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# Opinion 1/75 and exclusive European Union competences

Panos Koutrakos

## 1. Historical and Doctrinal Context

The 1960s and early 1970s saw the introduction of the main principles that shaped the constitutional nature of the European Economic Community (EEC) legal order, namely the supremacy<sup>1</sup> and direct effect<sup>2</sup> of EEC law. During that period, the development of EEC law was firmly about the relationship of the latter with the domestic law of the Member States and, particularly, the distinct features of the nascent legal system that would ensure its effectiveness vis-à-vis recalcitrant national authorities.

The foundations of the nascent legal order were laid gradually at a time when primary law made only a few references to external action. On the one hand, the EEC was endowed with express competence to pursue a Common Commercial Policy (CCP): Article 113 EEC Treaty (now Article 207 TFEU) provided that ‘the common commercial policy shall be based on uniform principles, particularly in regard to tariff amendments, the conclusion of tariff or trade agreements, the alignment of measures of liberalisation, export policy and protective commercial measures including measures to be taken in cases of dumping or subsidies’. This competence must be viewed in the context of the establishment of the customs union at the core of the internal market and the requirement for the adoption of a common customs tariff in the relations between the Member States and third countries as a necessary component of it.<sup>3</sup> On the other hand, the EEC was also competent to negotiate and conclude association agreements with a third country, a union of States or an international organisation<sup>4</sup> and to establish cooperation with international organisations.<sup>5</sup> Both these legal bases made no reference to the specific objectives of these policies, referring, instead, to how the latter are to be carried out.<sup>6</sup>

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<sup>1</sup> Case 6/64 *Costa v Enel* EU:C:1964:51 and Case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114.

<sup>2</sup> Case 26/62 *Van Gen den Loos* EU:C:1963:1. See B de Witte, ‘Direct Effect, Primacy, and the Nature of the Legal Order’ in P Craig and G De Burca (eds), *The Evolution of EU Law* 3<sup>rd</sup> ed (OUP, 2021) 187, in particular 188-192. See also Chapters 1 (by K Lenaerts) and 2 (by B de Witte) in this volume.

<sup>3</sup> Art. 9 EEC Treaty (now Art. 28(1) TFEU).

<sup>4</sup> Art. 238 EEC Treaty (now Art. 218 TFEU).

<sup>5</sup> Arts 229-231 EEC Treaty (now Art. 220(1) TFEU).

<sup>6</sup> It is for this reason that Cremona refers to the ‘absence of a *telos* in EU external policy’: M Cremona, ‘Structural Principles and their Role in EU External Relations Law’ in M Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart Publishing, 2018), 3 at 5.

Once the EEC had been well into its infancy, and against the dearth of primary provisions about external relations, questions about the rules governing external action started to arise. In March 1971, the Court had not only introduced the principle of implied external competence but had also held that such competence was exclusive in cases where action by Member States would affect internal rules or alter their scope.<sup>7</sup> While its disjointed reasoning was underpinned by the constitutional thread that had run through the foundational case-law on supremacy, the judgment broadened up the scope of the EU powers in ways that were viewed in some circles as running counter to the EEC Treaty.<sup>8</sup>

It was at that juncture, and four and a half years after the *AETR* judgment, that the Court handed down Opinion 1/75<sup>9</sup> in which it examined for the first time not only the scope of the European Economic Community (EEC) competence to conclude international trade agreements but also the nature of that competence. It did not do so in a policy vacuum. In terms of international law, Article XXIV:8(a) General Agreement on Tariffs and Trade (GATT 1947) defined (and still does) a customs union as ‘a single customs territory’ where ‘substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union’. The EEC had already been active in the context of GATT negotiations, even though it had not acceded to it.

As for the nature of the Community’s competence in CCP, scholarly analysis in the area had contested exclusivity on the basis of the conferral of external powers under primary law or had suggested that exclusivity was confined to the conclusion of international agreements but did not extend to autonomous measures in the absence of common rules.<sup>10</sup> Even in relation to international agreements, it had been argued that exclusivity did not have to extend to all trade agreements but only to those applicable to tariffs: Everling, who later became a European Court

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<sup>7</sup> Case 22/70 *Commission v Council (AETR)* EU:C:1971:32, para. 22 (see Ch. 6 by M. Cremona in this volume). See also I Govaere, ‘Implied Powers of the EU, Limits to Political Expediency and Internationally Inspired Pragmatism: *Commission v Council (ERTA)*’ in G Butler and R Wessel (eds), *EU External Relation Law – The Cases in Context* (Hart Publishing, 2022) 9.

<sup>8</sup> See the Opinion by AG Dutheillet de Lamothe, as well as the earlier analysis in P Pescatore, ‘Les Relations extérieures des communautés européennes, (1961) 103/II Recueil des Cours de l’Académie de Droit International de La Haye 1 at 97 (he subsequently reconsidered his view in ‘External Relations in the Case-Law of the Court of Justice of the European Communities’ (1975) 12 CMLRev 615 at n5).

<sup>9</sup> Opinion 1/75 (re: OECD Local Cost Standard) EU:C:1975:145.

<sup>10</sup> See the summary provided in P.J.G. 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) 11 Tex/ Int’l L.J. 485 at 492-494.

of Justice (ECJ) Judge, had suggested that, whether the uniform principles referred to in Article 113 EEC Treaty were ‘to be carried into effect by truly collective proceedings or rather by concerted action of Member States remains open and is left to the discretion of the Council to decide from case to case’.<sup>11</sup>

Three years prior to Opinion 1/75, it had been held in *International Fruit Company* that the Community had succeeded the Member States in the rights and obligations laid down in GATT as the Member States had transferred the relevant powers so that the EEC ‘has assumed the functions inherent in the tariff and trade policy, progressively during the transitional period and in their entirety on the expiry of that period’.<sup>12</sup> The judgment did not refer expressly to the exclusive competence of the EEC. However, it was couched in terms that suggest exclusivity, a point that became clearer in subsequent case-law on the circumstances under which the EU may assume the rights and obligations of Member States in agreements concluded by the latter.<sup>13</sup>

Against this background, the significance of Opinion 1/75 is not only about what the Court decided but also when and how it did so: Opinion 1/75 was part of the very first cases which laid the foundations of the power of the EEC to act on the international scene and was couched in strong and uncompromising terms which, while adjusted in practice, have become a point of reference for both subsequent case-law and practice.

## 2. Facts and judgment

In Opinion 1/75, the Commission asked the Court to rule on the compatibility with the European Economic Community (EEC) Treaty of a draft Understanding on a Local Cost Standard for export credit schemes.<sup>14</sup> Along with other sectoral agreements (on export credits

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<sup>11</sup> U. Everling, ‘Legal Problems of the Common Commercial Policy in the European Economic Community’ (1966–7) 4 CMLRev 141 at 150.

<sup>12</sup> Joined Cases 21-24/72 *International Fruit Company* EU:C:1972:115, para. 14. This formed the origin of the so-called ‘succession doctrine’ the scope of which has subsequently been clarified in strict terms, including in Case C-366/10 *Air Transport Association of America and Others (ATAA)* EU:C:2011:864. See R Schütze, ‘The “Succession Doctrine” and the European Union’ in A. Arnulf et al. (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing, 2011), 459.

<sup>13</sup> See A Petti and J Scott, ‘International Agreements in the EU Legal Order: *International Fruit*’ in Butler and Wessel (eds), n7 above, 21 at 27.

<sup>14</sup> The procedure on the basis of which the Court may be asked to rule on the compatibility of an envisaged agreement with EU law is laid down in Article 218 (11) TFEU. Opinion 1/75 was the first time the Court ruled on the basis of this procedure.

in specific aviation sectors, nuclear power plants, and telecommunications), this Understanding had been negotiated and drawn up under the auspices of the Organisation of European Economic Cooperation and Development (OECD).

In Article 112, which was subsequently repealed, the EEC Treaty provided as follows:

Without prejudice to obligations undertaken by Member States within the framework of other international organisations, their measures to aid exports to third countries shall be progressively harmonised before the end of the transitional period to the extent necessary to ensure that competition between enterprises within the Community shall not be distorted.

The request for Opinion 1/75 was submitted in the light of two parallel developments. On the one hand, while the transitional period had expired on 31 December 1969, the export credit systems of the Member States were still characterised by divergences. On the other hand, OECD negotiations had led to the finalisation of a draft agreement (the Understanding that was the subject-matter of Opinion 1/75) which would introduce a common standard for financing costs incurred in the state where the buyer was established. While the Commission had proposed that the Draft Understanding be concluded solely by the EEC,<sup>15</sup> one of the then nine Member States disputed the existence of the EEC's competence on the matter and two were of the view that the participation of the EEC would not exclude that of the Member States.<sup>16</sup>

In Opinion 1/75, the Court dealt with three issues. The first was the definition of an international agreement in the context of the procedure laid down in Article 228(1) EEC Treaty (now Article 218(11) TFEU): consistently with other strands of its case-law,<sup>17</sup> the Court adopted a function approach according to which 'any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation' amounts

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<sup>15</sup> COM (1974) 2238 fin *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* (Brussels, 18 December 1974).

<sup>16</sup> This information is provided in the Commission's request for Opinion 1/75 (p2): while the Opinion itself makes no reference to this request, the full text, along with all other procedural documents related to Opinion 1/75, are now available online in the Historical Archives of the European Union (CJEU-2383, Original code: C2-02-004) (<https://archives.eui.eu/en/files/documents/32974.pdf?d=inline>). For an analysis of the whole dossier, see J Kukavica, 'The Garden Grows Lusher: Completing the Narratives on Opinion 1/75', (2021) 6 *European Papers* 621.

<sup>17</sup> See, for instance, the definition of an 'act' in the context of an annulment action (Case 22/70 *AETR*, n7 above paras 41-42) or the definition of 'an emanation of the State' in the context of direct effect of directives (Case C-188/89 *Foster and Others v British Gas* EU:C:1990:313 at para. 20).

to an agreement within the meaning of the above EEC provision.<sup>18</sup> Having concluded that the draft Understanding on a Local Cost Standard met that definition, it moved on to the second issue, namely whether the conclusion of the Understanding fell within the competence of the EEC pursuant to Article 113 EEC Treaty (now Article 207 TFEU) governing the Common Commercial Policy (CCP). The answer was affirmative: applying a broad approach, the Court held that the concept of 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’ and that it ‘is in fact made up by the combination and interaction of internal and external measures, without priority being taken by one over the others. Sometimes agreements are concluded in execution of a policy fixed in advance, sometimes that policy is defined by the agreements themselves’.<sup>19</sup>

This chapter will focus on the third issue, namely the nature of the EEC’s competence to conclude the Understanding.<sup>20</sup> The conclusion that the draft Understanding on a Local Cost Standard for export credit schemes fell within the exclusive competence of the EU was substantiated on the basis of two main arguments.

The first was the function that the CCP played for the EEC internal policies: it was designed ‘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’.<sup>21</sup> Viewed in its internal market context, the CCP was held to give rise to exclusive competence on practical grounds:<sup>22</sup>

In fact, any unilateral action on the part of the Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member states in external markets. Such distortion can be eliminated only by means of a strict uniformity of credit conditions granted to undertakings in the Community, whatever their nationality.

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<sup>18</sup> Opinion 1/75, n9 above, at 1360.

<sup>19</sup> Opinion 1/75, n9 above, pp 1362 and 1363.

<sup>20</sup> For an analysis of the scope of the CCP, see ch. 20 in this volume (by I Govaere), as well as 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/Nijhoff, 2020) 47.

<sup>21</sup> Opinion 1/75, n9 above at 1363-4.

<sup>22</sup> *Ibid* at 1364.

The second argument was about the defence of the EEC interests on the international plane: the Community's competence had to be exclusive for, otherwise,<sup>23</sup>

in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest.

The two arguments are intrinsically linked: the conception of the CCP as linked to the common market was necessary in order to protect the common interests of the Community, and unilateral external action by the Member States could have repercussions for the mutual trust within the Community.

Finally, the fact that responsibility for the financing of the mechanism in question was borne by the Member States was considered 'of little importance' regarding the transfer of competence to the Community.<sup>24</sup>

In Opinion 1/75, the exclusive nature of the EEC competence in the CCP field had two main characteristics. First, it was *a priori*: rather than flowing from the existence of internal common rules applicable to export credits, it was based on the very *raison d'être* of the CCP as laid down in primary law. Therefore, exclusivity in this policy context emerges as a new legal principle which flows from a policy imperative: it is inextricably linked to the existence of the CCP in primary law and is not related to pre-emption. Second, it was not affected by practical arrangements about the application of the agreement in question: whether the financing of the Understanding were to be borne out by the Member States, rather than the Community, was irrelevant to the nature of the competence of the latter to conclude it pursuant to Article 113 EEC Treaty (now Article 207 TFEU).

The Court's reasoning is distinctly teleological (the wording of Article 113 EEC Treaty is only mentioned last in the relevant section of Opinion 1/75). The latter is, therefore, firmly in the tradition of the early constitutional case-law. In this vein, the strong terms in which it is couched are striking: the internal function of the CCP is '[q]uite clearly, ... incompatible' with the

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

exercise of concurrent powers by the Member States which, in the field governed by the Understanding ‘is impossible’ while distortions of competition may be prevented ‘only by strict uniformity of credit conditions.’<sup>25</sup> The force with which the Court sets out its reasoning is all the more remarkable in the light of the earlier part of the ruling where the scope of CCP was construed very widely: in fact, the Court opined that commercial policy should have ‘the same content whether it is applied in the context of the international action of a State or to that of the Community’.<sup>26</sup>

In construing the Community’s competence in such uncompromising terms, Opinion 1/75 may appear to articulate an uncompromising approach to exclusivity and its implications for the stature of the Member States in areas that fall within the scope of CCP. However, it is not only the benefit of hindsight which questions this assumption. Whilst bolstering the foundation of exclusivity, the link between the CCP and the common market also serves to highlight the limits of the former by drawing upon practice under the latter. Indeed, the very development of the common market and the processes of establishing and managing the internal market attest to the paramount importance of observing the dividing line between Union and national competence: this line has not only been extremely fine but has also proved to be in need of constant redefinition. In other words, to construe the CCP as the necessary adjunct to the establishment of the internal market was tantamount to implying the existence of inherent limitations to the exercise of the express competence granted to the Union.

### **3. Reception history: judicial and academic**

The broad and forceful terms in which Opinion 1/75 was couched notwithstanding, some commentators were sceptical about the scope of the exclusive nature of the Community’s competence in CCP. The question whether, in the absence of common rules, the Member States had lost their power to adopt autonomous measures was still viewed as open.<sup>27</sup> And yet, the foundation of the competence in the very existence and *raison d’être* of the CPP suggests that its exclusive nature covers all aspects of the policy.

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<sup>25</sup> Ibid at p1364.

<sup>26</sup> Ibid at p1362.

<sup>27</sup> See Kapteyn, n10 above, at 502 and H.H. Maas, ‘The External Powers of the EEC with regard to Commercial Policy: Comment on Opinion 1/75’, (1976) 13 CMLRev 379 at 385-387, who also saw scope for Member States powers even in the conclusion of international agreements.

Therefore, in the light of the Court's Opinion two questions became central not only to the EU's external relations but also to the constitutional arrangements that govern the relationship between the EEC and the Member States. The first is about the scope of the CCP: the *a priori* exclusive competence of the Community rendered the answer to this question increasingly contested. The second question is about the implications of the nature of the Community's competence: does exclusivity rule out completely Member State action in the field or is there room for the latter and, if so, under which conditions? As the former question is beyond the scope of this chapter, the following analysis will focus on the latter.<sup>28</sup>

In order to address this question, let us jump ahead and see how the Member States responded to the introduction of exclusivity in the CCP at the level of primary law. Given their position as the masters of the Treaties, they may introduce exceptions. This is what they did at the Treaty of Nice by providing for shared competence in certain aspects of the CCP.<sup>29</sup> It is not for this chapter to analyse those provisions.<sup>30</sup> Suffice it to point out that the Nice amendment introduced a degree of disconcerting complexity in functioning of the CCP (in her Opinion in Case C-13/07 *Commission v Council (Vietnam's accession to the WTO)*, Advocate General Kokott stated as follows: 'No doubt this legal position is not exactly conducive to the effective representation of Community interests in the area of external trade, particularly and precisely in the framework of the WTO. However, this disadvantage must be accepted as the Treaties stand at present').<sup>31</sup>

The convoluted Nice approach to exclusivity in the CCP was abandoned at Lisbon where the Treaty on the Functioning of the European Union (TFEU) codifies the conclusion of Opinion 1/75 and, in Article 3(1)(e) expressly acknowledges the exclusive nature of the Union's competence in CCP. It also confers upon the Union exclusive competence in four other areas, namely customs union, the establishing of the competition rules necessary for the functioning

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<sup>28</sup> See ch. 20 in this volume (by I Govaere).

<sup>29</sup> On their interpretation, see Opinion 1/08 EU:C:2009:739, handed down the day before the relevant provisions would become defunct and the Lisbon Treaty would enter into force. See the analysis in M. Cremona, 'Balancing Union and Member State interests: Opinion 1/2008, choice of legal base and the common commercial policy under the Treaty of Lisbon' (2010) 35 ELRev 679.

<sup>30</sup> See M Cremona, 'A Policy of Bits and Pieces? The Common Commercial Policy after Nice', (2001) 4 CYELS 61, H.G. Krenzler and C. Pitschas, 'Progress or Stagnation? The Common Commercial Policy After Nice', (2001) 6 EFA Review 291, and C Hermann, 'Common Commercial Policy after Nice: Sisyphus Would Have Done a Better Job', (2002) 39 CMLRev 7.

<sup>31</sup> Opinion of A.G. Kokott in C-13/07 *Commission v. Council* EU:C:2009:190, para. 124 (the case was removed from the register on 10 June 2010).

of the internal market, monetary policy for the Member States whose currency is the euro, and the conservation of marine biological resources under the common fisheries policy.<sup>32</sup> In most of these, the Court had already found the competence of the Community (as it then was) to be exclusive.<sup>33</sup> In addition to the *a priori* exclusivity of the EU's competence in the above areas, Article 3(2) TFEU also refers specifically to exclusive competence to conclude international agreements '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 in so far as its conclusion may affect common rules or alter their scope'. An analysis of this provision and the kind of exclusivity it sets out, described by Dashwood as 'implicit or supervening',<sup>34</sup> is beyond the scope of this chapter.<sup>35</sup>

Of the small number of policy areas in which the EU is endowed expressly with exclusive competence, CCP is the only external one. In other strands of express external action, the power of the Member States is either provided for in primary law<sup>36</sup> or its exercise is dependent on legal and policy considerations related to the scope of the international agreement negotiated by the EU. The CFSP, in particular, is listed in Article 2(4) TEU separately and none of the other categories of competences listed in the remaining of Article 2 TEU applies to it.<sup>37</sup>

The codification of the EU's exclusive competence in the CCP notwithstanding, the question remains about the extent to which EU law may tolerate, sanction, or even provide for unilateral action by the Member States. The answer is affirmative and, as it emerges from a parallel development of post-Opinion 1/75 case-law and legislative initiatives, it will be set out in the following section.

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<sup>32</sup> Art. 3(1)(a)-(d) TFEU.

<sup>33</sup> On the conservation of marine biological resources, see Joined Cases 3, 4 and 6/76, *Kramer et als* EU:C:1976:114 and Case 804/79 *Commission v UK* EU:C:1981:93, and on the customs union, see Case 41/76 *Donckerwolcke* EU:C:1976:182, paras 31-2. For the process leading to the drafting of Article 3(1) TFEU and an analysis of the provisions of the latter, see R Schütze, 'Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order', (2007) 32 *ELRev* 3.

<sup>34</sup> A Dashwood, 'Mixity in the Ear of the Treaty of Lisbon' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: the EU and Its Member States in the World* (Hart Publishing 2010) 351 at 356 and 360.

<sup>35</sup> See P Koutrakos, *EU International Relations 2<sup>nd</sup> ed* (Hart Publishing, 2015) Ch. 3.

<sup>36</sup> See Arts 208(1), 210 and 211 TFEU, as well as Art. 4(4) TFEU, about development cooperation and humanitarian aid.

<sup>37</sup> It has been described as a competence 'of a special nature': A Rosas, 'Mixity and the Common Commercial Policy after Opinion 1/75 – An Overview' in Hahn and Van der Loo (eds), n20 above 27 at 41. See M Cremona, 'The Position of the FSP/CSDP in the Constitutional Architecture of the EU' in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Foreign and Security Policy* (Elgar Publishing, 2018) 5 and P Koutrakos, *The EU Common Security and Defence Policy* (OUP, 2013) 22-35.

#### 4. Famous follow-up cases

Soon after Opinion 1/75 had been handed down, a pragmatic approach to exclusivity in the CCP field emerged in the Court's case-law. We may identify two strands in particular.

The first is about a practical aspect of the agreement in question, that is financing. Three years after it had delivered Opinion 1/75, the Court was asked by the Commission in Opinion 1/78 to rule on whether the conclusion of a commodity agreement fell within the exclusive nature of the Community.<sup>38</sup> The request was about the International Agreement on Natural Rubber which had been negotiated in the United Nations Conference on Trade and Development (UNCTAD). Having interpreted the scope of Article 207 TFEU in wide terms, the Court dealt with the mechanism set up under the Agreement about the financing of the buffer stock. The Member States had argued that, under the International Agreement on Natural Rubber, the buffer stock would be financed by public funds which, in their view, justified their participation in the conclusion of the Agreement. The Court agreed with them. It considered the financing arrangements central to the very application of the Agreement: they were 'an essential feature of the scheme for regulating the market [to be set up by the Agreement]' and, for practical reasons, they ought to determine whether the Agreement would be concluded by the Community or the Member States, depending on which would finance the Agreement.

Opinion 1/78 showed for the first time, and contrary to its conclusion in Opinion 1/75, that the significance of exclusivity as an *a priori* principle might not necessarily entail the conclusion of an agreement exclusively by the Community. Put differently, Member States are not necessarily precluded from concluding, along with the Community, an agreement falling within the scope of Article 207 TFEU despite the fact that their exclusion is inextricably linked to the nature of the Union's competence in that area. The pragmatism that this approach illustrates is as considerable as it is curious: given that the financing issue had been deemed irrelevant to the nature of the Community's competence and account being taken of the essential nature of exclusivity for the functioning of the common market, how could it be diluted simply because the Member States would choose to finance the application of the Agreement? The criticism levelled against this part of the ruling for 'putting the cart before the horse'<sup>39</sup> is correct in so

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<sup>38</sup> Opinion 1/78 EU:C:1979:224.

<sup>39</sup> J.H.H. Weiler, 'The External Legal relations of Non-Unitary Actors: Mixity and the Federal Principle' in H.G. Schermers and D. O'Keefe (eds), *Mixed Agreements* (Kluwer, 1981) 35 at 72.

far as the Court appears to strike at the very core of its construction of the CCP by undermining the principle of exclusivity in an unprincipled manner.

Cut to its bare essentials, the ruling appears to suggest that the degree of national involvement in the practical components of what is deemed central to the implementation and application of an international agreement should be relevant to the exercise of the express competence over the CCP. This acknowledgment of the implications of the pronounced role enjoyed by the Member States in the management of areas of activity where their competence had been transferred to the Union echoes the pronounced role that the Member States actually played in the regulation of the CCP during that period.

This parallelism between judicial construction and political reality brings us to the second strand of the case-law on CCP exclusivity. When the Court handed down Opinion 1/75, the CCP was incomplete due to the absence of uniform rules. This state of affairs was acknowledged in post-Opinion 1/75 case-law. In *Donckwerwolcke*, a dispute about the legality of French law requiring that importers declare the ultimate origin of products in free circulation, it was still possible under existing EEC law for different rules to apply to products originating in a third country when they originally entered the EEC. As this disparity gave rise to the possibility of deflections of trade, the right of the Member States to deviate from the CCP was sanctioned, albeit under specific conditions.<sup>40</sup> This approach acknowledged the inevitable impact that the lack of progress at policy level would have for the protection of the interests of the Member States and sought to address them within a set of EEC conditions compliance with which would ensure that national authorities would not be granted a *carte blanche*.<sup>41</sup> Put differently, in the absence of uniform rules that would govern trade between the EEC and the rest of the world, unilateral action by Member States was tolerated by the EEC provided that it was exercised within certain parameters set out in EEC law. Therefore, in different areas of CCP, the EU institutions showed willingness to accommodate national concerns by giving Member States time and space to adjust gradually to a uniform regulatory regime.

A case in point was the importation of cars from Japan. The 1970s saw a very considerable rise throughout the Community, causing alarm to national industries about its impact on labour

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<sup>40</sup> Ibid, para.35. See also Case 52/77 *Leonce Cayrol v Giovanni Rivoira & Figli* EU:C:1977:196..

<sup>41</sup> On the specific authorisation requirement in other contexts, see Case 174/84 *Bulk Oil* EU:C:1986:60 (about export of crude oil) and Case 59/84 *Tezi Textiel* EU:C:1986:102 (about exports of textiles).

forces and competitiveness and, ultimately, raising the prospect of significant market losses. The extent to which national industries were affected varied considerably: in 1980, for instance, Japanese firms had approximately 43 percent of the automobile market in Greece and only 0.14 percent in Italy. Depending on the strength of individual domestic industries, each Member State sought to resist the penetration of its market by Japanese imports pursuant to arrangements negotiated individually. These arrangements took the form of national quotas and voluntary export restraints the terms of which varied: in 1977, for instance, France imposed a limit on Japanese products of 3 per cent of its market, whereas Portugal only allowed the importation of 20,000 passenger cars.<sup>42</sup> This overtly protectionist policy was, at that time, justified in the light of the significance of domestic automobile industries for the economy of Member States.

In 1991, an agreement, entitled 'Element of Consensus', was concluded between the Commission and the Japanese Ministry of Trade and Industry. Its objective was to establish the progressive and complete liberalisation of the importation of Japanese cars, off-road vehicles and light commercial vehicles by the beginning of 2000. It did so by regulating the import regime for the five most important European motor vehicle markets, namely France, Italy, Spain, Portugal and United Kingdom, on the basis of substantially increased quotas.<sup>43</sup> Whilst not introducing common rules applicable immediately throughout the Community market, the Commission sought to merge a number of disparate individual national policies into a common, albeit provisionally diverse, policy negotiated and administered at Community level. Therefore, it sought to reduce the scope of diversity within the common market and render complete liberalisation a concrete objective by phasing out diversity subject to a set of EEC rules.

In substantive terms, the above episode shows how the EEC was willing to take the interests of the major national industries into account and protected them. Viewed from this angle, the agreement illustrated two broader points: exclusivity in CCP did not necessarily render national interests irrelevant neither did it ignore them; the exercise of exclusive competence in CCP did not necessarily entail the substitution of national concerns for an inflexible and centrally

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<sup>42</sup> See M Mason, 'Elements of Consensus: Europe's Response to the Japanese Automotive Challenge' [1994] *Journal of Common Market Studies (JCMS)* 433 at 436.

<sup>43</sup> See BT Hanson, 'What Happened to Fortress Europe? External Trade Policy Liberalization in the European Union' (1998) 52 *International Organization* 55 at 74–80, Mason, nX above and CRA Swaak, *European Community Law and the Automobile Industry* (The Hague: Kluwer, 1999) 187–204.

designed policy model. In political and practical terms, the negotiation and conclusion of the Elements of Consensus might not have been possible had it not been for the gradual evolution of the CCP: the acknowledgment of national concerns by the Union's Community's institutions and the sanctioning of the ensuing policies by the EU's judiciary had created the political environment necessary both for the Commission to step in and seek to address national concerns within a common framework and for the Member States to entrust the defence of their interests to the EU's executive. In other words, the implied acknowledgement by the Court in the 1970s and early 1980s that neither was the CCP a genuinely common policy nor was the Union exclusive competence truly exclusive was central to the development of that policy. Viewed from this angle, the contribution of the Court of Justice to the development of EU international relations was no less significant than that underpinning the establishment of the single market pursuant to its construction of the principles of free movement.

It follows from the above that, in addition to its introduction regarding the CCP, the Court has been pivotal to the management of exclusivity in so far as it sanctioned the exercise of power by domestic authorities under EU law conditions. The remaining of this section will explore this aspect of exclusivity by focusing on two areas of CCP, namely bilateral investment treaties (BITs) and transport.

As far as the former is concerned, the Lisbon Treaty brought foreign direct investment (FDI) within the scope of the EU's exclusive CCP competence and the Court held that BITs that Member States had concluded with third countries prior to their accession to the EU were contrary to EU law.<sup>44</sup> However, the replacement of the rights and obligations laid down in more than 1,200 BITs concluded by Member States by EU rules was dependent upon the adoption of the latter which itself was dependent on the development of an investment policy by the EU institutions. Put differently, it would take time for the EU to decide how to exercise its exclusive FDI competence and it would not be sensible for the Member States to abandon their existing arrangements in a policy vacuum. It was for this policy reason that, in 2012, the EU adopted

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<sup>44</sup> See Case C-249/06, *Commission v Sweden*, EU:C:2009:119; Case C-205/06, *Commission v Austria*, EU:C:2009:118; Case C-118/07, *Commission v Finland*, EU:C:2009:715. See the analysis in Denza, E., 'Bilateral Investment Treaties and EU Rules on Free Transfer-Comment on *Commission v Austria*, *Commission v Sweden*, and *Commission v Finland*', (2010) 35 ELRev 263, P Koutrakos, 'Annotation on Case C-205/06, *Commission v Austria*, judgment of the Court (Grand Chamber) of 3 March 2009, not yet reported; Case C-249/06, *Commission v Sweden*, judgment of the Court (Grand Chamber) of 3 March 2009, not yet reported' (2009) 46 CML Rev 2059 and L Lonardo, 'Potential Incompatibility of International Agreements Concluded by Member States before Accession: *Commission v Austria*, *Commission v Sweden* and *Commission v Finland*' in Butler and Wessel (eds), n7 above, 599.

Regulation 1219/2012 which provides for the maintenance in force and amendment of existing, as well as the negotiation and conclusion of new, BITs treaties by Member States under certain conditions.<sup>45</sup>

The Regulation establishes a procedural framework which is controlled by the Commission and revolves around two procedures dealing with the authorisation of existing agreements and the amendment of existing or the conclusion of new agreements. The authorisation of existing BITs is granted following their notification by all the Member States to the Commission. Such authorisation is granted without prejudice to either the Union's competence in the area<sup>46</sup> or any other EU law obligations of the Member States.<sup>47</sup> The Commission reviews the agreements in order to ascertain whether they are compatible with EU law, or overlap with an agreement which the Union negotiates, or constitute an obstacle to the development and implementation of the Union's investment policy.

On the other hand, the authorisation to amend existing or conclude new BIT follows a notification by the Member State concerned (covering the provisions to be addressed in the negotiations, the objectives of the negotiations and any other relevant information) at least five months prior to the commencement of the negotiations. This information is disseminated to the other Member States, and, within three months, the Commission decides whether to authorize the opening of formal negotiations. Such an assessment depends on whether the opening of negotiations would be in conflict with EU law, whether it would be superfluous in the light of imminent negotiations of an EU agreement, whether it is inconsistent with the EU's principles and objectives for external action, or constitute a serious obstacle to the negotiation or conclusion of BITs with third countries by the EU. All BITs notified to the Commission are published annually.<sup>48</sup>

The interactions between the Member States and the Commission that Regulation 1219/2012 provides are of considerable intensity and scope. It refers, not only to the opening of negotiations, and the signing and conclusion of BITs, but also the application of such agreements. For instance, in the process of the negotiation of a BIT, the Commission may

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<sup>45</sup> Reg. 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40.

<sup>46</sup> Ibid, recital 3 of preamble and Art. 1.

<sup>47</sup> Ibid, Art. 3.

<sup>48</sup> For the most recent list, see [2023] OJ C 150/1.

require that the Member State include any appropriate clauses and participate in the negotiations. As for the application of the agreement, Member States are required to keep the Commission informed without undue delay of all meetings under existing BITs and may even have to take a particular position set by the Commission. Similarly, any dispute about the application of a BIT must be notified to the Commission which may even go as far as to require that it participate in any settlement procedure. Its agreement would also be required prior to the activation of any dispute settlement mechanisms included in the BIT by the Member State concerned.

The transitional arrangements about the BITs concluded by Member States illustrate a pragmatic approach to the exercise of the EU's exclusive CCP competence. Not only does the existence of the latter not have to rule out unilateral action by the Member States, but it may render it part of a procedural framework governed by EU law within which the Commission may even become intrusive in all phases of the negotiation, conclusion and application of BITs concluded by Member States.<sup>49</sup>

This choice of conditioning the EU exclusive competence on the basis of a proceduralised set of rules is not confined to policy fields in which the EU is endowed with an express external competence. In order to illustrate this point, we shall focus, by way of example, on international aviation.<sup>50</sup> After a series of judgments finding certain aspects of Open Skies Agreements concluded by Member States with the United States to fall within EU exclusive and others within shared competence,<sup>51</sup> the EU adopted Regulation 847/2004/EC on the negotiation and

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<sup>49</sup> This aspect of the CCP must be viewed alongside the gradual development of the EU's FDI policy through negotiations with third countries (eg EU-Singapore Investment Protection Agreement [2018] OJ L279/3, investment protection chapter in the Comprehensive Economic and Trade Agreement with Canada [2017] OJ L 11/23, and the EU-China Comprehensive Agreement on Investment, finalised in 2020 but now moribund).

<sup>50</sup> For other examples, see Reg. 662/2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations [2009] OJ L 200/25 and Reg 664/2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligation [2009] OJ L 200/46. Both measures were adopted following Opinion 1/03 (*Lugano Convention*) EU:C:2006/81 where the Court had held that the Union had exclusive competence on matters affecting rules set out in the *Brussels I* Regulation, in particular regarding jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>51</sup> Case C-467/98 *Commission v Denmark* EU:C:2002:625, Case C-468/98 *Commission v Sweden* EU:C:2002:626, Case C-469/98 *Commission v Finland* EU:C:2002:627, Case C-471/98 *Commission v Belgium* EU:C:2002:628, Case C-472/98 *Commission v Luxembourg* EU:C:2002:629, Case C-475/98 *Commission v Austria* EU:C:2002:630, Case C-476/98 *Commission v Germany* EU:C:2002:631. In addition, the Court ruled in Case C-

implementation of air service agreements between Member States and third countries.<sup>52</sup> This measure established a system of cooperation between the Commission and Member States aiming at the coordination of negotiations with third countries, the achievement of a harmonised approach in the implementation and application of air services agreements, and the verification of their compliance with Union law.

Rather than dealing with an area where the Member States had ceased to enjoy any competence (as was the case with Regulation 1219/2012), Regulation 847/2004 authorises Member States to act in areas where their competence may coincide partly with that of the Union.<sup>53</sup> It sets out a framework of constant interaction between the Commission and the Member State negotiating an air services agreement in which the latter are under certain substantive and procedural obligations. In terms of the former, Member States must include in their negotiations any relevant standard clauses, developed and laid down jointly between Member States and the Commission and are prohibited from introducing more restrictive arrangements regarding the number of Union air carriers designated to provide services.<sup>54</sup> In terms of procedural duties, a Member State must notify its intention to enter into negotiations at least one calendar month prior to the commencement of formal negotiations (or, due to exceptional circumstances, as soon as possible) to the Commission which disseminates it to the other Member States for comments. It is for the Commission to ascertain whether the negotiations ‘are likely to undermine the objectives’ of EU negotiations with the third country underway, and/or lead to an agreement which is incompatible with EU law.<sup>55</sup>

The scope and intensity of the duties which Regulation 847/2004 imposes on Member States are considerable. For instance, a Member State may not enter into negotiations unless it has agreed to include any relevant standard clauses. Indeed, once these have been incorporated in

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466/98 *Commission v UK* [2002] ECR I-9427. Its conclusions were reaffirmed in Case C-523/04 *Commission v Netherlands* EU:C:2007:244.

<sup>52</sup> [2004] OJ L 157/7.

<sup>53</sup> Following the judgments set out in n51 above, the Commission also argued that the Union's exclusive competence also extends to a range of other issues which may be addressed in bilateral air services agreements, including safety issues, commercial opportunities, customs duties, taxes and (user) charges, restrictions on aircraft for environmental reasons: COM (2002) 649 final *Communication on the consequences of the Court judgments of 5 November 2002 for European air transport policy* (Brussels, 19 November 2002) at pp 7-8.

<sup>54</sup> N52 above, Art. 1(1) and 3.

<sup>55</sup> *Ibid.*, Art. 1(4).

the Agreement, that Member State ‘shall be authorised’ to conclude it, ‘provided that this does not harm the object and purpose of the Community transport policy’.<sup>56</sup>

While the two measures outlined in this section have different subject-matter and objectives, they also have a number of features that shed light on the EU’s approach to exclusivity in EU external relations. First, both Regulations 1219/2012 and 847/2004 aim to achieve their different objectives by setting out a set of rules and procedures which are based on the constant interaction between the Commission and the national authorities of individual Member States (and, in certain cases, the authorities of the other Member States too). Second, they constitute the response of the Union’s legislature to the assessment of the Court of Justice as to how competence should be distributed in the Union’s constitutional order, while the case-law of the Court itself also responds to the absence of common rules adopted by the EU decision-maker. Third, both sets of rules and procedures draw upon the duty of cooperation. Regulation 847/2004, for instance, states in its preamble that ‘[i]t is essential to ensure that a Member State conducting negotiations takes account of Community law, broader Community interests and ongoing Community negotiations’.<sup>57</sup>

The above analysis illustrates an understanding of exclusivity that differs from the terms in which it was first introduced in CCP in Opinion 1/75. The uncompromising implications of the transfer of competence from the Member States to the EU which was based on the teleological interpretation of CCP has gradually given way to a subtler construction of exclusivity. The latter does not only acknowledge a role for the Member States but it may even rely upon them in order to deal with policy issues that the EU competence alone may not address effectively. This chapter showed that the pragmatic understanding of exclusivity was not confined to the case-law or policy-making: it was shared by the Court and the EU’s legislature. In fact, the interactions of these two actors in the area suggest a shift from the question of the nature of the EU’s competence (determined robustly in Opinion 1/75) to that of its exercise. This shift enables the EU to address specific policy imperatives on the basis of practical and mutual acceptable arrangements. For the EU and its Member States, moving away from the theology of exclusivity to the effectiveness of practice can only be a good thing.

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<sup>56</sup> Ibid, Art. 4(2)).

<sup>57</sup> Ibid, Para. 8. See also Art 6 of Reg. 1219/2012, n45 above.