

## The EC in GATT/WTO negotiations: From Rome to Nice – Have EC Trade Policy Reforms Been Good Enough for a Coherent EC Trade Policy in the WTO?

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### Keywords

common commercial policy, competences, international agreements, trade policy, Amsterdam Treaty, Nice Treaty, European Convention, law

### Abstract


This article is an attempt to a thorough chronological analysis of the EC's existing law in the field of international trade since the WTO agreement. It deals with the evolution of the EC's common commercial policy competence through the years, starting with the WTO agreement signed in Marrakesh in 1994 until the days of the European Convention establishing a Constitution for Europe, with a view to enabling the EC with a coherent policy in the WTO framework. Thus, a legal analysis of EC trade policy in the pre-Amsterdam Treaty period, at the Treaty of Amsterdam, at the Treaty of Nice and during the European Convention period is provided.

### Kurzfassung

Dieser Beitrag ist der Versuch einer umfassenden chronologischen Analyse des bestehenden EU-Rechts auf dem Gebiet des internationalen Handels seit dem WTO-Abkommen. Es handelt von der Entwicklung der gemeinsamen EU-Kompetenz für Handelspolitik über die Jahre, beginnend mit dem WTO-Abkommen, unterzeichnet in Marrakesch im Jahre 1994, bis zu den Tagen des Europäischen Konvents, der eine Europäische Verfassung mit der Absicht erarbeitete, die EU zu einer kohärenten Politik in der WTO-Struktur zu befähigen. Somit wird eine rechtliche Analyse der EU-Handelspolitik für die Zeit vor dem Amsterdamer Vertrag, im Vertrag von Amsterdam, im Vertrag von Nizza und während des Europäischen Konvents geboten.

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## I. Introduction <sup>↑</sup>

In this paper, the evolution of the EC's external trade relations will be analyzed. The EC has become an important actor on the international scene, and since the 1970s, its external relations have been growing both in number of agreements signed and domains of participation. The European Communities have participated in an important number of multilateral conventions within the framework of the international or regional organizations, and are increasingly present in world affairs. In the context of multilateral relations, they have a growing role.<sup>(1)</sup> The EC's progression was not steady but was achieved in small steps as we will see in the analysis of this paper.

This paper begins with a legal clarification of Article 133 EC. Then, it continues with an analysis of Opinion 1/94 of the European Court of Justice and its consequences for EC trade policy are explored. An analysis of the Amsterdam and Nice negotiations, the changes made to Article 133 EC by the Nice Treaty, and the confusion brought by those changes follows. Finally, I will conclude with the European Convention's work on EC trade policy.

## II. What Is Article 133 EC? ↑

Article 133 EC is the legal basis for the common commercial policy. It allows the EC "to negotiate, conclude and implement trade agreements with other countries of the world."<sup>(2)</sup> EC trade activity includes trade in goods, but only parts of trade in services, trade in the commercial aspects of intellectual property and investment, which are shared with the Member States. Since the Treaty of Amsterdam, the EC is competent to negotiate and conclude international agreements on services and intellectual property rights but only if the EC Council so decides by unanimity, as we see in article 133(7) of the Nice Treaty.<sup>(3)</sup>

As defined by article 133 TEC, "the scope of the common commercial policy [...] has been interpreted very broadly by the Court of Justice. However, it does not cover international negotiations and agreements relating to services and intellectual property, two areas being discussed within the WTO."<sup>(4)</sup>

## III. Developments Of The EC In International Trade Affairs During the Decades of the 80s and 90s ↑ (5)

Looking back to the 1950s, what is most surprising is the place the EC now holds in world affairs. When the process of European integration started, the role of the EC in the international arena was minimal. As time has gone by, it has developed a greater role in international fora. There are a few important examples of EC action in the international arena in 1997. In the trade sector, the EC played an important role in two significant WTO agreements: the Telecommunications Service Agreement,<sup>(6)</sup> which covers about 90% of world revenues in the telecommunications sector and the Agreement on Financial Services,<sup>(7)</sup> which covers about 95% of trade in the banking, insurance and security sectors. In the same year, the EU donated Euros 438 million in humanitarian aid, and an EU special envoy was sent to support the Middle East Peace Process. The EU has adopted a strong position with regard to problematic states such as Cuba and Burma and led the industrialized nations in their decision to reduce greenhouse emissions by the year 2010 at the Kyoto Summit on Climate Change<sup>(8)</sup> in the Conference of the Parties to the Framework Convention on Climate Change, Kyoto Protocol, in December 1997.<sup>(9)</sup> Clearly, the EU has developed into a significant actor in many international spheres.

Having said that, it is important to note that more than just traditional external policies will define the EU's role. As the EC has integrated to create a single European Market with a single currency, its domestic policies are increasingly influencing its role in the international arena.<sup>(10)</sup> Since 1958, the vision of the EEC Founders has been expanding geographically as the EU has grown from six members to the current fifteen. With the Single European Act and the completion of the single market, economic integration has created a cohesive entity. Already in 1973, with the first enlargement of the EC to nine Member States, the EC had become the world's largest trading bloc.

In the field of the common commercial policy, authors such as Weiler argue against the popular belief that the 1970s were nothing much to the history of European integration and everything started after *Cassis de Dijon*.<sup>(11)</sup> During that time, the ECJ was the most influential international/supranational court, the Commission was assuming its role of the engine of the integration process and the European Parliament was requesting more institutional powers. The Council found itself more and more restrained in the Community game, probably against the original design of some Member States who regarded the EC Council as an *ultima ratio*, a refuge of nationalism. However, the EC was established originally on an unquestionable transfer of sovereignty from Member States to the EC,<sup>(12)</sup> with only the doctrine of implied powers as a caveat. Provisions that do not specify exactly what has been transferred to the EC, such as Article 308 EC, nevertheless constitute an explicit limitation of national sovereignty.<sup>(13)</sup>

The 12-member EC of 1986 was already the largest trading power in the world. However, the EC, just like the U.S., showed some significant internal weaknesses for the outside world: although the European Commission has the power to initiate and execute decisions for its Member States in international trade negotiations, its proposals must, by law, first be approved by the EC Council. Some authors argue that this internal division is detrimental for the EC's role of leader in the international trading system.<sup>(14)</sup> Toward the end of the Uruguay Round (early 90s), the U.S. leadership was being weakened. President Clinton utilized U.S. protectionist pressures which slowed the moves toward a Uruguay Round agreement. By contrast, Leon Brittan, EC Commissioner at the time responsible for EC trade policy, adopted a more assertive role. This made the leadership between the U.S. and the EC in the framework of the Uruguay Round more balanced.

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In the late 1990s, the EC devoted important efforts to encouraging other countries to launch a comprehensive WTO round. One of the reasons for the EC to favor a more comprehensive and broader agenda was that it believed there would be more opportunities for cross-cutting agreements among sectors. It would also facilitate progress in the negotiations themselves. However, the EC had neither the economic power nor the unity of purpose to replace the U.S. as a leader in the world trading system. Thus, a degree of consensus was necessary between the U.S. and the EC if a new WTO round was to be possible. The U.S. and the EC have both become highly dependent on trade and they both had a shared interest in launching the new WTO round at Doha.(15)

## A. Scope Of Article 133 EC Before Amsterdam

Article 113 (1-4) of the Treaty of Rome on the common commercial policy was a non-exhaustive enumeration of subjects covered. Years later, the Amsterdam Treaty inserted Article 133 (5) EC, which does not change the scope of Article 133. It authorizes the Council, acting unanimously, to extend application of paragraphs 1-4 to international negotiations on services and commercial aspects of intellectual property.

### A.1 Marrakesh: Opinion 1/94 and its Consequences between 1994 and now

Already during the negotiations to the Maastricht Treaty, the Commission had envisaged the replacement of the common commercial policy with a common external economic policy, whose scope would be larger, including not only trade in services, commercial aspects of intellectual property, and goods but also the external dimension of competition, establishment, and investment.(16) According to Cremona, the decision to include aspects of external economic policy within the scope of Article 133 EC thanks to the Nice amendment to that article was based “on the desirability of specific procedures, reinforcing the ‘open’ nature of the CCP.”(17)

In April 1994, the WTO Agreement was signed in Marrakesh. As a consequence of such agreement, Opinion 1/94 of the ECJ saw the light a few months later. In Opinion 1/94, the ECJ rejected the Commission’s argument that all trade in services and intellectual property rights were included in the EC’s common commercial policy insofar as they were covered by the TRIPs agreement.(18) That said, the ECJ also refused the exclusion of trade in services from the common commercial policy as a matter of principle: “it follows from the open nature of the common commercial policy, within the meaning of the Treaty, that trade in services cannot immediately, and as a matter of principle, be excluded from the scope of Article 113.”(19)

The Court had to examine the question of whether the EC has the exclusive competence to conclude the WTO Agreement, including GATT, GATS, TRIPS, and the dispute settlement understanding (DSU). The answer to this question depended on the scope of Article 133 EC. The European Commission’s position was that the EC had exclusive competence in the areas covered by these agreements. However, the EC Council indicated that these are areas of shared competence between the EC and its Member States and thus one could have a mixed agreement.

The ECJ’s response was that the EC did not enjoy exclusive competence for the conclusion of the WTO Agreement. In trade in goods, the ECJ did accept the EC’s exclusive competence on the basis of Article 133 EC.(20) With regard to trade in services and trade-related aspects of intellectual property rights, the Court decided that the EC is only partially competent for these matters.(21) With regard to exclusive external EC competence on these areas, it was also denied by the ECJ on the grounds that the EC had neither completely harmonised all services sectors nor all matters covered by TRIPS.(22) The Court also considered whether an exclusive external EC competence for areas covered by GATS and TRIPS could be implied from the necessity to conclude the WTO Agreement as a means to achieve the goals of the EC Treaty, or from Article 95 EC or Article 308 EC. The Court, however, denied such an interpretation.(23)

It is important to mention the distinction made by the ECJ between the modes to supply services, on the one hand, and the trade-related intellectual property rights, on the other. As for the modes to supply services, they do not concern the nature of the services rendered, but rather the way in which the services concerned are provided. By contrast, trade-related intellectual property rights concern the nature of these rights.(24)

### a. Trade in Services

With regard to trade in services, the distinction made by the ECJ between modes to supply services and services as such had an immediate consequence: competencies between the EC and its Member States were divided since trade in services is not restricted to a specific mode to supply services, in other words, cross-border supply of services.<sup>(25)</sup> As an example, we have the ECJ's judgment on the legal base of the agreement on government procurement between the EC and the U.S. before the entry into force of the plurilateral WTO Government Procurement Agreement. Here, the ECJ declared void the Council's decision by which the bilateral agreement between the EC and the U.S. had been approved. Article 133 EC was considered not to be a sufficient legal base for this decision.<sup>(26)</sup>

The ECJ interpreted that the EC has both explicit and implied foreign trade competencies. The WTO Agreement was jointly ratified by the EC and its Member States.<sup>(27)</sup> This means that the WTO Agreement is a mixed agreement and, therefore, there is a need for constant cooperation between the EC and its Member States in areas where there is no exclusive EC competence. The ECJ's Opinion 1/94 on the division of competencies between the EC and its Member States in the area of external trade relations meant that the legal phenomenon of "mixed agreements" had to be relied upon more often, given that new free trade agreements include trade in services and intellectual property rights due to their increased economic significance, for example, the mixed agreement between Mexico and the EC on economic partnership, political coordination and cooperation.<sup>(28)</sup> Another witness of this legal phenomenon is the mixed agreement between the EC and its Member States and South Africa. This agreement's conclusion was blocked by some Member States on the grounds that the South African concessions in the area of geographic indications for alcoholic beverages such as Grappa, Ouzo and Port were insufficient.<sup>(29)</sup>

### b. Intellectual Property Rights

With respect to intellectual property rights, according to the ECJ, the primary objective of the TRIPs Agreement is "to strengthen and harmonise the protection of intellectual property on a worldwide scale."<sup>(30)</sup> Therefore, those who were hoping to bring into the single procedure of Article 133 EC the whole range of matters that appear in the WTO package where the EC is competent are likely to be disappointed.

The exclusive EC competence in trade matters did not extend to certain aspects of the international supply of services<sup>(31)</sup> nor to the harmonisation of rules on the protection of intellectual property rights,<sup>(32)</sup> which the Court identified as the primary objective of TRIPs.<sup>(33)</sup> Two issues can be analysed from the construction given to Article 133 EC in Opinion 1/94: first, there were large parts of the WTO Agreement where EC competence fell to be exercised on the basis of provisions other than Article 133 EC, including Article 308 EC. This last article requires the Council to act by unanimity; second, EU Member States were free to conclude the relevant parts of the WTO package through the collective exercise of national powers, rather than through the EC.<sup>(34)</sup> In this sense, in Case C-53/96 *Hermes International v. FHT Marketing Choice BV* the Court said that "the WTO Agreement was concluded by the Community and ratified by its Member States without any allocation between them of their respective obligations towards the other contracting parties."<sup>(35)</sup>

### c. Consequences of Opinion 1/94

As Dashwood suggests,<sup>(36)</sup> critics of the ECJ's Opinion 1/94 have seen that cross-retaliation (for example, imposition of trade restrictions as a sanction for the failure by a third country adequately to protect intellectual property rights) may not be a possible option for the EC and its Member States, where different elements of a strategy fall under different competencies.<sup>(37)</sup> According to Dashwood, the problems of legal mixity are not unsolvable or uncontrollable.<sup>(38)</sup> As we will see later in this paper, zealous efforts were made during the Nice summit to secure an amendment to Article 133 of the Amsterdam Treaty that would change the consequences of Opinion 1/94 with regard to action within the WTO. The outcome was not very radical: Article 133 (5) EC empowered the EC Council to change the existing law.

According to Weiler, Member States are not prepared to live in a world in which the Community assumes that it is competent. Proof competence is necessary from now on. Opinion 1/94 is a good example.<sup>(39)</sup> The Commission had requested the ECJ under the procedure of Article 300 (6) EC to confirm the exclusive competence of the EC to conclude the WTO Agreement which had been negotiated within the framework of the Uruguay Round.<sup>(40)</sup> The Council, however, hoped that the Court would establish a clear dividing line between the Community's and the Member States' competence with respect to trade liberalization for purposes of ratification and future negotiations. The outcome was a shock to many: the Commission's powers in the field of services and intellectual property rights were severely curtailed. Had the ECJ's interpretation of the ERTA doctrine been more expansive, it would have supported a more pro-Community view. In the post-Opinion 1/94 period, Member States have worked more closely together in international trade issues. There are signs that the Commission is more cautious now. A new code of conduct has evolved in this field, regulating the interaction between the Commission and EC Member States.<sup>(41)</sup>

The Community as a whole is greater than the sum of its parts. According to Mavroidis, even Germany has much more weight as the EC's leading economy than it would by itself in international economic relations.(42) Even when EC Member States are loyal to the European integration process, they will continue to call into question the precise limits of Community competence in a world of qualified majorities. In this sense, the ECJ has an important role to play.(43)

## A.2 Duty of Cooperation ↑

The problem in EC's external trade relations arises because we are dealing with situations where the European Community and its Member States are competent to sign international treaties. The question is to see when Member States of the European Union authorize the European Commission, the executive power of the European Union, to act on behalf of Member States and the Community in bilateral/multilateral mixed agreements. The Commission's powers are to negotiate agreements, even if these are not exclusively *communautaire*. These agreements are eventually concluded by the EC Council.

The duty of co-operation suggested by the European Court of Justice seems to be a rather broad formula for the achievement of a unitary character for the EC, for example, the Community's post-Opinion 1/94 external relations regime. Opinion 1/94 does not give any guidelines as to the more specific implementation of the "duty of cooperation".(44) Co-operation has taken place until now either *ad hoc* or under an informal "code of conduct" agreed in May 1994 between the Council, the Commission and the Member States at the "post-Uruguay Round" negotiations on services.(45) However, the Member States, the Council and the Commission have been unable to reach an agreement –in spite of numerous attempts- upon a permanent and more comprehensive code that would cover the Community and Member States' participation in the WTO as a whole.

Nor does Opinion 1/94 indicate any provisions of either the EC Treaty or the Treaty on European Union in which the duty of co-operation can be found.(46) To justify its position, the Court simply referred to its previous case-law (Ruling 1/78 on the Draft Convention of the International Atomic Energy Agency on Physical Protection of Nuclear Materials, Facilities and Transport, paragraphs 34-36 (47) and Opinion 2/91 on ILO Convention 170 on Chemicals at Work, paragraph 36(48)).(49)

Where competence is shared between the EC and its Member States, both Member States and the EC are **obliged** to seek a common position. Coordination of their positions is indispensable to prevent inconsistencies or even mutual blockage within the framework of an international organization.(50) According to the ECJ, this requirement of unity in the international representation of the three Communities shows the importance of co-operation or close association between the Member States and the EC institutions in the negotiation or conclusion of agreements and in the fulfillment of commitments at the international level.(51) Community and Member States, since they have an obligation to co-operate, must attempt to organize harmoniously their coexistence in international organizations in which they share membership and competence, such as the WTO,(52) as stated in Opinion 2/91.(53)

As for the fulfillment of commitments at the international level, Opinion 1/94 (Re WTO Agreement)(54) describes how Community and Member States are each other's prisoners. The one cannot act without the other. Achieving a common position of Member States is a *sine qua non* for Community action.

The duty of cooperation between the EC and its Member States appeared as a consequence of Opinion 1/94 of the ECJ.(55) There was a need for a uniform international representation of the EC.(56) In spite of this, the EU Member States tried to pursue more strongly their interests in the area of external trade. One example is the use of voting rights within the Food and Agriculture Organisation (FAO). Here, the ECJ ruled that the Member States did not respect their duty of cooperation with the EC.(57)

This "duty to co-operate" is an obligation imposed on Member States and Community institutions under Community Law. Formerly, the repealed Article 116 EEC was available for that purpose.(58) It obliged Member States to proceed within the framework of international organizations of an economic character on matters of particular interest to the common market only by common action. However, Article 116 EEC Treaty has been regrettably deleted at Maastricht. It had proven to be a useful legal basis for coordination of actions of Member States and the Community in the no-man's-land of dubious demarcation between Community and national competencies, or where the exercise of these competencies was inextricably linked (for instance, the international commodities agreements in application of the so-called Proba 20).(59)

However, Article 116 EEC Treaty was not one of the most transparent provisions of the Treaty. Where the Community was not able to act because it was not a member of the relevant organization, Member States would have to act on its behalf, and the necessary Community action was decided on the basis of Article 133 EC, not Article 116 EEC Treaty. There is a similar issue in Article 12 TEU in relation to matters falling within the scope of the Common Foreign and Security Policy and Article 33 TEU in relation to *common positions* in international organizations and at international conferences in various fields covered by Title VI of the TEU.(60)

## B. The Amsterdam Treaty (61)

“Amsterdam did not succeed in transferring enough policy areas from unanimity to qualified-majority voting to free up the decision-making process looking ahead to a Union of 28 Member States.”(62) In fact, some commentators speak of unanimity as a dictatorship in EU policy-making, given the heterogeneity of the Member States’ legal systems.(63) Thus, the EC continues to face some difficulties in creating a coherent commercial policy. The Amsterdam intergovernmental conference negotiations did not extend the scope of EC powers in the field of external trade policy. However, they laid the foundations for a broader scope of EC powers in this field.(64) Although the Treaty of Amsterdam included some amendments stating that Article 133 EC procedures can extend over intellectual property and services, it still represents a hurdle because most decisions relating to these sectors must be unanimous,(65) in reference to the use of Article 133 (5) EC.

However, not *all* agreements on intellectual property and services would have to be concluded by unanimous vote, since there are aspects of services and intellectual property which already fall within the scope of the EC’s common commercial policy. In addition, if Member States are forced to reach a consensus, it will be more difficult to reach a Community position, even though the Commission has the power to act as a spokesperson in such negotiations according to the Amsterdam Treaty, provided the Council agrees to that application by unanimity.

Some WTO members have introduced cases related to services and intellectual property rights against individual Member States instead of against the EC as a whole. For instance, the United States has brought various TRIPS(66) cases against Denmark, Sweden and Ireland. In the last case, the U.S. brought a case against Ireland regarding measures affecting the grant of copyrights and neighboring rights.(67) The Commission’s main argument in the discussion on expanding EC competence over intellectual property and services was based on the EC’s need to be effective in international negotiations. However, Member States were not readily convinced, perhaps because the success of the Uruguay Round revealed concerns on the balance between the respective roles of the EC and its Member States in international affairs.(68)

The Amsterdam Treaty thus offered the possibility to modify the EC Treaty autonomously.(69) In other words, the EC Treaty could be modified independently of an IGC and ratification procedures in the Member States.(70) Such modification might have ended the so-called “division of powers between the EC and its Member States” in areas of trade in services and intellectual property rights stipulated by the ECJ in its Opinion 1/94, and therefore might have led to an exclusive EC competence.(71) This means that the negotiations and conclusions of international trade agreements in these issues would not have required a unanimous decision by the Council anymore and there would not have been need to ratify the agreement in question by all the EU Member States. Thus, the often-criticized(72) interpretation of Article 133 EC by the ECJ in its Opinion 1/94 would have been corrected.

It is important to be clear on the limits imposed by the drafting of Article 133 (5) of the Treaty of Amsterdam on the EC competence that may be created by the Council. Firstly, Article 133 (5) of the Treaty of Amsterdam makes reference to “international negotiations and agreements.” This gives the new competence only an external application, unlike the general competence of the EC under Article 133 EC, which is exercisable both internally and externally. Secondly, the Council has not been authorised to create a general competence for the EC to conclude international agreements on services and intellectual property matters. The type of agreements in question are those designed to remove impediments to the supply of services by non-nationals or to ensure the protection of intellectual property rights that belong to non-nationals. However, one cannot imagine a situation where a legal basis derived from Article 133 EC is used for concluding an agreement having as its essential objective the harmonisation of important areas of the parties’ internal legislation.(73) In this sense, as the ECJ explained in its Opinion 1/94, the EC Institutions may not, by concluding an agreement under Article 133 EC, “escape the internal constraints to which they are subject in relation to procedures and to rules as to voting.”(74)

Furthermore, the 1997 Amsterdam Treaty provided for a possible future decision by the Council to extend the common commercial policy to new areas: “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.”<sup>(75)</sup> In this sense, the Commission sees the Treaty of Amsterdam as giving an answer to the fundamental question of competence:

“Questions relating to trade in goods, but only parts of investment, services and intellectual property are already included in the day-to-day EU trade activity. Since the Treaty of Amsterdam, the rest is in an intermediate position: essentially an EU competence, but only to be used when the Council decides so by unanimity.”<sup>(76)</sup>

## IV. The End Of A Millenium <sup>↑</sup>

### A. History Of The Nice Negotiation

When GATT was created in 1947, the main engine of world trade was goods. Services hardly played a role in the international trading system. As trade in services became more relevant, there was a debate inside the EC on whether or not trade in services fell within the common commercial policy of the EC (Article 133 EC). For three main reasons was this debate important:

1. the unitary character of EC trade policy among the EU Member States,<sup>(77)</sup>
2. the exclusivity of EC competence in the common commercial policy,<sup>(78)</sup> and
3. the decision-making implications of Article 133 EC. This article gives responsibility for international negotiations to the Commission, it does not require consultation of the European Parliament, and decisions are adopted in the EC Council by qualified-majority vote.

It might be surprising to see that the Nice Summit agenda included the topic of external trade policy. Why was it the case? Mainly because the EC Council had not taken a decision in accordance with Article 133 (5) of the Amsterdam Treaty to extend the scope of the EC’s common commercial policy.<sup>(79)</sup> Therefore, it seemed appropriate to include the EC’s common commercial policy in the Nice IGC, which had as one of its aims the extension of qualified-majority voting to politically sensitive areas of the EC Treaty. The case-law on the dynamic nature of the common commercial policy and interpretation of Article 133 EC<sup>(80)</sup> supported the extension of the EC’s common commercial policy into services.<sup>(81)</sup> However, this dynamic nature of the CCP is kept within the control of the EC Council and is limited to intellectual property.<sup>(82)</sup>

Article 133 (5) of the Amsterdam Treaty left a series of questions unanswered, one of which was the extent of the EC’s existing external competence in relation to services, based on implied as opposed to express powers.<sup>(83)</sup> Since there was a need to find adequate and efficient negotiating mechanisms in the framework of the WTO, a reform of Article 133 EC was imminent at Nice. As we will see below, part of the discussion was about the extension of qualified-majority voting within the EU. In the words of the Commission at the time, “trade issues at this [Nice] IGC essentially concern the replacement of the unanimity rule by qualified majority.”<sup>(84)</sup>

Jean-Claude Piris, Director-General of the Council Legal Service, published a note in May 2000 on EC external economic relations.<sup>(85)</sup> Four main issues were at stake:

1. EC participation in the WTO,
2. EC single position in relation to third countries and the best decision-making process to achieve this goal,
3. the conclusion of mixed agreements, and
4. the establishment of the EC’s position within a joint body set up under an agreement, when that joint body is to adopt decisions with legal effects.

With regard to the first issue, Piris proposed two options: 1) the revision of Article 133(5) EC in order to require only a qualified-majority vote, as opposed to unanimity, so that trade in services and intellectual property could be included into the common commercial policy of the EC; 2) the creation of a Protocol on participation in the WTO. The advantage of such a Protocol for the EU’s decision-making process would be the existence of qualified-majority voting, even in the field of Member States competence. The Protocol option was rejected by Mr. Lamy, EC Trade Commissioner.



Since the situation at the time only worked where there is consensus, failure to reach it would lead to a deadlock and to the impossibility to comply with the duty of cooperation expressed by the ECJ.<sup>(86)</sup> With the imminent phenomenon of enlargement, paralysis would seem even more credible in the EU decision-making process based on unanimity, given the greater diversity of national interests and views. Thus, the need for reformation of the current situation was clear. In Piri's words, there was a need for "clear, simple, transparent, effective legal rules enabling a common position to be established by a qualified majority in all cases." Already the draft Protocol proposed common positions to be adopted by the Council, acting by qualified-majority vote; the Commission would be the "spokesman and sole negotiator" for the EC and its Member States in the WTO framework, presenting the common position agreed in the Council. Therefore, as Cremona rightly argues, "the complexity of the Nice amendment is a reminder of just how difficult it is to achieve consensus in this area [commercial policy], and also how important in practice that consensus is."<sup>(87)</sup>

In this sense, in January 2000, the Commission's Opinion clearly expressed that any change in voting procedures to Article 133 (5) EC would not be the best option. Rather, a better option would be the inclusion of services, intellectual property and investment into Article 133 EC: "The Commission would prefer a substantial amendment of the scope of Article 133 by extending it to services, investment and intellectual property rights."<sup>(88)</sup> France, on the contrary, had already opposed the idea of further broadening of EC powers in the field of external trade during the Amsterdam Summit of 1997.

That said, it was in the best interest of the EC, nevertheless, to benefit from an IGC to improve the EC's ability to take international actions. In this sense, the European Council of Feira in June 2000 decided to include the external trade policy on the agenda of the Nice IGC. The European Council gave green light to the Presidency Report on IGC negotiations.<sup>(89)</sup> Here the Portuguese presidency argued that Article 133 (5) EC is part of those provisions where Council decision by unanimity should be replaced by qualified-majority voting with regard to transfer of competence from national to supranational level. Conversely, other Member States thought that it was not necessary to deal with this same issue in Nice since it had already been in the Amsterdam summit agenda.

In September 2000, a French Presidency note proposed three alternatives to Article 133 EC:

1. the inclusion of services, intellectual property rights and investment either by amending Article 133 (1) EC or by adding a new paragraph 5 to cover new fields to be defined by a Protocol,
2. change of the voting procedure of Article 133 (5) EC so that the decision to include agreements on trade in services and intellectual property rights would be by qualified-majority vote as opposed to unanimity. The question was whether the EC's exclusive trade competence should be broadened to include issues such as services and intellectual property rights, where competence is shared between the EC and its Member States, or whether the catalogue of exceptions to the EC's exclusive trade competence (such as investment, services and intellectual property rights) should remain. In the end, the answer was somewhere in between these two positions,<sup>(90)</sup> and lastly
3. a new Protocol establishing the rules for a common position in the WTO by qualified-majority vote, without transfer of competence under Article 133 EC.

In November 2000, there were two options presented in the drafts for the new Treaty: 1) the inclusion of trade in services, investment and intellectual property rights in Article 133 (1) EC; 2) the creation of a Protocol for the extension of Article 133 EC to the negotiation and conclusion of agreements on trade in services and intellectual property rights. In December 2000, at the IGC, option 1 was the basis for the final text in Nice, including an explicit reservation of Member State powers; option 2 (the creation of a Protocol) was rejected. Since the Protocol on WTO participation was also dropped, there is no agreement on a single procedure for all WTO negotiations, whether it is for issues of exclusive EC competence, shared competence or Member States' competence.

## B. The EC Developments in Trade at Nice

During the Nice negotiations, the French presidency played the most active and important role: France wished to control the EC's common commercial policy as much as possible by insisting that there should be a specific exception for trade in cultural and audio-visual services (the so-called *spécificité culturelle*). This is one of the issues which explain the result of the Nice summit as far as the EC's foreign trade policy is concerned. Five principal issues were discussed in Nice: qualified-majority voting and the co-decision procedure, the weighting of votes in the Council, the composition of the Commission, the composition of the European Parliament, and closer cooperation. For the purposes of this paper, I will only mention the first one of them.

## B.1 Qualified-majority voting and the co-decision procedure (91)

The 1957 Treaty of Rome provided for a decision to be taken by unanimity in the EC Council for most of the areas covered. However, a few provisions were already subject to qualified-majority voting and the Treaty of Rome itself foresaw the mechanism of qualified-majority voting in many cases after the end of the transitional period in 1966. An example of this period is the so-called France's "empty chair," when General De Gaulle rejected a series of Commission proposals blocking their adoption in the Council and refusing to move toward qualified majority voting. This political crisis was resolved with the Luxembourg compromise in January 1966. The Council had stated in its conclusions that "where very important interests of one or more partners are at stake, the members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all [...]." The immediate consequence of this event was the veto culture, which damaged severely the process of European integration.

The praxis of qualified-majority voting was seen as a necessary element for the successive EU enlargements. Yet, several important and politically sensitive issues remained subject to the unanimity rule.

From Article 205 EC, we can infer that the EC Council acts by a majority of its members, as provided by the EC Treaty. Therefore, *de iure* the simple majority is the rule, whereas qualified majority and unanimity are the exception. However, *de facto* it seems as if qualified-majority voting will be the rule, whereas unanimity and simple majority will be the exceptions in the Council's decision-making process. Leaving unanimity aside as a common praxis in the Council is beneficial for an enlarged EU since it will become virtually impossible to take unanimous decisions in an EU of over 30 countries.

At Nice, the discussions seemed to be based on three options:

1. qualified-majority voting as the general rule with limited exceptions listed exhaustively,
2. issues to be transferred to qualified-majority voting with no exhaustive list of the areas excluded, and
3. a case-by-case approach.

At the Nice IGC, the Commission proposed the first option. However, the case-by-case approach prevailed.

With respect to the co-decision procedure,<sup>(92)</sup> it was introduced by the Maastricht Treaty and then simplified by the Amsterdam Treaty. The aim was to strengthen the powers of the European Parliament. The co-decision procedure is only applied for internal EC legislation, not for international agreements. Yet, the European Parliament can give its approval in trade agreements but does not need to under the Treaty rules. In this sense, in the case of the WTO agreement, the EP has the power to assent. The Commission alerted the fact that there is inconsistency when combining unanimity in the EC Council with the co-decision procedure. Thus, the Commission proposed instead the harmony of qualified-majority voting and the co-decision procedure. In the eyes of the Commission, commercial policy *inter alia* should come under the co-decision procedure.<sup>(93)</sup>

The Commission's Opinion on the IGC in January 2000 suggested the extension of co-decision to the common commercial policy.<sup>(94)</sup> This proposal did not see the light because the European Council refused to apply the principle of parallelism and, in the words of the Commission, this failure to increase the role of the European Parliament in EU decision-making under Article 133 EC is "regrettable for the democratic accountability of the Union's trade policy."<sup>(95)</sup> Some authors refer to this phenomenon of democratic deficit as insufficient parliamentary control.<sup>(96)</sup> Nonetheless, the Treaty of Nice amended Article 300 (6) EC in order to allow the European Parliament, the Council, the Commission or a Member State to request an Opinion from the Court of Justice on the compatibility of a given agreement with the Treaty.

## B.2 Changes made to Article 133 EC at Nice

For present purposes, I will focus only on the changes made to Article 133 (5) EC at the Nice summit. Paragraph 5 is replaced by new paragraphs 5-7 of Article 133 EC and modifications to paragraph 3 of Article 133 EC. What follows is a mere non-exhaustive list of six main changes from the metamorphosis suffered by Article 133 EC in Nice:

1. there is a need to ensure the compatibility of external agreements with internal policies and rules, under joint responsibility of the Council and the Commission (paragraph 3),
2. the Commission has the duty to consult *Article 133 Committee* and to report to the same Committee on the progress of negotiations (paragraph 3),
3. the common commercial policy is extended to include the negotiation and conclusion of agreements on trade in services and commercial aspects of intellectual property (paragraph 5),
4. there is an inclusion of specific voting rules for the new aspects of the common commercial policy (paragraphs 5 & 6),
5. the possible extension of the common commercial policy to other aspects of intellectual property rights is envisaged, subject to unanimous decision by the EC Council (paragraph 7),
6. transport<sup>(97)</sup> is not included in the common commercial policy (paragraph 6). This corroborates the European Court of Justice's Opinion that transport services are governed by Title V of Part Three of the EC Treaty and not by the provisions on the common commercial policy.<sup>(98)</sup>

### B.3 What remains unchanged of Article 133 EC at Nice

Three main issues remained the same at Nice:

1. the European Parliament is formally excluded from decision-making under Article 133 EC. However, as Herrmann claims, since the Nice IGC failed to strengthen the rights of the EP in relation to the common commercial policy, "at least the EP will now be empowered to obtain an opinion by the ECJ under Article 300 (6) EC, a change that enhances the ability of the EP to protect its rights concerning international agreements without having to wait for the Council to take a formal decision about the conclusion of an agreement which could then be challenged under Article 230 EC."<sup>(99)</sup>
2. it is not entirely clear whether investment continues to be excluded from Article 133 EC, although some aspects of investment are covered by the locution "trade in services." In this sense, the uncertainty on the scope of Article 133 EC is created by the fact that in the Nice negotiations all proposals to include an express mention of "direct investment" alongside "trade in services" to paragraph 5 were rejected.<sup>(100)</sup> Against this view is the position of Torrent, who argues that in the GATS, investment is deliberately camouflaged as "commercial presence,"<sup>(101)</sup> and
3. the proposed Protocol on WTO participation was associated with a decision not to transfer any competence to the EC under Article 133 EC.

## C. The New Article 133 EC: More Unnecessary Confusion and Complication?

### C.1 The Logic of Parallelism

Speaking of the text adopted by the European Council in Nice, the Commission argues that,

"by focusing on the principle of parallelism on which it is based, it [the text] becomes easier to understand. The guiding principle of the new Article 133 is to align the decision-making mechanism for trade negotiations on internal decision-making rules: in the area of services for example, it is illogical that decisions are taken by qualified majority on internal Market directives, but trade negotiations on the very same subject fall under a rule of consensus (effectively requiring unanimity)."<sup>(102)</sup>

Within the EU, there is a parallelism between external and internal powers: from paragraph 3 of Article 133 of the Nice Treaty, we see that the Commission and the Council are responsible for ensuring that "agreements negotiated are compatible with internal Community policies and rules."<sup>(103)</sup> Similarly, Article 300 (6) EC makes reference to Treaty-compatibility and argues that agreements found to be incompatible with the Treaty would only enter into force if and after there has been a Treaty amendment. This means that the EC can actually negotiate and conclude agreements under Article 133 EC which requires amendment of secondary legislation. Thus, as Cremona rightly points out, it would make little sense to believe that "the Community could not negotiate any agreement that was not compatible with Community law as it then stands (i.e. requiring no amendment of Community law)"<sup>(104)</sup> since this would imply a paralysis of external trade policy.

The internal policy objectives are relevant in determining trade policy positions. We see this in the new paragraph 3 of Article 133 of the Nice Treaty. The new wording of paragraph 3 of Article 133, which requires compatibility between the agreements negotiated and internal Community policies and rules, is done to avoid the fear that the Community will negotiate in sensitive internal policy sectors.

Parallelism is also dealt with in Article 133 (6) of the Nice Treaty, which prevents the Council from concluding agreements with provisions which might go beyond the Community's internal powers. Article 133 (5) (2) of the Nice Treaty shows examples of decision-making parallelism.

## C.2 Article 133 EC after Nice

### a. Form and Substance

Although the common commercial policy has traditionally been regarded as one of the areas of exclusive external EC competence,<sup>(105)</sup> the new subparagraph 4 of paragraph 5 of Article 133 of the Nice Treaty makes an exception to this principle by preserving the Member States' possibility to maintain and conclude bilateral agreements with non-member countries or international organizations on issues where there is no common interest to justify action by the European Community.<sup>(106)</sup>

A second characteristic to Article 133 of the Nice Treaty that has to do with the relationship between the Community's powers and those of the Member States is its second subparagraph of paragraph 6, which uses for the first time the locution "shared competence" to refer to a situation where EC competence in respect of a given matter exists but is not exclusive. The negotiation of agreements on issues such as trade in cultural and audiovisual services, educational services, and social and human health services will require both Community decision and the Member States' consensus.<sup>(107)</sup> Those agreements on issues mentioned in Article 133 (6) (2) EC will be concluded jointly by the EC and its Member States as mixed agreements.<sup>(108)</sup>

From a substantial view point, Article 133(6) of the Nice Treaty alludes to the locution "shared competence." With regard to situations of "shared competence," it might be decided by the Council to exercise the Community's non-exclusive competence over a given agreement, leaving no room for Member States' participation. Alternatively, if there is no Community legislation in the field covered by the agreement, the Member States alone could conclude the agreement without the Community. Both of these hypotheses are examples where the agreement would not be concluded jointly by the EC and its Member States. A totally different matter is the fact that, as Heliskoski argues, "in every field of Community policy there is likely to be at least some Community legislation in place and, consequently, the Community's participation in the agreement alongside the Member States might become necessary under the AETR principle."<sup>(109)</sup> That is why Heliskoski speaks of "unfortunate"<sup>(110)</sup> when referring to the way in which Article 133 of the Nice Treaty uses the locution "shared competence."

With respect to trade in services, the scope has been enlarged so that the EC's competence to negotiate and conclude trade agreements related to Article 133 EC is not restricted to the so-called "cross-border" supply of services but covers all types of supply. The exceptions would be agreements in the field of transport, as has been explained above,<sup>(111)</sup> and those agreements which lead to the harmonization of the laws or regulations of the Member States in an area which the Treaty rules out such harmonization, i.e., education,<sup>(112)</sup> vocational training,<sup>(113)</sup> culture,<sup>(114)</sup> and public health.<sup>(115)</sup>

As for intellectual property, subparagraph one of paragraph 5 is restrained to commercial aspects of intellectual property. It is thus more restricted than Article 133 (5) of the Amsterdam Treaty. During the Nice negotiations, the spirit was to create a paragraph 5 with a scope similar to that of TRIPs; however, such proposals were later rejected.<sup>(116)</sup>

### b. Decision-making Procedures

Qualified-majority voting has been a major characteristic of the EC common commercial policy's decision-making process as much as has been the absence of the European Parliament's involvement in the common commercial policy *stricto sensu*. After Nice, and with EU enlargement in mind, the use of unanimity is only required in four situations:

1. where it is required for the adoption of internal rules,
2. where powers have not yet been exercised by adoption of internal rules (article 133.5.2 of the Nice Treaty),
3. agreements under the “cultural exception” clause of article 133 (6) of the Nice Treaty must be concluded by common accord between the EC and its Member States, and
4. horizontal agreements.

Thus the whole point of Nice with respect to decision-making was to simplify the current situation. Already in an EU of fifteen Member States it is difficult to have unanimity, so in an enlarged EU of over 25 it is virtually impossible to reach unanimity, despite the sensitivities some Member States may have in certain fields.

### c. Expansion of Exclusive EC Competence?

Although the scope of the common commercial policy was broadened in previous IGCs, with agreements relating to trade in services and the commercial aspects of intellectual property, the Nice Treaty has not expanded the scope of EC commercial policy on issues such as services and intellectual property rights to exclusive EC competence; instead, there has been the preservation of “shared competence” between the EC and its Member States. In that same line of argument, Article 133 (5) (4) of the Nice Treaty gives Member States the right to “maintain and conclude agreements with third countries or international organizations insofar as such agreements comply with Community law and other relevant international agreements.” Thus, EC competence does not stop the continuation of Member States competence in these fields. Although this new competence will be shared, the Community will be able to act alone in international trade negotiations.

As for a different category of agreements on trade in services, a specific form of shared competence will continue, where joint negotiation and conclusion of agreements by the Community and its Member States in specific areas will be the normal praxis, as can be seen in Article 133 (6) (2) of the Nice Treaty. According to the Treaty of Nice, the Community alone will not be able to conclude agreements in these sectors: “Agreements thus negotiated shall be concluded jointly by the Community and the Member States.”(117) This also applies to Member States’ inability to conclude such agreements alone. This means that Member States will not lose their competence within the WTO forum.(118)

That said, the scope of exclusive external powers may change in situations of implied powers. The ECJ, in its Opinion 1/94, held that exclusive implied powers in trade in services might arise in two situations: 1) where internal harmonization is complete or 2) where legislation gives a specific competence to negotiate with third countries: “the [exclusive competence] applies [...] even in the absence of any express provision authorizing its institutions to negotiate with non-member countries, where the Community has achieved complete harmonization of the rules governing access to a self-employed activity [...]”(119)

This means that the current situation could change if new secondary legislation gives the EC exclusive powers in the common commercial policy or if harmonization is complete. On the other hand, and contrary to this approach, the new paragraph 5 of Article 133 of the Nice Treaty preserves Member State competence in the conclusion of mixed trade agreements. This can be summarized as a duty of close cooperation in the external relations of the Communities in cases of shared competence.(120)

## D. The Outcome Of Nice: A New Treaty Article

The common denominator to all IGC negotiations until Nice was the lack of transparency and information. At Nice, the increasing demands for greater transparency and simplicity(121) were not met by the new version of Article 133 EC. This new article is a bad example of simplification. Why is it not possible to simplify the Treaties so easily? One plausible answer is because at the IGCs the political compromise of the various EU governments *vis-à-vis* lobbies or other spheres of the national political arena is far too strong. In the case of Nice, most EU Member States did not bring the scope of the EC’s commercial policy in line with the scope of international economic law as it evolved from the conclusion of the WTO Agreement.

Most commentators have pronounced their disappointment toward the amendment of Article 133 envisaged by the Nice Treaty. The least pessimistic has been the Commission by admitting that “the progress made in improving the operation of EU’s trade policy is modest.”<sup>(122)</sup> Pescatore calls it a “legal bricolage” and alerts us of the inevitable and imminent paralysis of the Community’s decisional processes which will hamper an effective defence of the Community’s trade interests.<sup>(123)</sup> The import of unanimity into the common commercial policy risks the decisional paralysis announced by Pescatore; however, the import of shared competence threatens the uniform principles of the common commercial policy expressed in Article 133 (1) of the Nice Treaty.

If the criterion for measuring the success of the Nice Treaty has been, following Piris’ words, an obvious and understandable need for “clear, simple, transparent, effective legal rules,”<sup>(124)</sup> then one could argue that Nice has failed to do its homework properly. Despite the interest of the Commission to extend as much as possible qualified-majority voting in the decision-making process for issues such as trade in services and intellectual property rights, Member States have attempted to reflect as much as possible the current situation with regard to distribution of competence in order to preserve the existing EU’s decision-making *modus operandi*.

Many commentators<sup>(125)</sup> argue that the Nice Treaty has accepted the outcome of Opinion 1/94 of the ECJ: the new Article 133 after Nice preserves the same outcome as the Opinion in the sense that there continues to be shared competence in GATS and TRIPs.<sup>(126)</sup> The enigma of EC trade policy on issues of trade in services and intellectual property rights continues to stand up: Cremona argues in this sense that a rethinking of the locution “uniform principles” as the basis of the EC common commercial policy will have to be done given the non-exclusive competence nature of services and intellectual property rights. To have a common definition of common interest may be more important and efficient in EC trade relations than uniform rules.<sup>(127)</sup>

In the words of the Nice European Council, Nice was about “how to establish and monitor a more precise delimitation of powers between the EU and its Member States reflecting the principle of subsidiarity.” The prevailing principle of Nice was that of *quid pro quo*. In the case of the common commercial policy, France had to give concessions to ensure parity with Germany in the decision-making process. The main issue at stake in Nice was the division of responsibilities between the EU and its Member States, i.e., who does what, the arrangements for the exercise of those responsibilities, and the balance of power between Germany and France.<sup>(128)</sup>

The struggles over national representation in the EC institutions are, according to Yataganas, “a sign of Member States’ mistrust of supranational decision-making procedures in general.”<sup>(129)</sup> There is a need to democratize the EU institutional framework. Or as it was said at the Nice Declaration on the future of the Union, there is a “need to improve and monitor the democratic legitimacy and transparency of the Union and its institutions, to bring them closer to the citizens of the Member States.”

The European Parliament was the big loser in the new Article 133 EC. It was not given any new rights at the Nice summit, not even a formal right of consultation. So an informal information procedure remains. However, Herrmann argues that the EP must be consulted if an agreement within the meaning of Article 133 (6.2) EC is to be concluded.<sup>(130)</sup> It seems contradictory to grant a right of consultation to the EP in an area where the treaty-making power is shared between the EC and its Member States whereas such a right to be consulted does not exist in an area that comes under the EC’s exclusive competence. That said, it must also be mentioned that the EP will be entitled to ask the ECJ to render an Opinion on the compatibility of an international agreement with the EC Treaty, according to Article 133 (6) EC.

As for the Council, the proposal that it would have a greater say in negotiations along with the Commission was not supported. This would have meant a double EC representation in international agreements, against one of the great advantages of Article 133 EC, i.e., that the EC speaks with a single voice. Had this happened, it would have enabled the EC’s negotiating partners to play off the EC negotiators against each other with all negative consequences for the EC’s capacity as an international actor. A clear example of this is the EU’s Common Foreign and Security Policy (CFSP), which is bicephalous in nature: it is represented by the High Representative of the Common Foreign and Security Policy and by the EC Commissioner responsible for external relations.

#### **D.1 The Extension of qualified-majority voting and co-decision procedures**

The new Article 133 EC enables the EC to conclude international agreements on trade in services and intellectual property rights by qualified majority voting and without ratification by the Member States.<sup>(131)</sup> Nonetheless, there is a need for unanimity if only one of the services sectors or intellectual property rights covered by the agreement comes under Article 133 (5.2) EC. Moreover, ratification by the EU Member States is required if one of the services sectors in question comes under Article 133 (6.2) EC.

Consequently, only agreements on specific services sectors, such as the GATS protocols on telecommunications or financial services, can be concluded in accordance with the rules of Article 133 (1-4) EC. With regard to agreements on the commercial aspects of intellectual property rights, the scope is rather far reaching due to the dynamic relationship with the TRIPs Agreement. However, since the EC has not yet enacted internal rules in several areas of intellectual property rights, agreements on intellectual property rights where there are not yet internal EC rules, they must be concluded by unanimous decision within the EC Council. With respect to foreign direct investment, the Commission did not succeed in including it in the scope of the EC's common commercial policy.

After Nice all EU Member States agreed that, out of the 75 cases where the EC Treaty still required unanimity, consensus must continue to be the rule in only 25 of those cases; for the remaining 50 cases, it was considered by the Portuguese and French presidencies that unanimity should be replaced by qualified-majority voting. In the end, qualified-majority voting was introduced in only 27 articles out of the original 50 proposed by the Commission.(132)

There were five sensitive areas in which transition to qualified-majority voting was important for an enlarged EU. These are as follows:

1. the coordination of social security schemes for cross-border workers and minimum requirements in social policy (articles 42 & 137 EC; opposition from the British government),
2. visas, asylum and immigration issues (article 67 EC),
3. taxation (article 93 EC; opposition from the British government),
4. the services and industrial property aspects of the common commercial policy (article 133 EC; strong opposition from the French government), and
5. the financing of economic and social cohesion policy (article 161 EC).

With regard to EC trade policy, France showed its on-going problem with culture in the sense that the French government refused the idea of getting rid of commercial policy exemptions for cultural issues (the so-called *spécificité culturelle*). The final deal was to allow trade in services to be decided by qualified-majority voting, but only after accepting exemptions for France in culture and audiovisual services. The French and other delegations of EU Member States negotiated long hours to come up with the new Article 133 of the Nice Treaty. The European Commission had campaigned over 10 years to obtain more freedom to lead international trade in services negotiations for the EU. The final compromise was the inclusion of the negotiation and conclusion of international agreements on trade in services and commercial aspects of intellectual property. These agreements are concluded by qualified-majority voting, except when they include "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 it by this Treaty by adopting internal rules."(133) Furthermore, "agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services shall fall within the shared competence of the Community and its Member States."(134)

It is pertinent to mention that the draft Treaty presented at the beginning of the Nice Summit in December 2000 included a Protocol on the participation of the EC and its Member States in the framework of the WTO under Article 133(4).(135) This text made an effort at better defining the roles of the EC and its Member States in areas of shared competence. Yet, this useful text was unfortunately not included in the final draft.(136)

With regard to co-decision, it will only be applicable in seven articles(137) that have changed from unanimity to qualified-majority voting. Unfortunately, the Nice IGC was not capable of extending the co-decision procedure to measures that already exist under the qualified-majority rule, such as trade or agriculture.

In conclusion, the Treaty of Nice only represents a small step forward in strengthening the EC's capacity to act on the international sphere. Many negative aspects of the ECJ's Opinion 1/94 have been codified by the new Article 133 EC. The negotiation and conclusion of significant international agreements, be they bilateral or multilateral, are subject to unanimous decision within the Council and ratification by the Member States. There was no solution towards obtaining a more extensive EC's exclusive competence to reach trade in services, intellectual property rights and investment. The unanimity requirement enables third countries to exert influence on single Member States. This, in an enlarged EC of 25 to 30 members, could be detrimental for its capacity to act internationally. It is then clear that national sovereignty has gained over efficiency in foreign trade. The EC's negotiating power, in comparison to that of the U.S. or Japan, has therefore been reduced. This will not enable the EC to properly respond to the challenges of globalisation and the world trading system.

## V. The New Millenium: Whereto From Here? The Convention's Proposals For Article 133 EC Post-Nice <sup>↑</sup>

The tasks of the Convention were set by the Laeken Declaration, which asked the Convention to consider “how the division of competence can be made more transparent,” “whether there needs to be any reorganization of competence” as well as “how to ensure a redefined division of competence” and to ensure European dynamism at the same time. In other words, the demands of the Laeken European Council are:

- Transparency
- Reorganization
- Maintenance of the division of competence, and
- Dynamism

### A. Union Competences and Actions <sup>↑</sup>

A catalogue of competences goes against the evolutionary nature of the EU since it would put a break on the natural on-going process of European integration. Furthermore, it would most likely not act as a problem solver for EU matters or, if it does, it might nonetheless not suffice. These questions have been discussed in the Convention's plenary sessions and in its Working Groups. On the basis of such discussions, the Praesidium has drawn up a draft text of articles the aim of which is, *inter alia*, to:

“Define clearly the fundamental principles governing the limits of the competences between the Union and the Member States and the way in which the Union's competences are to be used (as well as the rules for applying those principles).

- Determine the different categories of the Union's competences. The key factor in establishing those categories is the extent of the legislative competence conferred on the Union in relation to that of the Member States, according to whether such competence is conferred on the Union alone (exclusive competence) or shared between the Union and the Member States (shared competence), or whether it continues to lie with the Member States (areas of supporting action).
- Indicate the areas covered by each category of competences. The lists of areas of shared competence are not exhaustive, which takes account of the Convention's wish not to establish a fixed catalogue of competences. The reference in Article 12 to “principal areas” avoids having to define in detail each area of shared competence. The exact definition, and the extent of each area, are determined by the relevant provisions of Part Two.
- [...] Include a provision introducing a measure of flexibility in order to enable the Union to react in unforeseen circumstances. However, that flexibility is restricted to areas already specified in Part Two. The provision requires that the Member States' national parliaments be informed explicitly whenever the Commission proposes to use the flexibility clause.”(138)

Part I, Title III (Articles I-9 to I-17) of the draft Treaty Establishing a Constitution for Europe(139) deals with the division of competences between the Union and the Member States. It presents a threefold classification: exclusive competence/shared competence/supporting action. However, Title III does not seek to allocate competences in the way that a federal constitution might.(140)

It is debatable how far Part I, Title III fulfils the demands of the Laeken European Council. The basic threefold may be controversial, not the least the definition of exclusive competence.(141) More work may be needed to secure an adequate level of transparency required by the Laeken Declaration. As for the right balance between the maintenance of any “redefined division of competence” and ensuring that “the European dynamic does not come to a halt,” one has to look at Article I-17 of the draft Constitutional Treaty, entitled “Flexibility clause.”

Title III of the Praesidium draft of the Constitutional Treaty (The Union's competences) accepts the fact that it would be futile to attempt to compile an exhaustive catalogue of Union competences. Rather it adopts a two-sided approach: firstly, it entails the restatement and strengthening of the fundamental principles that organize the relationship between Union and Member State powers; and, secondly, defining with greater precision than at present the different kinds of competence available to the Union.



## A.1 Categories of Union competence

The Praesidium draft distinguishes between the categories of exclusive, shared and supporting (or complementary) competence.

- Article I-11

Article I-11 lists and describes the different categories of the Union's competences, i.e., exclusive competence,<sup>(142)</sup> shared competence<sup>(143)</sup> and supporting action,<sup>(144)</sup> thereby stating for each category what the consequences of the Union's exercise of its competences are for the competences of the Member States.<sup>(145)</sup>

- Article I-12

Article I-12 seeks to describe and define those areas where the Union has exclusive competence. This new article may be controversial, especially for the relationship between the Union and the Member States, but also for the involvement of national parliaments in the control of Union legislation. It deals with internal competence<sup>(146)</sup> and external competence.<sup>(147)</sup> These are two separate but related subjects: it is possible for the Union to have exclusive external competence in an area where the Union and its Member States have shared internal competence under the Treaty. In other words, issues of shared competence may potentially become exclusive EC competence.<sup>(148)</sup>

The Union is said to have exclusive competence "to establish the competition rules necessary for the functioning of the internal market," as well as in the areas of customs union, common commercial policy, monetary policy for the Member States which have adopted the Euro, and fisheries conservation.<sup>(149)</sup> The list in paragraph 1 of the areas of the Constitution in which the Union has exclusive competence goes beyond the present situation, as it includes the entire common commercial policy. This means that Article 133 (6) (2) of the Nice Treaty should be deleted unless we give a different definition to the common commercial policy, far from the current one.<sup>(150)</sup>

Article I-12 (2) reflects the case law of the ECJ on the Union's exclusive competence to conclude international agreements. The Community's competence to conclude international agreements arises from two sources:

- express provisions in the Treaty. For example, article 133 enables the EC to enter into tariff and trade agreements within the scope of the Common Commercial Policy.
- The jurisprudence of the ECJ.<sup>(151)</sup> The Court has held that external competence may flow from other provisions of the Treaty and measures adopted within the framework of those provisions. The existence of internal rules<sup>(152)</sup> or unexercised Treaty powers<sup>(153)</sup> to adopt such rules confers external competences to the Community.

As a matter of law, the Community's ability to conduct external relations is restricted to those areas where it has competence, whether it is exclusive or shared. On the other hand, where and to the extent that the Community has competence, Member States' freedom of action is limited. A consequence of the supremacy of EC law is that Member States cannot prejudice the operation of Community law by entering into external obligations. Thus, Member States may not enter into agreements between themselves or with third States on the same subject matter. The EC and its Member States share competence in a situation in which the transfer of competence is partial, because the Treaty expressly preserves Member States' competence<sup>(154)</sup> or because the internal rules do not occupy the whole field. Both will be parties to the international agreement, which is commonly known as a mixed agreement.<sup>(155)</sup>

## B. The Union's External Action

Part III (The Policies and Functioning of the Union) deals in its Title V (The Union's External Action) with the common commercial policy (Chapter III).

## B.1 The Common Commercial Policy

Articles III-216 and 217 deal with the common commercial policy and argues that the common commercial policy includes “the conclusion of tariff and trade agreements *relating to trade in goods and services and the commercial aspects of intellectual property, foreign direct investment*” (paragraph 1). The text in italics was added to the text of the first paragraph of the current version of article 133 of the Nice Treaty. This makes it very clear that goods, services, intellectual property rights and investment would be covered by the common commercial policy and would therefore fall within the exclusive competence of the EC. Compared to the Nice Treaty, the scope would be increased in two aspects: firstly, the exception concerning cultural and audiovisual services, educational services, and social and human health services would be removed; and secondly, investment would be included in the scope of the common commercial policy.

Given that article III-217 of the draft Constitution, as it stands, would remove any shared competence in EC trade policy (services and commercial aspects of intellectual property rights), it would exclude national parliaments from ratifying any future WTO agreements. Therefore, EU national parliaments would see their influence on trade policy minimized.

## VI. Conclusions

One could say that the more it all changes with Article 133 EC, the more it continues to be the same thing. Changes have been made but one wonders whether these suffice in qualitative and quantitative terms. On the other hand, stagnation continues to be present: there is somehow a revival of the ERTA principle and France does not want to give exclusive competence to the EC in cultural services, just to mention a few examples. Even with the Convention’s new proposal of Article I-12 (1) of the Constitutional Treaty draft, by which the common commercial policy will become exclusive EC competence, experience tells us that France, among some countries, will reject it on grounds of audiovisual services, health and the so-called *spécificité culturelle*.

Much of the confusion in the common commercial policy has to do with the fact that there is no clear policy framework in the EC Treaty itself. If the EC puts its acts together externally, it might help it toward joining internally. If the EU wishes to achieve a main role in global governance, changes need to be made. Following Lamy’s ideas,

“the EU needs to speak at global level not just with a single voice, but through a single mouth: the Commission should have competence, as in trade, to negotiate on all matters pertaining to the management of globalization (e.g. environment, transport, energy negotiations, commodity organizations, OECD, FATF, WHO, FAO, etc.), and this under the full control as well as scrutiny of both the European Parliament and Member States.

[...] Qualified majority voting in the Council should apply to questions of global economic governance.

[...] We need to enshrine, in the Treaties, a method for a gradual integration of the three pillars of the EU and a gradual transfer of intergovernmentally managed subject matters to the Community method.”(156)

Full Community competence in almost all trade matters has enabled the EC to develop a higher profile in international trade questions. Perhaps this can be a lesson to take into account for the remaining trade matters under non-exclusive Community competence. The role of the Member States’ national Parliaments and the European Parliament has to grow: they need to be consulted given that there continues to be a democratic deficit in the negotiation and conclusion of EC international trade agreements.

Going from unanimity to qualified-majority voting for the negotiation and conclusion of international agreements on services and commercial aspects of intellectual property (with exceptions) has already been identified as a reduction of sovereignty. On the other hand, in an enlarged EU of over 25 countries, any proposal requiring unanimity will be dead by definition since it will be almost impossible to find consensus. Statistically, enlargement will increase the risk of a Member State using its *veto* to prevent the Community from adopting a common position. This collective weakness may work to the advantage of the Community's trading partners.(157)

There are today many situations in which national interests can be pursued only through the EU level. The main exercise of the first fathers of Europe until Giscard and Schmidt was to discern whether there is a national interest, no national solution and the only solution that can reasonably satisfy the national interest is a common solution. As for the future, I believe that there is no solid European architecture if the Commission is not at its center. Perhaps one compromising alternative to the current situation might be to have exclusive EC competence in trade matters, with clear exceptions of when and how these should apply, given that the current *status quo* does not seem to be a good option.

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(103) Article 133 (3) EC.

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(105) Opinion 1/75 (Re OECD Local Cost Standard) [1975] ECR 1355, pp. 1363-1364.

(106) Protocol on External Relations of the Member States with regard to the Crossing of External Borders, annexed to the Treaty of Amsterdam, OJ C 340 [1997] p. 108.

(107) Heliskoski, J. "The Nice Reform of Article 133 EC on the Common Commercial Policy," *Journal of International Commercial Law*, 2002, 1(1): 1-13, at p. 11.

(108) Heliskoski, J. *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, Kluwer Law International, 2001.

(109) Heliskoski, J. "The Nice Reform of Article 133 EC on the Common Commercial Policy," *Journal of International Commercial Law*, 2002, 1(1): 1-13, at p. 12, footnote 18.

(110) Heliskoski, J. "The Nice Reform of Article 133 EC on the Common Commercial Policy," *Journal of International Commercial Law*, 2002, 1(1): 1-13, at p. 12.

(111) See *supra* "Changes made to Article 133 EC at Nice," point 6.

(112) Article 149 (4) EC.

(113) Article 150 (4) EC.

(114) Article 151 (5) EC.

(115) Article 152 (4) EC.

(116) Finnish Government Bill 93/2001, p. 42.

(117) Article 133 (6) (2) of the Nice Treaty.

- (118) See, in contrast, the position under GATT after the transfer of common commercial policy competence to the EC in Cases 22-24/72 *International Fruit Company* [1972] ECR 1219.
- (119) Opinion 1/94 at paras. 96-98.
- (120) For a further explanation of the duty of close cooperation, see Leal-Arcas, R. "United We Stand, Divided We Fall-The European Community and its Member States in the WTO Forum: Towards Greater Cooperation on Issues of Shared Competence?," in *European Political Economy Review*, Vol. 1, No. 1, Spring 2003, pp. 65-79, at 66-69, <http://personal.lse.ac.uk/wergin/eper/vol1-no1/leal.pdf>.
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- (123) Pescatore, P. "Guest Editorial: Nice –Aftermath" (2001) 38 *CMLRev* 265.
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- (125) See, among others, Pescatore, P. "Guest Editorial: Nice –Aftermath" (2001) 38 *CMLRev* 265; Krenzler, H.G. & Pitschas, C. 'Progress or Stagnation?: The Common Commercial Policy After Nice,' *European Foreign Affairs Review* 6, 2001, pp. 291-313.
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- (128) Yataganas, X.A. Conclusions, in 'The Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union- A Continental Perspective,' *Jean Monnet Working Paper* 1/01, at <http://www.jeanmonnetprogram.org/papers/01/010101-03.html> (last visited, November 29, 2002).
- (129) *Id.*
- (130) *Id.*, at p. 312.
- (131) Krenzler, H.G. & Pitschas, C. 'Progress or Stagnation?: The Common Commercial Policy After Nice,' *Eur. Foreign Aff. Rev.*, 6, 291-313, 2001, at p. 310.
- (132) For a list of the 27 articles where unanimity has been changed by qualified-majority voting, see Commission of the European Communities, Secretary-General, "List of provisions to which the qualified majority rules will apply," CONFER 4706/1/00 REV 1.
- (133) Article 133.5.2 of the Nice Treaty.
- (134) Article 133.6.2 of the Nice Treaty.
- (135) Draft Treaty of Nice, doc. CONFER 4816/00, of 6 December 2000.
- (136) Provisional text of Treaty of Nice, doc. SN 533/00, of 12 December 2000. Final text SN 1247/01, of 30 January 2001. See also the Nice Treaty web site at [http://ww.europa.eu.int/comm/nice\\_treaty/index\\_en.htm](http://ww.europa.eu.int/comm/nice_treaty/index_en.htm)
- (137) These seven articles are Art. 13, 62, 63, 65, 157, 159 and 191 EC.
- (138) House of Lords, Select Committee on the European Union, "The Future of Europe: Constitutional Treaty–Draft Articles 1-16," Session 2002-03, 9<sup>th</sup> Report, 25 February 2003, p. 14.

(139) See Official Journal C 169, 18 July 2003 at <http://europa.eu.int/eur-lex/en/treaties/dat/constit.html> (last visited January 18, 2004).

(140) See the German experience of a clear division of competences between the Federal level and the Laender level in Title VII of the Fundamental Law for the Federal Republic of Germany of May 23<sup>rd</sup> 1949, especially articles 70-75.

(141) Article I-12 of the Constitutional Treaty.

(142) Article I-12 of the Constitutional Treaty.

(143) Article I-13 of the Constitutional Treaty.

(144) Article I-16 of the Constitutional Treaty.

(145) House of Lords, Select Committee on the European Union, "The Future of Europe: Constitutional Treaty–Draft Articles 1-16," Session 2002-03, 9<sup>th</sup> Report, 25 February 2003, p. 18.

(146) Article I-12 (1).

(147) Article I-12 (2).

(148) House of Lords, Select Committee on the European Union, "The Future of Europe: Constitutional Treaty–Draft Articles 1-16," Session 2002-03, 9<sup>th</sup> Report, 25 February 2003, p. 19.

(149) Article I-12 (1) of the Constitutional Treaty.

(150) Article 133 (6) of the Nice Treaty reads as follows:

An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonization of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonization.

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.

The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.

(151) Opinion 1/94, WTO [1994] E.C.R. I-5267.

(152) ERTA, Case 22/70 *Commission v Council*, [1971] E.C.R. 263.

(153) Rhine navigation, Opinion 1/76 [1977] E.C.R.A. 741.

(154) For example, article 174 (4) EC.

(155) For an overview of the EC and mixed agreements, see Leal-Arcas, R. "The European Community and Mixed Agreements", in *European Foreign Affairs Review*, Vol. 6, Issue 4, Winter 2001, pp. 483-513, Kluwer Law International.

(156) Lamy, P. "Europe's Role in Global Governance: The Way Ahead," Speech given at Humboldt University, Berlin, 6 May 2002, at [http://europa.eu.int/comm/trade/index\\_en.htm](http://europa.eu.int/comm/trade/index_en.htm)

(157) [http://europa.eu.int/comm/nice\\_treaty/procedures\\_en.pdf](http://europa.eu.int/comm/nice_treaty/procedures_en.pdf) (last visited April 7, 2002).

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