming that the Community has only limited competence in those fields, which permanently remain within the shared competences and always require the mixed agreement formula, so national ratifications, for agreements, especially for WTO Agreements, to be jointly concluded (Cremona, 2001: 74). On the other hand, the disputed question of whether the competences to cooperate with third countries as provided in Articles 149, 150 and 151 regarding education, vocational training, culture and public health, include the conclusion of agreements is answered in the affirmative, (Griller and

[5] It is argued that this is not the case if a provision foresees minimum harmonisation, so if the respective internal power exists, agreements establishing minimum standards should remain possible for the Community (Herrmann, 2002: 7). If this argument were correct, we could accept that the Community is competent to conclude agreements establishing only minimum standards whenever their internal counterparts are already within the scope of minimum harmonisation.

Gamharter, 2002: 98) even though they are shared. Lastly, the innovative approach in that subparagraph is that although the ECJ has always refused to include cultural diversity within the explicit exceptions to the principle of free circulation, for the first time the principle of cultural exception appears in the Treaty (Gautier and Lianos, 2001 : 190).

3.2 The Nature of Competences under Article 133

As regards Article 133(5)(4), a bizarre situation is incorporated into the CCP. This is because Article 133(5) must not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations insofar as such agreements comply with Community law and other relevant international agreements. The fact that the Community competence is established does not preclude the continuation of national competences in those fields. According to Griller and Gamharter, Article 133(5)(4) indicates that those competences are concurrent (Griller and Gamharter, 2002: 94). However, I think that it is a misinterpretation to consider of those explicit competences as concurrent, since 'under Article 133' the type of those explicit competences is shared, but non-concurrent, in terms of which exclusivity is restricted by Article 133 itself, save the existence of concurrent competences based on the doctrine of implied powers. This is because, as to concurrent areas in fact the Member States remain competent insofar as the Community has not preempted and so exhaustively occupied the field, which signifies that the Community in theory may totally harmonise these fields. However, the competences under Article 133 imply that the Community cannot exercise its external competences in conformity with the doctrine of preemption. In that respect, Cremona asserts that there is a Treaty-based hindrance to full uniformity in external trade, since Article 133(5)(4) will preserve national competences to conclude agreements whatever actions are taken at the Community level, 'internally' or externally (Cremona, 2002: 379). It is true for the special kinds of services under Article 133(6)(2) that are characterised by shared competence, in terms of which internal harmonisation is ruled out, so actions are allowed only to a certain extent However, outside these sectoral fields this comment should not be accepted since the new Article 133(5)(4) does not concern cases of implied competences as these do not fall under its regulation, but only refers to the standard case in which the Member States act insofar as there is no conflicting provision of Community law or other agreements (Griller and Gamharter, 2002: 97). The new paragraph 5 will not henceforth serve as the

sole basis for those competences, since the situation regarding exclusive competences based on the doctrine of implied powers is not changed by it (Griller and Gamharter, 2002: 96). Furthermore, it is against the case law, which recognised external exclusivity through common rules in *AETR* doctrine and through complete internal harmonisation or internal Community acts in *Opinion 1/94*. Therefore, for agreements in the new domains, the provisions, mentioned in *Opinion 1/94*, should also remain the legal bases under the doctrine of implied powers. Accordingly, under the *AETR* ruling, the right of the Member States to maintain and conclude such agreements should only remain to the extent that the Community has not yet internally harmonised the particular areas dealt with by those agreements (Krenzler and Pitschas, 2001: 307). Whenever related internal rules have been harmonised, the Member States should lose their right to conclude international agreements in those fields at least in order to safeguard the unity of the common market and uniform application of Community law. If this argument were correct, it should be accepted that while these competences are regulated under the new provision, it should be accepted that the doctrine of implied powers is in charge (co-charge situation) as well. Therefore, whereas the doctrine of preemption would not directly apply to the new areas under Article 133, it should be accepted that it applies to them through internal harmonisation on the basis of provisions other than Article 133 under the doctrine of implied powers. However, this argument cannot apply to specific sectors regulated under Article 133 (6)(2), which are under the Treaty-based hindrance.

Consequently, Article 133(5) signifies the extension of the scope *ratione materiae* of the CCP[6] to the new areas (Heliskoski, 2002: 1). Article 133(5)(4) constitutes neither a specific authorisation, a delegation of competence to the Member States, the nature of exclusive competence, nor the nature of concurrent competence (under Article 133 only, save the implied competences), so Article 133(5) would constitute an explicit external competence of the Community, which is not exclusive, but shared.[7] Cremona describes this situation as granting the Community competence to negotiate 'alone', while preserving the residual competences of the Member States (Cremona, 2002: 377). In that regard it is noteworthy that Article

[6] As mentioned above, I consider that it should however be accepted as the extension of the scope *ratione materiae* of the CCP only, not the scope *ratione materiae* of the Community competences.

[7] As stated by Neframi, this explanation is however contrary to the *effet utile* of Article 133(5), which is a consequence of the nature of reform. (Neframi, 2002: 630)

133(5)(4) contradicts in a way Article 133(5)(1), since the latter employs the expression 'shall also apply'[8], which rather implies at first glance, as a legal term, the exclusive nature of the competences within the scope of the extension. For that reason the expression 'may' in the Amsterdam Treaty, should have been retained for the sake of consistency between subparagraphs. Furthermore, it is a reflection of the logic of parallelism, which is significant in comprehending the nature of competences in the new areas (Commission, 2000). Given that these competences are not exclusive, but Treaty-based shared (non-concurrent) competences and also still implied external competences, the Nice amendment could be regarded not as a rule for the Community to exercise those competences, but as an opportunity or permission to exercise. In that regard, it could be argued that Article 133(5) establishes an exceptional legal basis for the Community, alongside other legal bases on the other provisions of the Treaty under the doctrine of implied powers, to enable the Community to exercise of its already existent (potential) competences in the external sphere also on the basis of Article 133(5) for commercial objectives, irrespective of the internal constraints developed in *Opinion 1/94* in order to enable the Community to adapt to the developments of international trade law. Given that an explicit legal basis precedes an implicit legal basis, as long as Article 133 is enough for conventional competences in terms of the WTO, the implied powers doctrine will remain hidden, save the exclusivity of those external competences upon internal harmonisation.

Moreover, under Article 133(5)(4) the Member States maintain and conclude agreements in accordance not only with Community law but also with Community agreements. Article 133(5)(4) is intended to avoid conflict of norms between the Community agreements and national agreements (Cremona, 2001: 84). While exercising their residual competences, the Member States are still under the duty to comply with the *acquis communautaire* and other relevant international agreements, and not to exercise them in detriment to the Community competences. Accordingly,

[8] This wording causes confusion about the nature of those competences. For instance, Krajewski interprets the competences under Article 133(1) having exclusive nature with the exception of the sectoral carve-out. (Krajewski, 2005: 96) This confusion in my view could be cleared up in a way that, exclusivity could be argued as to multilateral agreements within the framework of the WTO save sectoral ruling out, whereas it allows maintenance and continuity of national competences as to bilateral agreements, since in that construction the case of multilateral agreements is primarily taken into account.

since the primacy of the existing multilateral trade system constituting an international economic framework over national agreements has been accepted by Article 133(5)(4), there is a judicial obligation for such national agreements to be compatible with the WTO Agreement (Torrent, 1998). That is because Article 133(5) seems to be concerned primarily with multilateral agreements: the WTO Agreement, which is particularly taken into consideration. Accordingly, as to the WTO, the Community may conclude alone agreements concerning the subject-matters within the scope of the CCP, save the Treaty-based hindrance for sectoral fields, which are shared even for the WTO framework. Consequently, it could be asserted that this fact represents the acceptance of the exclusive jurisdiction of the ECJ by the Member States in interpretation of the provisions of the WTO Agreement, under the precedence of which the compliance of all external trade relations of the Member States performed under Article 133(5)(4) is provided.

3.3 Procedural Requirements under Article 133

Article 133(5)(2) states that the Council must act unanimously in one of the fields mentioned in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon. Given the difficulty in reaching unanimity, it could be actually argued that the parallelism still is retained with the procedural unanimity rule for the exercise of those competences, since the unanimous voting would lead to the same result as the cases of the shared competence by restricting the margin of manoeuvre for the Community. Furthermore, it is argued that regarding services and intellectual property rights, internal legal bases already foresee QMV, so the applicability of the new version with the unanimity requirement regarding internal rules could be questioned (Cremona, 2001: 103). However, I consider that it is enshrined as a precaution for Articles 94 and 308 from which implied external competences arise.[9] Moreover, what does wording "a field in which the Community has not yet exercised the powers" mean? In that respect, it is not obvious to what extent the internal competences should be exercised in order to rule out the unanimity requirement for the

[9] In *Opinion 1/94*, (Opinion 1/94, [1994] E.C.R. I-5267) at paragraph 59, as regards intellectual property the ECJ stated that at the level of internal legislation the Community is competent to harmonise national laws pursuant not only to Article 95, but also to Articles 94 and 308.

decision-making concerning those external competences, which remains t be interpreted by the ECJ.

Whereas the agreements related to goods, cross-frontier supplies services and counterfeit goods are concluded by QMV irrespective internal rules, as regards trade in services and intellectual proper uncovered by the core area of the CCP, unanimity is required for th agreements insofar as the Community has not exercised its interna competences in that field or unanimity is required for the adoption internal rules. The new areas are under a different treatment from the co area of the CCP to which paragraphs 1 to 4 apply. In other words, whera as to the fields (trade in goods, cross-frontier supplies of services an counterfeit goods), which are considered under the extended notion customs union, there is no connection with internal rules, regarding th notion of the common market the logic of parallelism is upheld Accordingly, the different legal treatment in the services sector caused b the distinction between the mode of cross-border supply on the one hand consumption abroad and the presence of natural persons, on the othe continues to exist.(Lukaschek and Weidel , 2002: 138) As argued also b the Commission, the guiding principle of the new Article is to alig decision-making for the trade negotiations on internal decision-making rules, which reflects the logic of parallelism (Commission, 2000) According to some scholars, this different legal treatment also shows th reluctance of the Member States to extend the scope of the CCP to these domains (Gautier and Lianos, 2001 : 193). In that regard, it should be born in mind that the consequences of unanimity rule would not make bi difference in the exercise of those competences from the consequences o shared competences, save the national ratification and so the use of mixe agreement formula. It is also noteworthy that the reason behind th unanimity requirement for the fields where the Community has not yet exercised its internal competences, which would be assumed to preserve the logic of internal integration, would exceed its function. Accordingly it would impede the Community to adapt to the developments of international trade law and to take advantage of the exercise of its external competences under compelling circumstances, and so would restrict the Community in the external sphere parallel to the line where it has actualised its interna potential competences under the logic of the internal regime.

Moreover, Article 133(5)(3) brings the concept of horizontal agreement into the Treaty by referring both to the preceding subparagraph and Article

133(6)(2). I think that the concept of horizontal agreement, which is not defined, comprises matters such as capital, probably foreign direct investment and competition that are not included within the new Article 133 alongside the matters included within. Therefore insofar as any horizontal agreement also concerns Article 133(5)(2) and Article 133(6)(2), the Council must act unanimously to negotiate and conclude it.[10] Therefore, the conflict between QMV and unanimity is resolved in favor of unanimity, so the stricter procedural rule applies.[11] Horizontal agreements, some provisions of which are based on the doctrine of implied powers to be concluded under Article 300, must be concluded with unanimity whenever they also concern the fields of services and intellectual property rights, which require unanimity because of internal constraints and the fields of special kind of services, which are within the Treaty-based shared conventional competence and in terms of which the Community has only supporting, coordinating and complementary competences in the internal market and the Treaty therefore impedes total internal harmonisation. Consequently, it could be argued that the Community conventional competences regarding those areas to be exercised via QMV under Article 300 stay under the shadow of strict unanimity imposed by Article 133(5)(3). It is strange that whereas Article 133 conceives both the delimitation of competences and procedural rules to exercise of those competences in a piecemeal approach, its conception for agreements within the framework of the WTO is under the strong influence of package deal approach because of the interlinked characteristics of its Annexes, since whenever a horizontal agreement is to be concluded, the stricter rule, the unanimity, applies.

Furthermore, in Article 133(6)(2), the Treaty itself gives guidance to the Community and the Member States how to exercise those shared conventional competences in accordance with Article 300 by declaring the

[10] In brief, unanimity is required where it is required for the adoption of concerning internal rules; where the concerning internal competences have not been exercised yet; as regards the special services sectors under Article 133(6)(2); in horizontal agreements.

[11] According to the *Commodity Coding* Case, (Case 165/87 *Commission of the European Communities v Council of the European Communities* [1988] ECR 5545) at paragraph 11, where a measure comes partly within the area covered by one Article and partly within that covered by another, the procedural requirements of both Articles on a dual legal basis must be satisfied. See. In that regard, this subparagraph seems a codification of a jurisprudential principle and also a restriction of procedural rules for the Community competences concerning the other fields by the new Article 133.

requirement of the conclusion of concerning 'mixed' agreements throu common accord of the Member States for their respective parts.

As regards Article 133(3)(1), the institutions will be responsible f ensuring that the agreements concerning the whole CCP are to compatible with internal Community policies and rules. With compatibility obligation, the new version indicates that internal polic objectives are relevant in determining external trade positions.(Cremon 2001: 76) In jurisprudence however, the international agreements conclude by one of the institutions of the Community take precedence over secondar Community law. In that respect, whereas under Article 300(6),[12] it allowed that international agreements may entail the Community amendin secondary legislation, under Article 133(3)(1), which applies Article 300 i a specific way, the Commission and Council have to take into considerati possible future internal amendments and ensure the compatibility o concerning agreements with internal Community policies and rules. In tha regard, this new provision requires that international agreements henceforth be negotiated and concluded only if they do not require any changes in preexisting Community law including particularly secondary legislation, or after the modification of secondary law to enable that agreement to be concluded (Griller and Gamharter, 2002: 107). On the other hand, it is also asserted that the duty of compatibility (consistency) is rather an obligation to resolve any inconsistency, which derives from Article 300(7). Otherwise it would render external trade policy completely unworkable if the new provision meant that the Community could not negotiate any agreement that was not compatible with Community secondary law, as it stands[13] (Cremona, 2001: 76). Furthermore, although according to Opinion 1/94 the ECJ did not require the CCP to be compatible with the internal policies and rules, I think that the new provision restricts the Community competence even within the scope of the core CCP by emphasising the prominence o internal rules and policies.

[12] The fact that Article 300 requires compatibility of international agreements wi the Treaty implies that the Community may conclude agreements which lead amendment of secondary Community law.

[13] It is also asserted that since the negotiating history of Article 133 does n indicate that such a drastic change was raised as an issue, Article 300(3)(2) mu remain applicable, which states agreements may entail the amendment of seconda Community law. (Griller and Gamharter, 2002: 107)

Lastly, Article 133(3)(2) provides that the Commission is under the duty not only to consult the Article 133 Committee while conducting negotiations, but also to regularly report to it on the progress of negotiations. Accordingly, the function of the Article 133 Committee is strengthened, so even if the Community is allowed to act in the new fields with QMV, it will be under the control of the Member States via that Committee.

3.4 General Remarks on the Nice Version of the CCP

Pescatore presumes that the new Article 133 is a legal bricolage, the primary effect of which will be to paralyse the decisional process inside the Community and to hamper a flexible defence of the Community's trade interests (Pescatore, 2001: 267). Griller and Gamharter consider this amendment a major step backwards. (Griller and Gamharter, 2002: 100). The amendments not only make the external trade policy, as correctly described by Cremona, a "policy of bits and pieces" and difficult to understand even for legal scholars, but also cause some confusion about the nature of the competences of the Community regarding the new fields. Its real threat is described as fragmentation and deconstruction of the CCP into a policy of bits and pieces, which signify a lack of coherence arising out of revision, and a number of different permutations and procedures applicable to the different aspects of commercial policy (Cremona, 2001: 61, 62, 89). It is true that it is also a complicated set of restrictions, reservations and exceptions to the exception (Griller and Gamharter, 2002: 109). This is because the new provision is drafted within the logic of parallelism to protect the logic of delimitation in internal competences, the result of which is a fragmented trade policy by virtue of a piecemeal approach applying to the new areas, which unfortunately will affect the effectiveness of the CCP. Parallelism between internal and external competences is not only procedural but also substantive; it concerns competence as well as compatibility, policy as well as decision-making rules (Cremona, 2001: 75). Therefore, it creates differential decision-making procedures by systematically giving priority to internal rules over international commitments. Consequently, the existing delimitation of competences in external trade could be maintained, since the general trend is therefore to tighten at all stages the control of the Member States, as States, over external trade policy in order to meet national concerns (Pescatore, 2001: 266). It can be seen here that how do the procedural requirements affect the vertical delimitation of competences in the Community legal order and how do they take a significant part in the vertical competence delimitation game.

Generally, the new Article 133 is very complicated, lacks simplicity to b understood even by legal scholars in order to reach a consensus and lack adaptability to the progress of international trade law.

The amendments to Article 133 bring a bizarre situation and ambiguity into Community law. In fact, with the new provision, the divided and fragmented characteristics of external trade determined by the ECJ in *Opinion 1/94* as the core (the CCP) and periphery (implied external competences) of external trade policy is carried into the CCP. In other words, the Nice Treaty brings the implied competences in external trade remaining outside the CCP into it - a codification of existing potential competences of the Community.[14] On the other hand, it does not touch the core of the CCP, so preserves the *acquis communautaire* developed so far in terms of the CCP, save the restriction through the compatibility requirement under Article 133(3). Accordingly, for the first time it clearly separates the CCP from the doctrine of exclusivity, since the new fields will be subject to the varying types of shared competence (Cremona, 2002: 375). However, it is noteworthy that the question of the unity and coherent action of the Community should not have been disconnected from the nature of Community competences (Gautier and Lianos, 2001 : 181).

Furthermore, the measures regarding the implementation of agreements are still governed by internal provisions. Thus, as long as no internal harmonisation is achieved, the Member States remain competent to implement the agreements concluded by the Community in the new areas, so preemption still seems important internally. In cases where secondary legislation exists and precludes Member State activity, the Community itself is bound to take legislative steps for the implementation of agreements, but these implementing acts must not be based on the new Article 133, which is related to conventional aspects only, but on the internal competences (Griller and Gamharter, 2002: 95). In other words, internal provisions still apply for autonomous measures in the new areas even for the Community. Therefore, the need for an alternative legal basis for the implementation of the agreements regarding the fields within the scope of extension strengthens the complexity of the legal structure in these fields (Cremona, 2001: 73).

[14] In that regard, as mentioned above, this new version should also be regarded as an exceptional legal basis enabling the Community to exercise its potential competences under the procedure of the CCP for the commercial objectives irrespective of prior jurisprudential constraints.

The CCP, which could be regarded still as a part of external economic relations only, is therefore separated into two components: whereas as to the core to which paragraphs 1 to 4 apply, the periphery to which other paragraphs apply and the periphery to the periphery to which *ultra vires* prohibition applies; whereas as to the core and the periphery to which the QMV applies, as to the periphery and the periphery to the periphery to which unanimity rule applies; whereas as to the core both aspects of competences (conventional and implementing competences) are conferred, as to the periphery the dissociation of conventional competences from implementing competences is provided; whereas as to the core the characteristics of exclusivity is maintained, as to the periphery the type of conferred competences is explicit shared, but non-concurrent.

In the Nice Treaty, consequently the content of the new extension is defined and regulated according to the subject-matters. It is based on a piecemeal approach, which is also against the general trend in Community law, i.e. the evolutionary construction of the Community and the dynamic division of competences. European experience is based on the non-strict division of competences with catalogues within the Community legal order in order to enable the Community to adapt to international developments immediately, otherwise the attainment of the Treaty objectives would lose its central point in determining the division of competences in the Community structure. The new Article 133 thus limits to some extent the discretionary power of the ECJ. The scope of the CCP can no longer be defined by principles, even by the ECJ, in accordance with its evolutionary characteristics, since the amendments not only strengthen the restrictively interpreted characteristics of the core CCP by adding in paragraph 5 that "in so far as those agreements are not covered by said paragraphs", but also contain guaranty for its fragmented structure. In that regard, the new version blocks the dynamism of the CCP by even preventing the ECJ from re-interpreting its content. In this case, the new version also banalises the notion of the exclusive external competences of the Community, by putting forward exceptions to exceptions which are exception to the core and linking them up with the exercise of internal competences through procedural requirements. Thus the nature of explicit exclusive competence is distinguished from its material scope (Gautier and Lianos, 2001 : 204).

With the permanency of shared competences concerning the agreements related to trade in cultural and audiovisual, educational, social and human health services the concept of 'shared competence' developed in jurisprudence is now enshrined in the Treaty as a new legal category

(Meunier and Nicolaidis, 2001). So it is a sign of constitutionalisation an perpetuation of the mixed agreement formula in the external sphere (Gauti and Lianos, 2001 : 200). Additionally, amendments also give most parts *Opinion 1/94* constitutional value by putting them into the Treaty (Gauti and Lianos, 2001 : 191). For instance, the fact that the new Article 133 do not entail the extension of QMV to cases where it did not exist before an cannot be used as a means to outflank explicit internal restrictions reflect its conformity with the ECJ's approach in *Opinion 1/94* (Cremona, 200 378). Furthermore, the new Article 133 indicates by referring to "insofar a those agreements are not covered by the said paragraphs" that the notion o the CCP interpreted by the ECJ in *Opinion 1/94* is primarily taken int consideration.

On the other hand, Article 133(5) has a regulating function for th exercise of the Community competences, not a function of attributing new competence to the Community (Neframi, 2002: 633). In other words, the new version does not expand the existing external competences of the Community, but allows exclusively exercise of its potential competences irrespective of prior internal constraints developed in the jurisprudence with an exceptional legal basis within the scope of the CCP. Accordingly, the amendments could be regarded as a clarification of the existence of implied shared competences, which can no longer be questioned (Griller and Gamharter, 2002: 109). In that respect, it seems more like a codification of existing implied competences than a truly new set of external competences the construction of which reflects the functional criterion for commercial objectives (Neframi, 2002: 633), since nowhere else in the Treaty are express external competences explicitly linked to the internal competences (Cremona, 2001: 78). However, as far as exclusivity is concerned, the preservation of the existing position might have consequences in the contex of implied powers, so the line between exclusive and non-exclusiv competences may change (Cremona, 2002).

With the allowance of more extensive exercise of its externa competences, I would assert that in external trade the Community get closer to the structure of federalism. However, it is still far from being a external façade of the common market concerned only with services an intellectual property rights by excluding subject-matters such as capita probably foreign direct investment and competition. The consequence of th exclusion of capital movements from the scope of the CCP is also a furth restriction on services, since financial services, even if they do not invol

the movement of persons, remain outside the scope of the CCP, as far as they are linked with the transfer of capital (Lukaschek and Weidel , 2002: 127). Lastly, with respect to the WTO, it is impossible for the Community to replace totally the Member States in the WTO.

4. The CCP in the Constitutional Treaty

The Constitutional Treaty makes some radical changes by integrating the CCP, as its significant constituting part, into the single framework of external relations of the EU to be conducted in the context of its principles and objectives[15], which emphasises the interconnectedness and interdependence of all matters in the globalised world. Article III-314 declaring the term 'the Union' confirms the exclusivity of the CCP enshrined in Article I-13(1)(e), so the cessation of external competences of the Member States within the scope of the CCP. According to Article III-315(1) the exclusive nature of the CCP is provided, without any reservation, to be based on uniform principles particularly, with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods, services, the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade.[16] Correspondingly, the fragmented structure of the CCP in the Nice Treaty is relinquished, save unanimity rules as a procedural requirement. The authorisation of national protective measures under Article 134 by the Commission in cases of deflection of trade or economic difficulties is also eradicated. Additionally, the second paragraph of Article 131, which refers to the favourable effect of the abolition of customs duties between the Member States upon the competitive strength of undertakings is removed. Furthermore, Article 132 with regard to the harmonisation of the systems whereby the Member States grant aid for exports to third countries is abolished. However, the compatibility requirement inspired by the Nice Treaty is retained, since Article III-315(3)(2) requires that the institutions of the Union shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. Furthermore, the negotiation and conclusion of international agreements in the fields of

[15] Article III-292 sets out those principles and objectives.

[16] Uniform principles apply to the establishment of tariffs, the conclusion of tariff and trade agreements, achievement of uniformity in measures of liberalisation, export policy, the protective measures in the event of dumping and subsidies.

transport is still excluded from the ambit of the CCP and so will be subje to the provisions of Section 7 of Chapter III of Title III and Article III-325.

The objectives of the CCP in Article III-314 are extended, thus th Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions o international trade and on foreign direct investment, and the lowering o customs and other barriers. Given that the CCP will be conducted in the context of the principles and objectives of the Union's external action a stated in Article III-315(1), its objectives also include the principles and objectives of external action such as sustainable economic development, human rights, integration of all countries into the world economy, promotion of an international system based on multilateral cooperation and global governance. Whether the Union exercises the CCP in the context of these principles and objectives will then be subject to the judicial control of the ECJ. "The objectives of the CCP are thus broadened beyond the uniformity inspired internal market rationale and WTO-inspired trade liberalisation" to encourage a greater coherence not only across external policy, but also between external and internal policies (Cremona, 2003: 1347). Accordingly, the CCP is shown as an important component of the big picture of all external action.

The conclusion of international agreements relating to trade in foreign direct investment, as a subject-matter, is inserted into the CCP in recognition of the fact that financial flows supplement trade in goods and today represent a significant share of commercial exchanges (CONV 685/03). With respect to the term 'foreign direct investment', Krajewski discusses what type of agreements the CCP embraces (Krajewski, 2005: 111-114). He asserts that the extension of the CCP should be narrowly interpreted, since the inclusion of foreign direct investment in Article III-315(1) should thus be regarded as including those aspects of foreign direct investment that have a direct link to international trade agreements. Foreign direct investment would therefore be only part of the CCP as far as restrictions to foreign direct investment are concerned in the context of Article III-314, but not investment protection against expropriation. Only investment negotiations that have clear trade component should thus be part of the CCP.

It is noteworthy that this argument seems in line with the interpretation of the scope of the intellectual property rights, since its commercial aspects

is only taken into consideration in the construction of the Article, which is assumed to comprise intellectual property within the WTO Agreement. The term 'the commercial aspects of intellectual property' is retained by the Constitutional Treaty without any reference to its other aspects with the allowance of extension enshrined under Article 133(7). It could be considered that it entirely comprises the trade-related aspects of intellectual property regulated in the TRIPs Agreement.

In addition, although the scope of the CCP[17] extends the concept of customs union and get closer to become the external façade of the common market, the term 'customs union' is preserved in Article III-314. It could be assumed to refer to the WTO Agreement, which defines the exception of economic integration with the term 'customs union'. It could also be asserted that it is preserved as being an origin and the fundamental base, on which the European integration has evolved.

According to Article III-315(2)[18] European laws shall establish the measures defining the framework for implementing the CCP. However, as stated in Article III-315(6), the exercise of the competences conferred by Article III-315 within the scope of the CCP "shall not affect the delimitation of internal competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of Member States insofar as the Constitution excludes such harmonisation." This situation brings some ambiguity in terms of the scope of the CCP. Whether the CCP includes implementing competences alongside conventional competences is answered in fact by Article III-315(2), which clearly confers implementing competences, in affirmative way. However, it remains to be determined to what extent implementing competences are conferred. Certainly Article III-315(6) reflects the aim to protect the logic of internal delimitation of competences. In other words, as regards its first part this Article seems as a temporary bulwark against the reverse-*AETR*-effect, which has been the main national concern against the extension of the CCP so far. Therefore, external exclusivity shall not have a reverse-AETR-effect

[17] As to the subject-matters declared in Article III-315, it could be asserted that in pre-Opinion jurisprudence these subjects had been non-exhaustive and declarative, so 'in principle' no particular instrument should be a priori excluded from its scope. However, it remains to be interpreted by the ECJ whether any subject, which is not stated in Article III-315(1), would take place within the scope of the CCP.

[18] The term 'framework laws' is deleted from this paragraph in order probably to provide full uniformity through only European laws.

on national internal competences against the logic of internal delimitat until the degree of harmonisation in the sphere of positive integratio attained. It could be asserted that whenever internal harmonisation has b attained, autonomous measures could then be taken on the basis of Art III-315. As regards the second part of the Article, there is an absol prohibition to harmonisation of legislative or regulatory provisions of Member States where the harmonisation is ruled out regarding "supporti coordinating and complementary competences in terms of educatio culture, vocational training and health regulated in Article I-1 Accordingly, there is an absolute permanent prohibition for the Union as t implementing competences for the respective subject-matters, which rul out harmonisation. The Member States will then be under the duty tc implement agreements, which are negotiated and concluded by the Unior within the scope of the CCP.[19]

QMV is provided in the commercial policy save the following fields. The unanimity requirement for the Council to act is therefore maintained by Article III-315(4) for the following cases. The Council shall act unanimously for the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal rules. The Council shall also act unanimously for the negotiation and conclusion of agreements: a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them." It is noteworthy that the risk of prejudicing the Union's cultural and linguistic diversity on the one hand, the risk of seriously disturbing the national organisation of respective services and the risk of prejudicing the responsibility of Member States to deliver them on the other hand remains to be determined by the ECJ as a last resort. Accordingly, in terms of the risk assessment, the onus of proof lies with the Member States and the assessment will be subject to the judicial scrutiny of the ECJ.

[19] Here comes the constitutional principle of the duty of cooperation into play to govern how to exercise those respective competences.

On the other hand, the unanimity requirement in the Nice Treaty relating to the field in which the Community has not yet exercised its internal competences is removed. Furthermore, the Constitutional Treaty removed not only the nature of shared competence regarding the fields of cultural and audiovisual services, educational services, social and human health services, but also horizontal agreements. Accordingly, in terms of the WTO Agreement, which is considered in the context of package deal, the fact that the ratification requirement for the fields within the shared competences has been a big obstacle for the conclusion of the entire (mixed) agreement is removed in the Constitutional Treaty. However, even though exclusivity is provided for the respective subject-matters, the unanimity requirement would pose a significant problem in the negotiations and conclusion of agreements in external trade, since unanimity would lead to the same result with the cases of shared competences. It could easily lead to deadlock, and so no action or agreement at all in those fields by virtue of the total cessation of the external trade competences of the Member States. It would cost the entire agreement under the WTO regime because of its package deal characteristic.

What is the difference of the CCP in the Constitutional Treaty from the Nice version of the CCP? The Constitutional Treaty does no longer contain *ultra-vires* prohibition connected to internal competences, as enshrined in Article 133(6)(1), even though restrictions on implementing competences are retained. In Article III-315, conventional competences as to the sectoral fields no longer are excluded from the *ratione materiae* scope of the CCP. Whereas in Article 133 only conventional competences are conferred, in Article III-315 both conventional and implementing competences are conferred, though implementing competences as to the subjects where harmonisation is possible will chase the evolution of European positive integration in the internal market and implementing competences as to subjects where harmonisation is ruled out are absolutely excluded. It could therefore be asserted that the substantive attribution of competences within the scope of the CCP no longer depends on the logic of parallelism, save procedural parallelism as a safeguard for sectoral fields. The Union not only may have external competences beyond the existence of its internal competences, irrespective of their exercise, but also may exercise them more broadly than the degree of internal harmonisation. Accordingly, the scope of the external Union competences would extend beyond the scope of its internal competences, both in existence and exercise, the situation of which is defined by Krajewski as a step towards further federalisation of the Union's external relations (Krajewski, 2005: 117-119). Consequently, the

CCP in the Constitutional Treaty is in the way to further become a truly express exclusive external competence.

5. Conclusion

The Constitutional Treaty much more simplified the provisions of the CCP after the complex structure of the Nice Treaty. The new CCP to be conducted in the context of the principles and objectives of the Union's external action would promote efficiency in external trade for the Union, not only in facing the problems of globalised world, but also in playing a proactive role in the construction of mutually cooperative global governance to reach the abovementioned objectives without damaging the logic of internal delimitation. However, the unanimity requirement, arising from the national concerns facing the globalisation, regarding the respective fields poses a real problem and would impair the efficiency of the new CCP. The unanimity stays as a sword of Democles on the exercise of conventional competences especially in the context of the WTO framework under its single package deal. The national control on conventional competences of the Union within the scope of the CCP is strengthened by Article III-315(6) through the delimitation of implementing competences, where the implementation lies with the Member States. The combination of unanimity with the QMV rule and the minor dissociation of conventional competences from implementing competences bring another permutation to the CCP, which enables the national control on the exercise of Union competences within the CCP inspired by national concerns. Even though the Union has gained a great scope of competences, their exercise is not guaranteed to be in a supranational way. The Member States would always be in the policy-making via unanimity rule, the Article 315 Committee and urge arising from their implementing competences.

Moreover, the doctrine of implied powers developed in jurisprudence is explicitly recognised in Article I-13(2), according to which "[t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope." It is also confirmed in Article III-323(1) that "[t]he Union may conclude an agreement with one or more third countries or international organisations where the Constitution so provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the

Union's policies, one of the objectives referred to in the Constitution, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope." Furthermore, Article I-18(1), which is called flexibility clause and has precedent in Article 308, states that "[i]f action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures." The preceding legal bases, which have been developed in the case law, would be needed in terms of external economic relations the concept of which still has a more comprehensive content than that of the CCP in the Constitutional Treaty. However, the Constitutional Treaty fails to clarify the phenomenon of mixed agreements arising from the shared nature of external competences.

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