The European Communities' WTO Trade Negotiation Jurisdiction Relating to Cross-Border Content Services

- Thesis: Draft of Chapter 3 -

The WTO and the Liberalization of Cross-border Electronic Services: a transatlantic perspective

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Chapter 3: The European Communities' WTO Trade Negotiation Jurisdiction Relating to Relating to Cross-Border Content Services [1]

Introduction

The EC will be at the center of the debate concerning audiovisual service negotiations and decisions to be taken with respect to digital trade products (online movies, entertainment games, etc.) that have been raised in the WTO E-commerce Work Program.

This chapter shows that the EC negotiators' hands are tied on the defensive side with respect to audiovisual service negotiations in the WTO. This superprotective regime for audiovisual services, mostly created through French pressure, is the result of two plots: an orchestrated change of the EC's Trade Policy regime that – under the new Treaty of Nice - actually creates a de iure veto power over the whole EC commercial policy for a single Member State (see 3.3) and the imposition of a defensive EC negotiation mandate concerning cultural services for the Doha negotiations (see part 3.4).

Given that France is determined to block any audiovisual negotiations in the WTO framework, the distribution of trade policy competences between the EC and its Member States is such that the EC will not be able to make any binding commitments with respect to audiovisual products. This holds even if a majority of EC Member States were willing to make binding commitments in the EC schedule as one Member States retains a veto power of the audiovisual GATS concessions of the EC. This ambition to keep audiovisual products out of the ambit of trade rules may also postpone pro-liberal decisions to be taken with respect to the open e-commerce questions raised by the WTO E-Commerce Work Program. Like during

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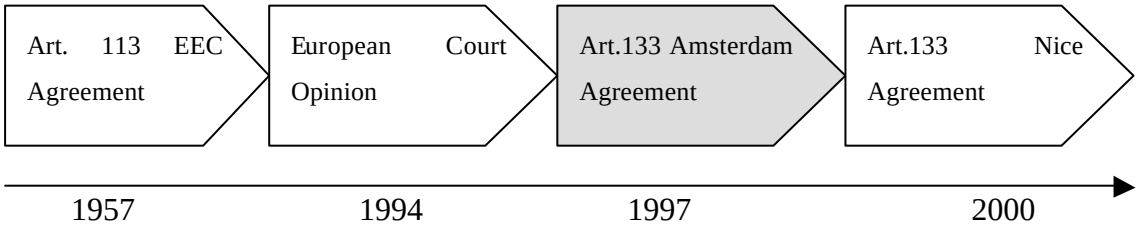
[1] The compilation of this part of the thesis would not have been possible without the very fruitful interdisciplinary co-operation between economists and legal experts. My thanks are directed especially to HAKAN ANDER (DG Internal Market), Prof. CHRISTOPH VEDDER (University of Augsburg), Prof. HEINZ HAUSER (University of St. Gallen) and Prof. MARTIN NETTESHEIM (University of Tübingen), who, as leading commentators on Article 133 or experts on EC law, assisted me in clearing up questions of detail on the EC's foreign trade competence. Dr. MICHAEL HAHN put his unpublished manuscript at my disposal and also helped with additional questions. Because the legal interpretation of Article 133 is complex and disputed among legal experts, and also because the final results of the research were not communicated with the persons mentioned above, the responsibility for any incorrect interpretation of Article 133 rests with the author of this thesis.

the Uruguay Round France will take all necessary steps to protect the cultural sectors from trade liberalization[2].

In discussing this examination of the EC foreign trade responsibilities, four important points should throughout be borne in mind:

Point 1: The legal position regarding the EC's foreign trade policy jurisdiction is extremely complex. The EC's foreign trade jurisdiction is based on Article 113 of the EEC Agreement that has been in legal force since 1958 and changed through the Amsterdam and Nice Agreement. Because of the new numbering of the Amsterdam Agreement (1997) we are now dealing with Article 133[3]. In the opinion of experts on EC law, this specific section from the European Agreement was not well drafted. Some even argue that the commercial policy article leads to more questions than answers[4]. As Sketch 3 shows, neither the interpretation of the Article nor the Article itself is of a static nature[5].

Figure 1: The evolution of Article 133 (previously 113) regarding EC Foreign Trade Jurisdiction



Point 2: Without prejudging later arguments, it could already be stated that the trade policy jurisdiction depends on two aspects: Firstly, in terms of the allocation of the jurisdiction, it has to be clarified whether any article of trade is a good or a service. Should the article of trade be a service, then one should furthermore distinguish – in terms of determining the trade policy jurisdiction – between the kind of GATS delivery mode (Mode 1 - 4) and subsequently also in terms of the kind of service sector. In summary, one needs a case-by-case test to decide what division of the trade policy responsibilities is at stake between the EC and its member states.

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2 See JAROTHE (1998), S. 348 that describes the French determination to block the whole Uruguay negotiations for the sake of the audiovisual services.

3 To simplify matters, the author will from here on always refer to Art. 133.

4 See EVERLING (1969), p. 187 and HAHN (1999), Para. 1. Cf. HERRMANN (2001) or HERRMANN (2002) regarding the lack of clarity in the Nice Agreement.

5 In addition to the treaty changes, the European Court of Justice was asked to interprete Art. 133 in 1994.

This chapter concentrates on the aspects relevant to e-commerce. Although we will need to address the subsequent arguments on a wide front in order to delineate the matter precisely, in the final analysis the author will be investigating the assignment of competence for two constituting parts of e-commerce:

(i) Trade in electronic services (cross-border service delivery under GATS Mode 1 or consumption abroad under GATS Mode 2)

(ii) Trade in digital products (GATS Mode 1 / Mode 2 as service, or GATT as good).

For instance business and financial services, educational and health services and audiovisual services are all covered by electronic services under (i). As the categorization under mode 1 or mode 2 is still unclear, both scenarios must be analysed. It is also difficult to describe the position of digital products in terms of Point (ii) above[6]. One cannot predict whether the WTO negotiating parties will classify these as GATS transactions. Clearly, the unresolved categorization of digital products as either products or as services will have some consequences for the division of trade negotiation jurisdiction.

Point 3: In interpreting the subsequent implementation of the assignment of responsibility, one cannot ignore the political sensitivities in the audiovisual services negotiations. Here a number of EC member states, such as France, took a strong stance against any liberalization of the audiovisual sector[7]. This cautious attitude was also prevalent regarding other service sectors such as the provision of health or education and training services. As will be set out, this attitude also permeates through to the willingness of the EU member states to transfer an express power for trade negotiations to the EC institutions regarding the services sector.

Point 4: The consequences of the formal legal interpretation of Art. 133 – that in theory prescribes a separate type of jurisdiction over trade negotiations in terms of each negotiating topic – are in practice considerably watered down. During the consultations between the EC Member States and the European Commission in Brussels – or even during the WTO negotiations in Geneva – one cannot draw a neat division between the different case

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[6] Digital products, should be understood here solely as music, films, etc. electronically off-loaded point to point. This term clearly does not encompass broadcast services, the categorization of which as "audiovisual services" does not present any problems, and also falls under GATS Mode 1.

[7] This reticence in the audiovisual sector, but also regarding the health, education and training, and entertainment sectors, was shared by nearly all WTO member states. Therefore, this is definitely neiher a purely European nor a French attitude.

scenarios. This is due to the need to adopt overarching negotiating packages[8] in which not all elements fall under an exclusive EC jurisdiction. Moreover, despite an exclusive EC power in certain cases, the EC Member States have always in the past tried to reach consensus when making foreign trade decisions in the European Council[9].

In order to describe the evolution of the EC foreign trade jurisdiction in the service sector, the author will be discussing step by step the relevant influences on Art. 133 that are hinted at in Figure 3[10]. The original Art. 133 (previously Art. 113) and its amendments through the Treaty of Amsterdam (1997) and the Treaty of Nice (2000) are reprinted in the annex of this chapter and can be read in conjunction with the below text.

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[8] Negotiating packages across sectors are those agreements that do not refer exclusively to the service sector or to the GATS production sector, such as for instance cross-border electronic transactions.

[9] The right to conduct a majority vote on trade issues which is anchored in the European Treaty has so far never been used in practice.

[10] It is clear that – because of the steadily increasing number of digital products – the unresolved questions on the protection of intellectual property are playing a significant role in the electronic commerce sector. However, in accordance with the decision not to treat intellectual property issues in this thesis, the trade policy competence regarding the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) will not be discussed. It suffices to say that the question of the trade competence distribution between EC Members States and the EC with respect to TRIPS issues is as complex as in the case of services. The horizontal e-commerce questions that relate to the TRIPS have been set out in another work; see HAUSER and WUNSCH (2002), pp. 98 - 105.

3.1 Exclusive Foreign Trade Jurisdiction of the EC in Trade in Goods

In contrast with internal matters, where the EC enjoys a range of unfettered responsibilities, the EC jurisdiction *vis-à-vis* questions of foreign relations are more circumscribed[11]. Most of the EC jurisdiction on foreign relations is shared with the member states. Exclusive EC foreign relations' jurisdiction is not the norm, but may be granted by the the EC Agreements.

Such an exclusive EC power relating to "common commercial policy" does however exist in respect of international agreements regarding international trade in goods[12]. From 1958 until the Maastricht Agreement (1993), Art. 113 of the EEC Agreement (and Art. 133 after the Amsterdam Agreement) made provision for the foreign trade responsibility of the EC[13]. Art. 133 of the EC Agreement that prescribes a common commercial policy for all EC member states, grants to the European Community (EC)[14] the authority to negotiate regarding international trade matters in the WTO forums in accordance with a set of principles on the basis of unanimous decisions by the Council[15]. This entails the most important transfer of powers to the EC both in terms of autonomous and also external jurisdiction in concluding agreements in terms of international law[16]. Because this power is of an exclusive nature, only the Community is responsible in this respect. The member states are not competent to act[17]. And so, formally speaking, the member states have been excluded since 1970 from determining any autonomous and self-determined foreign trade policy concerning the trade in

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[11] See McGOLDRICK (1997) for a general introduction.

[12] Cf. Art. 133, Para. 1. This competence belongs to the EC and not to the European Union, because international law does not accord the latter the status of an international legal entity, CRAIG & BÚRCA (1998), p. 116.

[13] VEDDER (2001), Para. 1.

[14] Embodied by the Directorate General for Trade in the European Commission (short: DG Trade).

[15] See in this respect HAHN (1999), Para. 2.

[16] VEDDER (2001), Para. 3. and MÜLLER-HUSCHKE (2001), Para. 1

[17] BOGDANDY & NETTESHEIM (1993), p. 465 f. or CRAIG & BÚRCA (1998), p. 114.

goods[18]. The competence that a member state may have lost in terms of this setting up of exclusive EC competence can in normal circumstances not be regained[19].

Two institutional actors are mainly responsible for shaping this exclusive EC foreign trade competence: One is the Directorate General for Trade of the European Commission that consists of European civil servants and the other is the European Council[20], consisting of high ranking government representatives of EC member states (normally ministers). Under the original Treaty of Rome, the European Parliament – the competence of which will not be examined more closely – does not play a decisive role in concluding international agreements. It is merely consulted regularly on the conclusion of such trade agreements, without having any decision-making powers[21]. In addition, one major difference to the USA is the fact that the private sector plays a much smaller role in the trade policy formulation process (this point will be substantiated in later drafts).

Regarding the formal standpoint on the decision-making process one could state the following: In terms of Art. 133, Paragraph 2, the Commission is obliged to lay proposals on the conduct of a common commercial policy before the Council. The proposals for any negotiation mandate are normally couched in broad terms so as to provide sufficient room for maneuver to the Commission during the negotiations[22]. In accordance with the contents of these proposals, the Council then empowers the Commission to start with the relevant negotiations. The results of the subsequent negotiations then again have to be approved by the Council. Both procedures – the approval of the negotiating mandate and also the acceptance of the results of the negotiations – are conducted as specified in Art. 300 on agreements with

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[18] VEDDER (2001), Paras. 8-13. Thus, for instance, the EC foreign trade law takes precedence over the German foreign trade law. The exclusion of the application of foreign trade law is also valid when the organs of the Community have not enacted any secondary Community law; thus there is no concurrent competence.

[19] HAHN (1999), Para. 5 and HAHN (2002), Para. 17.

[20] In the following sections the European Council will in general terms be referred to as "the Council" and the European Commission as "the Commission".

[21] Art. 300, Paras. 2 and 3.

[22] See for instance the part on services in the negotiating mandate that the Council adopted for the Ministers' conference in Seattle 1999; see "Preparation of the Third WTO Ministerial Conference", Council Conclusions, October 25, 1999; 12092/99, Annex II, DG E III, p. 4). Although the negotiating mandate gives some direction, it does not greatly limit the Commission's negotiation flexibility . It is not necessary to set strict parameters either, because the Commission has to act in such a fashion that the Council will approve the results of the negotiations. The EC Member States usually recognize the need to give a wide negotiating margin to the Commission (see German *Bundestag*, 14th Legislative Period, Motion and Statement on "The reinforcement of the free world trade at the new WTO round", Printed Matter 14/5755, April 3, 2001, p. 1.).

third states[23]. In terms of the "common commercial policy", provided for in Art.133, Para. 1, the Council only needs a qualified majority to approve both negotiating procedures[24].

Consequently individual member states do not have any veto right over the "common commercial policy" (Para. 1). An exception is the approval of international agreements regarding an area where – in terms of internal EC practice – the Council may only accept new laws or amendments thereof unanimously. Until the Nice Agreement, this right was not explicitly held in Art. 133, but it was previously conducted – as were most of the rules regarding the conclusion of international agreements with third states – by means of Art. 300, Para. 2.

For negotiations on international trade agreements the majority principle has clear advantages over the principle of obligatory unanimous decisions. First, it simplifies or accelerates decision-making[25]. And secondly, qualified majority voting reduces the risk that an explicit veto right may enable one EC Member with a protectionist interest to impede progressive trade liberalization supported by the majority of the other EC Member States.

But in day-to-day EC commercial policy decisions the distinction between trade decisions that necessitate either qualified majority or unanimity has been blurred. Although most international trade agreements since 1957 would only have needed qualified majorities in the Council, it has become normal practice to gain the support of the representatives of all EC Member States for decisions on negotiating mandates or for the approval of specific agreements[26]. Hence, in Brussels foreign trade questions are thus mostly decided upon by means of unanimous decisions[27].

To ensure that a consensus is present in the European Council when international agreements are approved and to ensure that the Commission's negotiators do not stray too far from their negotiating mandate during negotiations, the Commission is assisted by the so-called "133

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[23] Art. 133, Para. 3.

[24] Art. 300, Para. 1. Also see MÜLLER-HUSCHKE (2001), Para. 236 on the decision-making procedure.

[25] This is also the reason why – in terms of the expansion of the EU eastwards and in drawing up the Nice Agreement – there was support for accepting the principle of accepting decisions by means of a qualified majority.

[26] See HAYES (1993), KUIJPER (1995), p. 223, MEUNIER & NICOLAIDIS (2001), p. 1 and HAHN (1999), Para. 27.

[27] See MÜLLER-HUSCHKE (2001), Para. 234. This urge towards unanimity follows the principle of consensus of the Luxemburg compromise.

Committee"[28]. This Committee consists of senior representatives from the bureaucracy of the national Ministries and the Commission. Its task is to help agree on a common commercial policy that will find acceptance by all EC Member States[29].

Furthermore, it is an important characteristic of the exclusive EC competence that the conclusion of international trade agreements no longer presupposes any ratification procedures by national parliaments. As soon as consensus is reached in the Council regarding the conclusion of an agreement, then no further approval by the national parliaments is necessary for the agreement to become binding on all member states. The member states only continue to have influence through their Council representatives and through their national officials on the 133 Committee.

This exclusive competence regarding the "common commercial policy" is described in the literature as a structurally necessary external expansion of the Community's internal free exchange of goods and services[30]. Out of functional considerations it is feared that individual external trade actions by a single EC member states could otherwise provoke trade and competition distortions that will endanger the internal coherence and the functioning of the internal market[31].

It should be recognized however, that the agreements offer little help in interpreting the boundaries of the exclusive EC competence[32]. This is due to the imprecise definition of "common commercial policy" in Art. 133, Para. 1[33].Therefore, it cannot be concluded clearly from the agreements what elements of the foreign trade agreements are not covered by the abovementioned exclusive EC commercial policy competence[34]. Until the conclusion of the

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[28] Art. 133 Para. 3. For further information see HAHN (1999), Para. 27 and VEDDER (2001), Para. 83.

[29] The Committee has monthly meetings with the most senior delegates of national Ministries and weekly meetings between the more junior colleagues. The contents of these meetings are not made public.

[30] See VEDDER (2001), Para. 7 and HILPOLD (1999), pp. 118-126.

[31] BOGDANDY & NETTESHEIM (1993), p. 465 f. and the WTO Opinion 1/94 of the European Court of Justice, p. I-5323.

[32] CREMONA (2001), p. 6 f.

[33] See this paragraph in the Annex. According to LINDBERG (1963) the precise scope of the CCP was not defined because differences existed between the liberal and more protectionist stances of the six founding governments.

[34] HERRMANN (2001), p. 269.

Uruguay Round this question was never formally addressed. Even the 133 Committee did not tackle this issue[35].

From 1970 until the Uruguay Round, this exclusive EC competence was exercised in all GATT and most other trade agreements without the direct approval of the member states, and hence of the national parliaments[36]. Under the auspices of the "common commercial policy" the EC member states were always eager to assume a co-ordinated position in the WTO. Although between 1947 and the establishment of the WTO in 1994 the EC itself was not a formal member of the GATT, it nevertheless always had the status of a *de facto* party to trade agreements[37]. The EC could act as a party to all treaties to be concluded.

Since 1994 the "European Communities and their Member States" have been parallel treaty members of the WTO[38]. However, for all practical purposes the procedures during negotiations have not change[39]. In formal WTO negotiations, the Commission acts on behalf of all EU member states[40]. This also happens in WTO Ministers' conferences, the work done in the WTO Councils, and also the GATS working parties in Geneva. In the case of formal decisions in the WTO forum, it is the Commission that casts all votes of the EC member states *en bloc*[41]. This co-ordinated action under the auspices of the Commission is also found during informal bilateral trade meetings, which for instance regularly take place between the USA and the EU. At important negotiations the Commission is accompanied by members of the 133 Committee or representatives of the Council Presidency[42].

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35 See BOGDANDY & NETTESHEIM (1993), p. 466.

36 See BOURGEOIS (2001), p. 72.

37 MÜLLER-HUSCHKE (2001), Para. 209 and BOURGEOIS (2001), p. 71.

38 WTO Document WT/REG39/1*, April 24,1998, Establishment of the European Union, Services.

39 See PAEMEN & BENCH (1995) for an account of the EC's trade policy during the Uruguay Round. In sum, the EC was never an integrated whole during the negotiations (especially in the agricultural and audiovisual question).

40 See NUGENT (1994), pp. 118-119 or CRAIG & BÚRCA (1998), pp. 115-119.

41 Thus by means of the combined vote of the Commission all EC member states vote in an identical fashion. For more information, see KUIJPER (1995), p. 224.

42 HAHN (1999), Para. 27.

3.2 The Conclusion of the Uruguay Round, the WTO Opinion of the European Court of Justice, and the Amsterdam Agreement

3.2.1 The Unresolved Question of the Division of Competence at the Conclusion of the WTO Agreement

Before the conclusion of the WTO Agreement at the Uruguay Round in 1994, it was accepted that the elements of the GATT Agreements were fully covered by the exclusive competence of the EC. This position, however, changed in the context of the Uruguay negotiations, because the WTO Agreement in the offing would not only consist of the GATT Agreement on trade in goods, but also of an General Agreement on Trade in Services (GATS) and an Agreement on the trade-related aspects of intellectual property rights (TRIPS). This was the time where the exclusive EC foreign trade competence, the boundaries of which had to date not been established, would be set before a test[43].

The lack of clarity on the division of competence did not really become visible during the negotiations. This was because – despite any doubt on the principle of an exclusive competence – the negotiations were conducted solely by the Commission on the basis of the negotiating mandate by the Council[44]. The Council nevertheless explicitly indicated when it laid down the WTO negotiating mandate in September 1986 that the final decision on the unresolved question regarding competence still had to be taken[45].

In this way the requirements of WTO trade diplomacy were addressed, without the Council prejudicing in any way the question of the division of competence between the European Communities and their member states[46]. After all, especially the GATS Agreement involved questions on national competence, for instance in the fields of direct investments, matters regarding tax laws, residence rights and also cultural matters – such as audiovisual services – over which the member states did not wish to lose their control[47]. On the basis of this

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[43] VEDDER (2001), Para. 6.

[44] HILF (1995), p. 210.

[45] See WOOLCOCK & HODGES (1996), p. 320.

[46] HILPOLD (1999), p. 103.

[47] BARTH (1994), p. 459.

provisional decision on the negotiating mandate, the final decision on the question of competence was delayed until after the negotiating round[48].

But during the last stage of the negotiations, and especially shortly before the conclusion of the WTO Agreement, quite serious differences of opinion started to emerge between the Commission and the member states regarding the delimitation of Art. 133, Para. 1[49]. The Commission held the opinion that the whole WTO Agreement resorted under the exclusive EC competence. According to the Commission and also the legal literature, the renunciation of clearly delimiting the scope of the "common commercial policy"-term in Art.133, amounted to the EC foreign trade competence being flexible and open to any newly developed trade policy instruments[50]. As a consequence, the exclusive EC competence should also cover the new trade agreements, such as the GATS or TRIPS, which encompassed the new sectors of services and intellectual property rights[51]. This interpretation was supported by the fact that the world trade in services was rapidly expanding and also by Article 131, which calls for a harmonious development of world trade and the progressive abolition of restrictions on international trade as a common objective of the economic union.

In conformity with the procedures of the exclusive negotiating competence the Commission thus recommended to the Council that the WTO Agreement be approved[52]. Accordingly the European Community, and not the EC Member States, would have become party to the WTO Agreement[53]. But the member states resisted this interpretation of Art. 133, Para. 1, and argued that the WTO Agreement exceeded the exclusive foreign trade competence of the EC. Hence, the GATS became an important trigger of the controversy regarding the delimitation of the EC trade policy competence[54].

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48 BOURGEOIS (2001), p. 72, states: "The issue was put on the back-burner and the negotiations were conducted according to the procedures normally followed for GATT negotiations, albeit that the Commission negotiated for both the EC and the Member States".

49 KUIJPER (1995), p. 222.

50 See VEDDER (2001), Paras. 24-25. This interpretation came from the European Court documentation 1/78 on the Naturkautshuk International Rubber Treaty, Collection 1979, 2871 and 2912 f.

51 See VEDDER (2001), Para. 35 and HERRMANN (2001), p. 270.

52 See COM (94)143, where the Commission forwarded the results of the WTO Agreement to the Council for its approval.

53 KUIJPER (1995), p. 223.

54 HERRMANN (2001), p. 270.

Then, the decision whether the EC or the member states should ratify the Agreement, played a key role after the Declaration of Marrakech regarding the successful completion of the WTO Agreements[55]. In order to avoid a disgrace for the EC and its Member States because of the internal voting problems, some rapid action was called for. And so, a few months before the agreement would be concluded, the EC requested an opinion of European Court of Justice (ECJ) concerning that issue.

3.2.2 The Incisive European Court of Justice Opinion of 1994[56]

The European Court of Justice (ECJ) was only in partial agreement with the Commission's arguments. It saw one strand of commercial policy competences that flow out of Art. 133 and another strand of competences that go under the title of "implied powers"[57]. The first strand follows the Principe d'Attribution: EC competences are gained by the means of an explicit trade authority delegation from the member states to the EC that is make explicit in an EC Treaty.

The second more disputed competence strand can be deduced from the "implied powers doctrine" or the "theory of parallelism"[58]. Accordingly, external competences arise from other provisions of the Treaty and actions adopted thereunder. The Community can conclude agreements which deal with matters falling within its internal jurisdiction with explicit treaty specifications on this external competence[59]. This principle was first found applicable for the EC in the ERTA judgment[60]. There the ECJ held that "whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary

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55 CREMONA (2001), p. 9.

56 The Opinion has the reference number of European Court, Collection 1994, and WTO Opinion 1/94. On the interpretation of the Opinion see BOURGEOIS (1995), HILF (1995b), HAHN (1999), Paras. 9-19, VEDDER (2001), Paras. 55-56. A detailed description can also be found in chapter four of HILPOLD (1999), pp. 103-149.

57 See YI (1998), p. 9-10 for a description of the two strands.

58 Also called in „foro interno in foro externo principle". This Latin phrase was coined by the former judge of the ECJ, P. Pescatore (1979), p. 618. For a detailed analysis of this complicated concept see MACLEOD ET AL (1996).

59 Thus agreements pertaining to fields not mentioned in Art. 133.

60 Case 22/70, Commission v. Council on the European Road Transport Agreement, [1971] ECR 263.

for attainment of that objective even in the absence of an express provision to that effect."[61]. Most actions that woud fall under this scope fulfil a particular objective of the Community and were enacted in the course of the operation of the common market. Thus, a progressive widening of internal powers then has a widening of external powers as its consequence.

Following this logic, it is rather undisputed that implied powers of this sort arise when internal acts of the institutions explicitly provide for negotiations with third countries. But also plain harmonization of internal legislation can lead to external competences. The degree of competence depends on the reach of the internal Community law. Common rules which are the most far-reaching use of internal competences and have lead to a complete harmonization may give rise to exclusive competences[62]. Also, to achieve exclusive competences the ECJ has argued that the EC must have made use of its internal power[63]. But external competences (not exclusive ones) may also arise if trade treaties with third countries are a necessary precondition to reach the aim laid down by a treaty[64]. Then, it does not matter whether a common rules has been priorly adopted[65]. Contrary to acts of full harmonization, steps like the creation of minimum EC standards may only lead to concurrent competences – meaning that the member states can take external action if the EC has not yet done so[66]. Concretely, this means that the adoption of new internal competences involves a recognition of the external EC competences in just that particular field[67].

The two sources of possible external competences advanced by the ECJ each have their own problems when trying to delimit specific competences in practice. On the one side, external powers that are derived explicitly from the treaty depend on a clear definition of the commercial policy definition under Art. 133. As demonstrated the drafters of the Art. 133 have not included such a clear definition. On the other side, the derivation of implied powers is at best a difficult case-by-case decision that has to be performed for each trade sector at

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61 Quoted from ECJ, Opinion 2/94, Para. 26. See also DE WITTE (2000), p. 7 and Hilpold (1999), p. 114-117.

62 MACLEOD ET AL. (1996), p. 49 and p. 56 f.

63 ECJ, Opinion 2/94, Para. XX. If for instance a European Treaty confers the power for harmonization in a certain field to the EC but the EC has not taken extensive community action in this field, then no exclusive external competence arises.

64 Herrmann (2002), p. 9-10.

65 Opinion 1/76, (1997) ECR 741, p. 755.

66 By the means of a bilateral trade agreement with a third country for instance.

67 HILF (1991), p. 11 and PETERSMANN (1991), p. 204.

hand[68]. As no service sector is completely harmonized by EC law, it may be claimed that no straightforward exclusive competence arises out of the secondary law. Thus, a close look at the internal secondary law must be used to make predictions with respect to external competences. But clearly this concept does not allow for a precise statement about what external competences the EC has due to implied powers. With respect to regulatory issues relevant to e-commerce, one can state quite safely that a lot of policy areas are concerned where the Member States are not ready to delegate full competences to the Commission (consumer protection, etc.). Then, it is the delibarate decision of the Member States if they want to cooperate with their fellow member states in international negotiations[69].

Together with the above yardsticks of explicit and implied powers the ECJ's Opinion came to the following conclusion: It found that in accordance with Art. 133, Para. 1 the "common commercial policy" of the member states continued to be under the exclusive EC competences. In its Opinion the ECJ recognized that this exclusive competence had to adapt itself to the changing interpretation of the international community regarding the sectors covered by trade agreements. If the growing number of new trade policy themes were considered outside the traditional EC foreign trade competence, then a loss of European Community control over trade policies would ensue in the long-term. Therefore the European Court did not freeze its interpretation of the description of Art. 133, Para. 1 of the "common commercial policy" in its original form of 1957[70].

Despite this the ECJ decided that the whole of the WTO Agreement did not resort under the exclusive competence of the EC. In this connection the member states could not be excluded from participating in the negotiations and from the conclusion of the WTO Agreement. The WTO Agreement should therefore be concluded as a mixed agreement[71]. In its findings on the division of competence the ECJ differentiated between the subject-matterss of the Agreement,

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[68] NETTESHEIM & BOGDANDY . See also TIETJE (XX) , para 15 who mentions that an analysis of all secondary law is necessary to determine effects from the internal market on external trade negotiations. His conclusion is also that case-by-case analyses are necessary .

[69] YOUNG (2001), p. 5.

[70] HAUSER & WUNSCH (2002), p. 164. In other Opinions the Court made clear that the competences flowing from Art. 133 must be interpreted widely *(*Opinion 1/78, [1979] ECR 2871 concerning the International Rubber Agreement).

[71] See NEUWAHL (1996) for more on the concept of mixed agreements.

namely GATT, GATS or TRIPS[72] and in terms of services, also according to the kind of service delivery mode.

On the one hand, the ECJ confirmed previous thinking: The sectors dealing with industrial goods, agricultural produce, coal and steel products, etc. – and thus also the GATT with its subsidiary competence – all resort under the exclusive foreign trade competence of the EC in terms of Art. 133, Para.1[73]. Because the WTO Agreement on technical barriers to trade (TBT) does not aim to draw up technical regulations, but rather aims to ensure that no unnecessary trade barriers are raised, according to the Opinion – and despite the misgivings of certain member states – it is subject to the exclusive EC competence[74].

On the other hand, the ECJ made a surprise finding that the negotiations and the conclusion of the GATS and TRIPS agreements were not in the exclusive domain of the EC, because international co-operation in these fields did not support any explicit EC aim. In the light of the Opinion, there is an internal EC competence in this respect and possibly also a concurrent implicit competence to conclude agreements, but these do not resort under Art. 133[75].

According to this authoritative interpretation of the ECJ, the EC is exclusively responsible for only **one** of the four GATS service delivery modes[76]. Art. 133 encompasses the service delivery modes that are managed internally in the EC through Arts. 49 *et seq*. of the EC Agreement, and thus the cross-border trade of services which does not presuppose any crossing of borders by persons (GATS Mode 1). Only services not bound to any person and that are thus of a similar nature than trade in goods, would in terms of international trade accordingly be exchangeable immaterial goods[77], that in terms of Art. 133, Para. 1 regarding the common commercial policy, encompass an exclusive EC competence. All other GATS production modes that necessitate a change of the locality of service providers and/or

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[72] Responsibility for TRIPS was however not covered in the Opinion. It should nevertheless be pointed out that the European Court did not make any findings on any exclusive EC competence in this area.

[73] Gleaned from VEDDER (2001), Para. 35.

[74] See ECJ, Collection 1994, WTO Opinion 1/94, Para. 33 and for more details, HAHN (2002), Para. 23.

[75] See HILF (1995b), pp. 250 ff .

[76] See European Court, Collection 1994, WTO Opinion 1/94, Paras. 44-46 and Cf. the statements in HILF (1995), 239, pp. 250 ff., MÜLLER-HUSCHKE (2001), Para. 18, HILPOLD (1999), pp. 111-113, VEDDER (2001), Paras. 35-40.

[77] See VEDDER (2001), Para. 36.

clients[78], are – in accordance with the Opinion – not within the EC's common commercial policy mentioned in Art. 133, Para. 1. An exception holds when accessory services accompany a certain international trade in goods, such as the assembly of a delivered machine[79]. Only then and due to the connection to the trade in goods are GATS modes 2-4 covered by an exclusive EC competence.

This distinction between the delivery of services along the need for physical movement of persons was indispensable for the continued preservation of parallelism between internal and external EC competences. Following the theory of parallelism outlined before, in those sectors where the EC has no exclusive internal competence – such as the movement of persons – there may equally be no exclusive trade competence on the EC level[80]. Moreover, the Court argued that the elimination of service trade barriers between the EC and third countries are not directly connected to the realization of the goals of the internal market[81].

The ECJ Opinion had the following consequence for the conclusion of the inseparable WTO Agreements:

Because in addition to GATT rules the WTO Agreement established trade rules for all four service delivery modes and for trade-related intellectual property rights therefore the Agreement in its totality exceeds the exclusive EC foreign trade competence. As the EC is not responsible on its own, it is only competent for concluding the WTO agreement as a mixed treaty with shared responsibilities in conjunction with its member states[82].

The Opinion also referred to three significant changes that result from its interpretation:

(i) Firstly, the finding concerning the mixed competences accords each country a *de jure* veto right in the European Council. This veto right applies to both the adoption of a negotiating mandate and also the approval of the results of the relevant negotiations. The consequence is that the Commission should at first receive an *ad hoc* negotiating

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78 GATS Modes 2-4.

79 See European Court, Collection 1994, WTO Opinion 1/94, Para. 46 f.

80 HILF (1995b), p. 257. It woud be illogical if the EC can make GATS mode 4 commitments for its Member States whereas it does not have the internal competence to decide about Member States's immigration or work permit policies with respect to third states.

81 See European Court, Collection 1994, WTO Opinion 1/94, Para. 15, I-5274.

82 HILF (1995a), p. 210 and MÜLLER-HUSCHKE (2001), Para. 208.

brief for the WTO negotiations by means of a unanimous decision of the Council. Subsequently, the Council needs to approve unanimously the results of the negotiations[83].

(ii) Secondly the direct participation of the member states in concluding international trade agreements again involves the national parliaments. Because the decision-making procedures of the EC are not sufficient to bind the EC member states, it also becomes necessary for national parliaments to ratify the WTO Agreements. For the Federal Republic of Germany, for instance, this means that the articles from the Constitution (*Grundgesetz*) regarding the ratification of international agreements – and especially Art. 59 of the Constitution – are relevant. At the same time, the internal division of competence between the central state and the federal states also comes into play. Although this is not the place to discuss the issue of mixity and the federal principle it suffices to say that this is an additional source of tension during negotiations[84]. In some cases the ability of the federal governments to secure the implementation of treaty obligations which fall outside its legislative competence is severly constrained.

In federal states like the Federal Republic of Germany this is especially the case for agreements affecting culture[85]. After the EC agreed on the TV without frontiers Directive, the German government was criticized by the German Constitutional Court for not involving the German *Länder* enough. Following this logic, any agreement on WTO-level that touches upon cultural issues must involve the federal institutions[86].

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83 See MEUNIER & NICOLAIDIS (2001), p. 1.

84 See WEILER (1999) for a detailed account on the external legal relations of non unitary actors that are characterized by mixity and the federal principle.

85 When concluding international agreements not within the exclusive competence of EC member states, the FRG has to take into account the interests not only of the central state – in other words the national Parliament – but also of the federal states. This was agreed through the Lindau Agreement that stipulates that the competence to conclude agreements in terms of international law, which lie within the exclusive responsibility of the federal states, will be undertaken by the central state. The central state is internally obliged to obtain the concurrence of the federal states before the relevant agreement could become valid in terms of international law. This is especially true of cultural agreements. In this connection see the relevant commentaries on Art. 59, for instance by MAUNZ & DÜRIG (2001) and WEILER (1999), p. 149 ff.

86 "Fernseh-Richtlinien"- Entscheidung des Bundesverfassungsgerichts. Sourc is missing.

(iii) Thirdly, the Opinion opened up the theoretical possibility that while respecting the constraint of shared competences, the EC member states may independently conclude bilateral agreements with third states[87].

HILPOLD states that this part of the European Court Opinion reflects the wish of the member states to reverse the "creeping incapacitation" they were facing in the GATT/WTO environment[88].

In order to avoid any rupture in the close relations between the member states despite this incisive decision, the ECJ emphasized the need for a common representation of the Community in terms of international law and the possibility for co-ordinated actions of the EC institutions[89]. The ECJ was aware that the differentiated allocation of competence – created by means of the complicated internal voting arrangements and the concomitant ratification process – would not strengthen the EC's "single voice"-approach in the WTO. And so the Opinion emphasized that the EC and its member states had the obligation to ensure that they co-operated closely in WTO matters[90]. This obligation is based on the provisions of Art. 133, Para. 3, that specifically requires co-ordination between the Commission and the Committee of 133 at negotiations, the conclusion of agreements, their ratification, but also at the implementation of the relevant agreement [91].

And so the EC's membership of the WTO did not rest solely on its exclusive foreign trade competence[92]. On the basis of the ECJ Opinion it was decided as a practical measure to agree on a "dual" membership of the WTO ("the European Communities and their Member States"), for both the EC and for the individual member states[93].

To pay respect to the newly formalized different competence distributions, the Commission drafted a skillful procedure for the acceptance of the whole WTO Agreement. In accordance

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87 As long as no existing WTO or other rules are broken, it does not matter whether or not these other countries are members of the WTO.

88 Cited from HILPOLD (1999), p. 103.

89 HILPOLD (1999), p. 130.

90 HILF (1995a), p. 218 and HILF (1995b), p. 255 f., and HAHN (2002), Para. 36. For details also on the duty to co-operate, see HILPOLD (1999), pp. 129-137.

91 HERRMANN (2001), p. 270.

92 VEDDER (2001), Para. 23.

93 BOURGEOIS (2001), p. 73. This is also sometimes described as "parallel" membership. It is formalized in WTO Art. XI.

with this plan, the Council discussed and voted on the different parts of the agreement individually. Nevertheless, a previously formalized Council decision foresaw only the simultaneous and unanimous approval of the total WTO negotiating package[94]. The European Parliament was consulted before the Council approved the agreement[95]. In addition, the WTO Agreement was also ratified by the relevant national parliaments.

In practical terms, the 15 EU member states and the EC continued to act as a single unit in the WTO circles after the conclusion of this mixed agreement. For instance, the GATS Agreement provides only a single country schedule for all EC states[96]. In accordance with the competences attributed to the EC member states with respect to the GATS, it nevertheless happened that individual member states deviated from the official EC GATS commitments[97]. This even happened regarding the GATS Mode 1 column in which the ECJ prescribed an exclusive competence of the EC[98].

All in all, the ECJ Opinion's denial of the EC's exclusive trade policy competence for the service sector, brought about a state of affairs which one could not necessarily directly deduce from Art. 133. Accordingly, modern international trade agreements that encompass more than the exchange of goods and relate to new trade policy aspects are not covered fully anymore by the "common commercial policy"-terminology used in Art. 133, Para. 1.

Since the conclusion of the WTO Agreements two attempts have been made to convert the ECJ's WTO Opinion 1/94 into primary law and/or to expand the EC's exclusive competence in foreign trade matters. The first attempt was reflected by the amendment to Art. 133 by means of the 1997 Treaty of Amsterdam. After the positive Irish referendum on October 18, 2002, the Nice Treaty will now soon be ratified by all EC member states. The content of the Amsterdam Agreement that directs the present EC foreign trade competence will then be revoked. Thus, only limited attention is paid to the Amsterdam Treaty changes.

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94 On this matter, see KUIJPER (1995), pp. 240-241. Thus, the Council could not veto individual parts of the WTO agreement.

95 See KUIJPER (1995), pp. 229- 232.

96 Any states joining the EU at a later stage would be an exception.

97 This could be seen from the analysis of the EC's GATS commitments in chapter 2.

98 The fact that individual member states deviated from the common EC position in the common GATS schedule can be seen as indication for the fact that the differences between exclusive and shared competence are evened out in practice. This point will be taken up later again.

3.2.3 The Limited Influence of the Legally Valid Treaty of Amsterdam (1997)

While the Maastricht Agreement did not bring about any legal amendment of Art. 133[99], the Amsterdam Agreement introduced a new Paragraph 5 into Art. 133[100]:

> (5) On the basis of a proposal by the Commission and a hearing of the European Parliament, the Council may, by means of a unanimous decision, expand the application of Paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property rights, inasmuch as these paragraphs do not cover these matters.

Although only one paragraph was added to the EC Agreement and no other amendment was introduced to the existing paragraphs, Paragraph 5 aimed to clarify an interpretation of the term, "common commercial policy", used in Paragraph 1. This entailed the first explicit reference to the sectors of "service" and "intellectual property rights" in Art. 133. Paragraph 5 has the single goal of converting the findings of the European Court into primary law[101].

In this way the ECJ's interpretation was formalized: namely that trade policy decisions on all GATS Modes are not automatically part of the "common commercial policy" and thus part of the EC's exclusive foreign trade competence. Although the trade in cross-border services (GATS Mode 1) are not legally affected by this explicit curtailment of EC commercial policy competence, the drafters of the Treaty did not make this exclusive competence explicit in the treaty.

Still, Paragraph 5 of Article 133 created a new possibility that a unanimous Council decision could also expand the EC's exclusive foreign trade competence on an *ad hoc* basis to include the negotiations regarding the three remaining GATS modes and intellectual property rights[102]. One can observe in this possibility the attempt to expand again the EC's foreign trade competence to all sectors of the present day trade policy. In terms of the Opinion's terminology, the Council – in following the European Court Opinion – may reverse the prescribed formula of concluding mixed agreements on a basis of consensus.

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[99] CREMONA (2001a), p. 9. See DASHWOOD (1998) for a complete treatment of the Amsterdam provisions and MEUNIER & NICOLAIDIS (1998), p. 14-17 for the negotiation history.

[100] All amendments to the agreement have been cited in Chapter Three. Because of the brevity of this amendment, we were able to quote the whole of the text.

[101] HAHN (2002), Para. 41.

[102] Thus no EC Intergovernmental Conference (IGC) was necessary for the extension of the competence. Cf. MEUNIER & NICOLAIDIS (2001), p. 1.

But as the current opinion of the legal literature on Paragraph 5 notes, there are nevertheless problems in interpreting the possibility to extend the competence[103]. There is for instance a difference of opinion on whether this extension is limited to a case-by-case basis or by a time limit, or whether a unanimous Council decision may approve a wide-ranging extension[104]. Are we therefore dealing with a possibility of extending the exclusive competences on all areas covered by mixed competences or does the Council have a free hand in deciding in which fields a selective extension should take place[105]? Is it perhaps also possible to extend the exclusive competence to certain sectors only while retaining the *de jure* veto right in others[106]?

On the one hand, the member states – that could not agree on a definitive extension of the exclusive competence – opted for the interpretation associated with "variable extension". This refers to a case-by-case approach, together with a time limit[107]. But on the other hand, leading commentators on EC law interpreted the matter as follows: By means of Art. 133 a first step was taken in the creation of a genuine wide-ranging foreign trade competence in the service sector[108]. Accordingly, a possible interpretation of Paragraph 5 would be a long-lasting extension of the exclusive competence mentioned in Para. 1 of Article 133[109]. The Commission regarded the Amsterdam Agreement as a limited transfer of competence regarding foreign trade matters[110].

However, to the present day there is no definitive clarification regarding these interpretation problems. It is certain though that since the creation of the Treaty 1997, the possibility to

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[103] VEDDER (2001), Para. 56, MÜLLER-HUSCHKE (2001), Para. 35, HAHN (1999), Para. 40 and CREMONA (2001), p. 23.

[104] See in this respect e.g. MÜLLER-HUSCHKE (2001), Para. 35. It is not clear either whether the extension to an exclusive competence refers only to the negotiating process by the Commission or whether it fully covers the conclusion of agreements by the Council. In this respect see VEDDER (2001), Para. 56.

[105] HAHN (1999), Para. 40.

[106] CREMONA (2001), p. 23.

[107] HAHN (1999), Para. 40 also refers to the fact that in 1997 the German Government was of the opinion that Art.133 Paragraph 5 "enables the negotiating competence of the Commission to be expanded on a case-by-case basis, also in terms of the mixed responsibility of the Communities and their member states regarding the services and intellectual property sector." Printed matter 784/97, October 17, 1997, p. 155.

[108] See VEDDER (2001), Para. 59.

[109] VEDDER (2001), Para. 56 refers to the point made by HAHN (1999), Para. 41.

[110] EU Commissioner LAMY (2000) saw the Amsterdam Agreement as a transfer of competence. According to LAMY, the Nice Agreement would complete the transfer of competence because then the decision-making procedures for areas like services change over from unanimous to qualified majorities.

expand competence in all service sectors has never been used[111]. Commentators added that the amendments effected by the Amsterdam Agreement did not offer a long-lasting solution[112]. Because the new Art.133 of the Nice Agreement will nullify the inserted Paragraph 5 of the Amsterdam Agreement, it stands to reason that until the implementation of the Nice Agreement, the possibility will not be used to expand the competence by means of a unanimous Council decision[113]. All in all nothing much has changed, since no conscious and formal action has been taken regarding the expansion of competence as a result of the Amsterdam Agreement[114]. The restoration of exclusive competence across the whole spectrum of trade sectors was at least avoided.

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[111] VEDDER (2001), Para. 58 and HERRMANN (2001), p. 269. In other words, the Council did not convert the shared competence to an exclusive EC competence at any time before the approval of the negotiating mandate.

[112] See in this respect MÜLLER-HUSCHKE (2001), Para. 241 or CREMONA (2001), pp. 33-34. The latter calls this agreement "an agreement to disagree" or an "agreement to postpone agreement".

[113] Thanks goes to Prof. VEDDER for this point. See VEDDER (2001), Para. 59. As the Amsterdam Agreement has no long-term future, we only concentrated on its core elements. A detailed description Art. 133 of the Amsterdam Agreement can be found in VEDDER Paras. 55-58, CREMONA (2001), pp. 21-25 and HAHN (1999), Paras. 28 and 42.

[114] Thanks goes to Prof. NETTESHEIM and Prof. VEDDER for this point. Please also see VEDDER (2001), Para. 1.

3.2.4 Critical Appreciation of the Legal Situation Before the Ratification of the Treaty of Nice

Because the content of the Amsterdam Agreement has not been applied applied, one must refer to the legal situation created by the ECJ Opinion to formulate a critical appreciation the current state of affairs.

So much has been written on the various points, that the literature cannot be discussed in any great detail[115]. But it suffices to say that a clear line of thought has crystallized on the differentiated and difficult process of expanding's the EC's commercial policy competence: Seen from a political point of view, it is a pity that the ECJ Opinion and its take-up in the Treaty of Amsterdam represents a reverse in the evolutionary understanding of the question regarding the EC foreign trade competence[116]. Following this logic, for the EC mixed agreements have become the norm in terms of trade agreements concluded in the WTO environment since the ECJ Opinion. Despite the fact that for instance the WTO agreement initially contained only a limited competence for member states, it developed into a mixed agreement. Clearly, this denial of competences led to a weakening of the EC's negotiating powers[117].

Moreover, the literature refers to a significant divergence between the EC law interpretation of the term "commercial policy" and its meaning in standard international economic law[118]. Whereas the community interpretation excludes new trade issues like most service transactions and IPRs, the themes discussed during WTO negotiations have transcended by a wide margin the negotiations on a mere lowering of customs duties. The WTO negotiating mandate of Doha, for example, prescribed that negotiations should take place on themes such as investment rules, competition rules and the relation between free trade and the official procurement sector[119].

This phenomenon of "narrow versus wide" interpretation of commercial policy casts a shadow on new forms of transactions, such as e-commerce, but especially on new types of

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[115] For a discussion of the relevant positions, see HILPOLD (1999), pp. 117-129.

[116] HILPOLD (1999), p. 111 and VEDDER (2001), Para. 36.

[117] See FISCHER (2000), 240, p. 126 and Bourgeois (1995), p. 786.

[118] HAHN (1999), Para. 19, 32 f., HAHN (2002), Para. 11, VEDDER (2001), Para. 55.

[119] WT/MIN(01)/DEC/W/1, November 14, 2001, pp. 4-5.

regulations trying to integrate "new themes" in the international world trade order. It stands in stark contract to the fact that the EC is one of the most important trade nations in the service sector and to calls of the former US Trade Representative chief BARSHEFSKY to establish a new "trade policy for a net-based economy"[120]. Especially, the division of competences along the lines of service delivery forms cannot be expected to work in practice. What will be important for future competence questions is the fact that the the ECJ opted for a fairly conservative interpretation of the implied powers doctrine[121]. According to the Opinion, the numerous internal market directives that affect all modes of service delivery did not suffice to lead to an implied external competence.

The European Commission is therefore justified in complaining about the unsatisfactory situation, namely that an expanding segment of trade has been removed from its exclusive competence in the midst of the tension of the economic structural change to a service driven economy[122]. Especially when it is difficult to achieve consensus between the member states, a dangerous situation could emerge. As happened during the Uruguay Round, in borderline cases endless internal discussions could ensue regarding the jurisdiction of the Community[123].

If each EC country should have the power to veto proposals or decisions during the internal process of casting votes, then it would be quite possible for the protectionist tendencies of a single country to block a whole group of important trade nations in the WTO forum[124]. It is also a fact that the European Court Opinion has caused the question of the EC's foreign trade competence to become a highly explosive political theme.

The EC thus became a difficult negotiating partner of the other WTO member countries and in the future these competence and coordination problems may limit the EC's ability to act as

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[120] For instance in USTR BARSHEFSKY (1998) and USTR BARSHEFSKY (2000). The acronym, USTR, stands for United States Trade Representative.

[121] See MCDONALD (2001), p. 85.

[122] The authors thank RUDOLF ADLUNG (WTO Trade in Services Division) for this point, and see also ADLUNG (2001), p. 139. The Commission issued this warning before the Amsterdam Agreement. See "Reinforcing Political Union and Preparing for Enlargement", Commission Opinion of February 28, 1996, Paras. 25-27. See PAEMEN and BENSCH (1995), p. 95 that draw a link between the lackluster performance of the EC during the Uruguay Round.

[123] See HILF (1995a), p. 218.

[124] This was certainly the case during the negotiations on audiovisual services. But MEUNIER & NICOLAIDIS (2001), p. 1 emphasize that country specific protectionist tendencies influence the overall EC acceptance of liberalization measures in all service sector: Greece and Denmark in terms of maritime transport, Germany

a lead figure in trade negotiations[125]. It was only a small consolation for other WTO member states that the Commission announced that the trade concessions already made would not be impaired by the problems surrounding the division of competence[126].

Before the negotiations on the Nice Agreement the Commission thought that the only way out of this dilemma would be the proposal that Paragraph 1 of Article 133 be amended[127]. It would be to the effect that the existing exclusive competence on the trade in goods be expanded to include the service, intellectual property and investment protection sectors. The Commission saw in Nice above all the chance to achieve the changeover from the principle of unanimity to the principle of a qualified majority during Council decisions[128]. The Commission also argued for a greater involvement of the European Parliament[129].

An initial and far-reaching proposal was made drafted in November 2000[130]. Particularly, the Commission presented a protocol draft concerning the participation of the EC in the WTO that formalized the different roles of the Member states and the EC. The main points declared that a) a single procedure shall apply in all cases – exclusive or shared EC competences and Member State competences-, b) the Commission shall be sole negotiator for the EC and that c) qualified majority would be the standard decision-making procedure.

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vis-à-vis civil aviation, France regarding audiovisual services, the public sector and matters of health services.

[125] An observer of transatlantic trade relations summarized the situation as follows: "Although the EU is an economic giant, it is a pygmy when it comes to foreign policy", cited from FISCHER (2000), p. 125. In other forums, such as the negotiations on the Law of the Sea Convention, the other negotiating parties criticized the wrangling between the Commission and the member states as an extremely annoying and blocking state of affairs. See KUIJPER (1995), p. 224. The point on the damaged EC's ability to act as a leader in negotiations was made by ADLUNG (2001), p. 132.

[126] During the creation of the WTO a representative of the EC had to convince the WTO negotiation partners that there was no danger to the maintenance of the concessions made on the basis of mixed competence. See WTO Document WT/REG39/M/4, October 13, 1998, on the Examination of the Treaties establishing the European Union, Services: "The question of how competencies were divided was a difficult one in practice, on a daily basis. Shared competence in trade in services affected only the internal decision-making process.[…]. [Once the EC and their Member States] take a commitment that level of treatment would be ensured, irrespective of the source of competence." The terms used in brackets came from the original documentation. They indicate omitted parts of a text and added parts of sentences to increase its readability.

[127] See WIEDMAN (2001) for insider views of the IGC negotiations.

[128] See LAMY (2000).

[129] See the proposals by the Commission under CONFER (2000) on a greater right for information to the European Parliament. It is however not clear whether or not this right was already introduced in terms of Art. 300, and that nothing would be changed in terms of this proposal. (See German *Bundestag*, 14th Legislative Period: Question and Reply "Proposal by the EU Commission regarding the Reform of Art. 133 of the EC Agreement on a common Trade Policy", Printed Matter 14/3241, April 18, 2000, pp 1-2.)

[130] CONFER (2000). pp. 34-42.

During the debate about the formulation of the Nice Agreement the majority of EC member states accepted this line of thought by the Commission. Finland, Sweden, Italy, the Benelux states and the United Kingdom all spoke in favor of the expansion. Especially countries, such as the United Kingdom, that enjoy a comparative advantage in trade in services, had a positive interest in liberalizing the sector. They saw the necessity for an exclusive Community competence to achieve this liberalization.

A vociferous minority, namely France – that held the EU presidency at the time - but also Spain and Portugal –- were the strongest defenders of the less integration-friendly principle of shared competences[131]. But critical voices were also heard in national Parliaments like the German *Bundestag*. It was feared that the creation of a wide-ranging exclusive competence on the level of the EC would lead to national parliaments irreversibly losing all competence on trade policy matters[132]. This criticism was especially valid if the increasing loss of competence of the national parliaments was not accompanied by a greater role by the European Parliament.

Ultimately the Nice Agreement had to do justice to both parties. A watering down of the initial proposals occured. On the one hand, it was agreed that an amendment to the agreement would mean that Europe could once again "speak with one voice". On the other hand, this competence delegation was accompanied by a series of limitations that are particularly relevant to audiovisual services.

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[131] See KRENZLER & PITSCHAS (2001), Para. 292 and 443, MEUNIER & NICOLAIDIS (2001), p. 2. and GOULARD (2000). The latter links the French Presidency and the lack of flexibility resulting from the "cohabitation" to the rather disappointing outcome of the Nice changes.

[132] German *Bundestag*, 14th Legislative Period, Question and Reply: "Proposal by the EU Commission on the Reform of Article 133 of the EC Agreement on a common Trade Policy", Printed Matter 14/3241, April 18, 2000, p. 1 and 2. During the debate the failure of Seattle was ascribed to the absence of democratic participation by the national parliaments and the lack of transparency in the decision-making procedures at the WTO. The proposal by the Commission did not solve this problem, but limited the capacity of democratic control measures over the WTO even further.

3.3 The Treaty of Nice: A failed Attempt to Create Exclusive EC Competences for a Modern Commercial Policy

3.3.1 The Changes Enacted by the Nice Treaty

In October 2002, the second Irish referendum confirmed the Treaty of Nice. Once the Treaty enters into force, its new Art. 133 will specify the new trade policy jurisdiction of the EC.

The Nice Agreement amended Paragraph 3 of Article 133 which had existed since 1957; Paragraph 5 which was changed in Amsterdam was revised again; and new Paragraphs 6 and 7 were introduced[133]. A first glance at the text reveals that a new order has come about regarding the Community's competence in terms of trade policy. For the first time the treaty mentions an express power of the EC for service negotiations[134]. But as will be shown later, the hope that the Nice Agreement would unconditionally expand the term of the "common EC commercial policy" to cover all new trade sectors was only partially fulfilled.

A close-up on the article's modifications shall support the above observations[135]:

Thus, Art. 133 (5) specifies that Art. 133 Paras 1-4 that confer an exclusive competence and the possibility of majority voting to the EC shall also apply to the conclusion and negotiation of trade treaties regarding trade in services and intellectual property rights. The Community will in future be fully responsible for the external aspects of trade in services, including GATS modes 2-4. This involves a genuine transfer of competence, in as far as these have not yet been transferred[136]. On the basis of a qualified majority the Council is now empowered to conclude international agreements relating to services. However, as opposed to earlier drafts the whole field of investment (except for services under GATS mode 3) was not put under exclusive competence[137]. This leads us to the limitations of this treaty modification.

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[133] The amendments to Article 133 are contained in the annexure to this Chapter.

[134] See HERRMANN (2001), p. 269.

[135] For a summary of changes see KRENZLER & PITSCHAS (2001).

[136] VEDDER (2001), Para. 59, HERRMANN (2001), p. 271. According tot he European Court Opinion the existing competence only relate to trade in goods, trade in accessory services and Gats Mode 1 transactions.

[137] See HERRMANN (2001), p. 272 and VEDDER (2001), Para. 60.

This new above-mentioned paragraph only transforms existing and concurrent competence into exclusive ones[138]. In other words, in fields where the EC did not have internal competences no new exclusive responsibilities arose. As opposed to the exclusive competence conferred to traditional trade issues by Art. 133 Para. 1, the paragraph 5, subsection 1 does not give rise to a competence to create secondary law necessary to fulfill external trade obligations[139]. While the EC has both internal and external competence to lay down rules in the fields of trade in goods and GATS Mode 1 transactions, it can only exercise external competence regarding international treaties relating to the other three GATS Modes and matters relating to TRIPS.

So, for instance, it is not incumbent on the EC alone to conclude agreements with third states on all components relating to trade in services. As before, the EC's exclusive competence continues to be excluded from certain sectors, such as Mode 4 transactions. Consequently and deviating from Para. 5, SubPara. 1 that allows majority decisions on matters relating to the EC's exclusive competence, it should be noted that Para 5, Subpara. 2 prescribes that the contents of agreements needing unanimous approval for the adoption of internal rules should also be approved unanimously by the Council[140]. A unanimous decision is also needed in those cases where an agreement may cover some fields regarding in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules[141].

As if the above treaty specifications were not explicit enough on the boundaries of the EC external competences, paragraph 6, Subpara. 1 reiterates that an agreement may not be concluded by the Council if it includes provisions that would go beyond the Community's internal powers. If an agreement is concluded on the basis of the new service trade competence and hence the creation or the amendment of secondary community law is necessary, then this competence must be found outside of Art. 133. Specifically, areas in which the treaty rules out harmonization cannot be negotiated by the EC (Art. 149-152). This relates especially to areas like the freedom of movement for workers from third countries / immigration, taxation, social policy, education, culture or public health.

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[138] VEDDER (2001), Paras. 56 and 60, and HERRMANN (2001), pp. 271-272.

[139] HERRMANN (2001), p. 271.

[140] This amounts to the same phenomenon taking place twice: The same limitation was also foreseen in Art. 300, Paragraph 2, where internal needs prescribe unanimous decisions.

[141] VEDDER (2001), Para. 61.

But the new Art. 133-version also explicitly introduces sector-specific exemptions from the exclusive EC competence that will play a particular role in the current GATS negotiations. According to Para. 6, Subpara 2, agreements relating to trade in cultural and audiovisual services, services in the area of education and training, as well as trade relating to social services and public health fall within the shared competence of the Community and its member states. In the original draft, the precedent for this wide list of service sectors was set by a unanimity requirement for agreements that affect the ability of Member States "to promote cultural diversity"[142]. Then a debate about the inclusion of other sectors started.

As a result, for the first time Art. 133 Para. 6 institutionalizes shared commercial policy responsibilities of the Community and its member states and possibly even mixed trade agreements[143]. Thus, the conclusion of such agreements again foresees the principles of unanimity in the Council and their ratification by national parliaments. The parallel between the sectors where France wanted to protect itself from further liberalization and the sectors in which these exceptions were introduced can hardly be overlooked[144]. In fact, France struggled hard to obtain a veto right on these sectors[145]. It should be recognized though that all EC member states were rather reticent to apply liberalization measures in these sectors. Finally, as specified by Para. 6, Subpara. 3 the transport sector that is also influenced by rather protectionist tendencies of the EC Member States falls outside of the logic of new exclusive service trade competences laid out in the new Art.133 version[146].

A result of this institutionalization of limited EC competences and the emphasis on remaining member state rule-making competences is the fact that most of the transferred competences are not exclusive. In terms of Paragraph 5, Subpara. 4 – it is not possible to prevent EC member states to maintain and conclude agreements with third countries or international organisations insofar as such agreements comply with Community law and other relevant

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[142] CONFER (2000). p. 37.

[143] See VEDDER (2001), Para. 64.

[144] MEUNIER & NICOLAIDIS (2001) p. 1 are of the opinion that country specific protectionist tendencies are characteristic of the unwillingness of certain EU member states to institute liberalization measures: Greece and Denmark in the maritime transport sector; Germany in civil aviation; France in audiovisual services, the public sector and health services.

[145] HERRMANN (2002).

[146] VEDDER (2001), Para. 64.

international agreements[147]. Finally, Art. 133, Para. 5, subsection 3, provides that Council unanimity is needed for the negotiation and conclusion of horizontal agreements that contain elements that necessitate unanimous approval of the Council or that fall under shared competences.

On the organizational front, new elements of Art. 133, Para. 3 strengthen the already existing duty of the Commission and the 133 Committee to co-operate. In addition to consultations, the Commission is now formally instructed to "regularly report" to the 133 Committee on the state of the negotiations and to ensure that the negotiated agreements are compatible with the Community's political measures and regulations.

In summary the following points can be made: The Commission's considered proposals were fulfilled only to a limited extent by the Nice Agreement. Nevertheless, both the Commission and the Member States make reference to the principle of parallelism to explain the above-mentioned services[148]. According to this principle, the decision-making procedure for trade negotiations is aligned with internal decision rules. The anxiety of Member States that trade negotiations could otherwise "harmonize" via the back door and dismantle national policies has been an influential driver for the formalization of this principle.

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[147] Nice Agreement, Art. 133, Para. 5, Subpara. 4. See HERRMANN (2001), p. 272, who states that after the conclusion of the Nice Agreement those trade agreements concluded by the EU no longer necessarily need to be mixed treaties. But the possibility to conclude mixed agreements nevertheless continues to exist.

[148] "The reform of Art. 133 by the Nice Treaty – The Logic of parallelism", http://europa.eu.int/comm/trade/faqs/rev133_en.htm. and "The Commercial Policy of the European Union", http://europa.eu.int/comm/trade/misc/tib1_en.htm, both downloaded in July 2002.

3.3.2 The Trade Policy Jurisdiction for Cross-border Audiovisual Services after the Ratification of the Treaty of Nice

Here the trade policy jurisdiction established by the Treaty of Nice shall be assessed for cross-border service transactions of digital content services (audiovisual services delivered under GATS Mode 1). In a first step, a strict legal analysis for this trade transaction is provided. In a second step, this legal analysis is embedded in the context of how negotiations are conducted in the WTO ("the negotiation reality"). This latter step demonstrates that express powers that had already been transferred to the EC via the ECJ Opinion (concerning the GATS mode 1) are being retroactively curtailed by the new Art. 133 of the Treaty of Nice

3.3.2.1 Legal Analysis of the Trade Policy Jurisdiction with Respect to Cross-Border Service Transactions

The distribution of trade policy competences throughout the different stages are summarized in Table X. For this section only the two rows concerning the GATT and GATT (second and third row from above) are relevant. The row concerning the so-called "Negotiation Reality" (single undertaking) will be taken up in the second step of this analysis.

Table 1: Different Trade Policy Competence Distribution depending on Product Type, Delivery Mode or Service Sector

		ECJ Opinion 1994	Treaty of Amsterdam 1997	Treaty of Nice, 2001
Goods / GATT		Express power of the EC	Express power of the EC	Express power of the EC
Services / GATS	Mode 1	Express power of the EC	Express power of the EC	Express power of the EC
	Mode 2, 3, 4	Shared powers and necessity for the conclusion of mixed treaties	Possibility of competence extension in favor of the EC for all GATS modes. No necessity for conclusion mixed treaties.	Conditional express power of the EC with sectoral and other exemptions. No necessity for conclusion of mixed treaties.
Negotiation Reality Single Undertaking		Unanimity requirement and/or conclusion of mixed treaties	Unanimity requirement and/or conclusion of mixed treaties	Unanimity requirement and/or conclusion of mixed treaties

Explanations to table 4: The different shades hint at the spectrum of the trade policy competence distribution between the EC and its Member States (MS). **Light gray shading** with black text stands for an express power of the EC, no involvement of national Parliaments, clear distribution of jurisdiction and thus reduced negotiation complexity. **Dark gray shading** with white text stands for shared competences, the duty for mixed treaties and the involvement of national Parliaments, a de iure veto right of each single MS and high negotiation complexity. **Grey shading** with black text stands for limited express powers depending on service sector and mode of delivery (case-by-case test), unclear competence distribution and high negotiation complexity.

Due to the minor importance of the changes made in the Treaty of Amsterdam the text focusses on the legal situation established with the ECJ Opinion. According to this Opinion described in 3.2.2 all GATS Mode 1 transactions fall under the express trade policy power of the EC[149]. This extension of express powers from the Member States to the EC is irrevocable and subsequent treaty changes do not impinge on this acquired trade policy competence[150].

In other words, the cross-border transactions involving digital content products (like software, music, movies deliveries via satellite, the Internet or cable) or other cross-border transactions like business services or financial services fall under express EC trade policy jurisdiction[151]. At first sight, this finding is particularly striking because a majority of EC member states for instance could overrule a minority of EC Member States to make GATS mode 1 commitments in audiovisual services. Moreover, - as trade policy for goods is equally an express power of the EC - this finding does not depend on whether digital trade products are considered goods or services within the WTO[152].

It can be argued that – in strictly legal terms - the Treaty of Nice does not change much with respect to the trade policy competence distribution for digital products. As mentioned before, the express powers conferred to the EC via Art. 133, Para. 1 are not transferred back to the EC Member States via subsequent treaty changes. Consequently, the thesis can be put forward that the competence limitations introduced by Para. 5 and 5 of the Treaty of Nice do <u>not</u> affect the express power of the EC when dealing with the cross-border trade of audiovisual services[153].

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[149] The author assumes in the remainder of the text that electronic cross-border transactions fall under GATS mode 1. The subsequent legal interpretation does however not depend on that assumption. Even if WTO Members would decide to classify electronic cross-border transactions under mode 2 it would still be an express power of the EC, as it is still a cross-border service transaction without the involvement of the movement of a natural person.

[150] Otherwise, the EC trade policy competence would be weakened twice. Firstly, the ECJ Opinion extracted parts of the services trade policy from EC jurisdiction. Secondly, the Amsterdam Treaty or the Nice Treaty would even curtail the EC's express power to deal with cross-border trade in services (GATS Mode 1).

[151] HILF (1995b), p. 252 or COTTIER (1994), p. 749 ff.

[152] Currently, WTO Members wonder whether digital products should be classified under the GATS or the GATT (see chapter 2 of this thesis). Seen from this perspective, individual EC Member States do not have an incentive to tilt the WTO decision towards a service classification of digital trade products to get a veto power over certain steps of service trade liberalization.

[153] The results presented here are tentative. Although the statements are backed up with interviews of the legal experts in the field a definite judgement concerning these issues may have to come from a second ECJ Opinion.

The fact that the EC does not lose its express power to negotiate cross-border audiovisual or other services via the limitations introduced by Para. 6 of Art. 133 produces a strange outcome. Whereas the EC seems to have the express power to negotiate and conclude agreements with respect to cross-border online transactions of movies, health or education services (GATS mode 1), it shares this competence with the Member States when negotiations about the local establishment of a media firm, a health or education service provider are concerned (GATS mode 3).

With this knowledge in mind, the next section tries to assess the implications of the changed EC trade competences against the background of how WTO negotiations take place in practise.

3.3.2.2 The New Art. 133 Against the Background of the WTO "Negotiation Reality"

The strictly legal assessment in the previous section established that the EC maintains its express powers with respect to cross-border audiovisual or other content transactions.

If, however, one takes into account how WTO negotiations are conducted and how WTO trade agreements are agreed upon, this express power for GATS mode 1 may not mean very much in practise. The reasons for this weakening of the express powers of the EC is that most agreements in the WTO are the result of negotiation packages.

Three examples of circumstances where negotiation packages are at the order of the day can be enumerated. First, most WTO trade agreements rely on the "single undertaking" principle meaning that WTO Member States must ratify all elements of the deal if they want to become a member of the trade agreement. During the Uruguay Round, for instance, more than 100 WTO Member States negotiated for more than 8 years on GATT, GATS and TRIPS rules[154]. Second, even within certain sector-specific negotiations the agreements reached – like a horizontal GATS regulatory discipline - affect different service sectors or delivery modes at the same time. Moreover, negotiations on specific commitments always strike deals concerning commitment levels across all GATS delivery modes. Third, overarching negotiation packages are also very common within the EC. To speak with a single voice, the

[154] For a good account of the Uruguay Negotiations see SENTI (2000), Para. 198 ff. and CROOME (1995).

EC Member States need to coordinate their requests and offers before tabling the proposal in Geneva. These packages usually also contain various sectors and delivery modes.

Within these negotiation packages single product types (entertainment games) or certain delivery modes (GATS mode 1) are never negotiated in a separate, compartementalized fashion. Thus, the rigorous application of the different voting rules established by Art. 133 that vary according to products (good or service?) and delivery mode (mode 1 or another GATS mode?) is not applied in day-to-day-negotiations or meetings of the 133 committee. Consequently, it suffices if one of the sectors or limitations specified in the Nice Treaty is affected to make a unanimous Council vote necessary[155]. The express power of the EC with respect to GATS mode 1 transactions is thus retroactively curtailed if agreements include provisions for which unanimity is required for the adoption of internal rules (Art. 133, Para. 5, Sentence 2), if they include provisions that harmonize areas that are not addressed by the Treaties (Art. 133, Para. 6, Sentence 1) or if they address in any way cultural, audiovisual, educational, social, human health or transportation services (Art. 133, Para. 6, Sentence 2). Moreover, the limitation introduced by Art. 133, Para. 5, Sentence 3 mandates that the Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement that entails any of the before-mentioned limitations.

As the Doha Development Round will be concluded as a single undertaking, several of these circumstances will kick in at the same time. Thus, the EC and its Member States will have to conclude a mixed treaty with ratification of the national Parliaments. At least, the unanimity of the Council will be necessary for a successful ratification of the treaty. This circumstance of mixed treaties with a de jure veto right of each Member States is taken up by the last row of Table XX. All in all, it seems as if the Treaty of Nice has quietly led to a "Renaissance of the unanimity criterion" that even affects the EC competence for cross-border trade transactions[156]. The desire of some EC Member States to get a guaranteed veto right on certain service trade issues – and here audiovisual services seem to have played the biggest role - has materialized[157]. Even the many legal arguments that buttress the argument that

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[155] See HAHN (1999), Para. 23 or MÜLLER-HUSCHKE (2001), Para. 17.

[156] See HAHN (1999), Para. 34 and VEDDER (2001), Para. 55.

[157] See HERRMANN (2002) and MEUNIER & NICOLAIDIS (2001) who state that France has fought hard to introduce a de iure and de facto veto right for all services mentioned under Art. 133, Para. 6, Sentence 2.It must be reiterated that already before the Treaty of Nice an informal agreement existed to take the decisions on the basis of unanimity. Obviously, this informal requirement was not enough to some EC Member States anymore.

mode 1 is still an irreversible express power of the EC cannot change this negotiation reality[158].

[158] See z.B. COTTIER (1994), S. 749 ff. or for the irreversibility of exclusive EC competences LAMMERS (1998), Para. 20 or VEDDER (2001), Para. 10. This power of individual EC Member States over the mode 1 concession of the EC is not new. It was already reflected in the EC's GATS schedule of the Uruguay Round where– against the intuition of the ECJ Opinion - the mode 1 column contains many deviations of individual EC Member States from the overarching EC offer. Whereas for instance the EC made full commitments in accounting services for GATS mode 1, Italy, France and Greece deviated from that commitment while introducing a commitment of "unbound". Almost every general EC commitment is downgraded by limitations entered by individual member states.

3.3.2.3 Critical Appreciation of the Current EC Trade Policy Jursidiction

In general the current competence distribution between the EC and its Member States cannot be fertile to the necessary EU leadership needed in the current service negotiations. While officially the Commission qualifies the progress in the Treaty of Nice as being "modest" the legal literature reserves harsher criticism for these changes[159].

The critique is not essentially directed to the superprotective regime established for audiovisual services but to the lack of express EC trade policy powers when it comes to services. Through, the Treaty of Nice, mixed agreements and shared competence between the EC Member States and the EC relating to trade agreements have become the rule rather than the exception[160]. Yet another opportunity was missed to establish a uniform trade policy with a clear division of roles and a "victory of the sovereignty camp" has occurred. This is due to the fact that the concept of a common commercial policy in terms of Para. 1 was not automatically expanded in full to all new trade themes. A "balkanization" of the exclusive external competences of the Community is the result[161]. The Treaty of Nice excludes a number of service sectors from the exclusive competence of the EC. Also, it makes more explicit the boundaries of the EC with respect to rule-making in trade-matters because the principle that the EC cannot develop external rules on issues where it does not have internal competences is cemented[162]. Especially the exception of highly politicized areas, such as health services and education and training, shows that the member states succeeded in preventing that their national competences could be curtailed by the Community's trade policy. More importantly, a *de jure* veto right was now introduced that can be used by single EC member states to block commercial policies desired by the majority.

But as the next section on the Doha mandate of the EC discusses even before France could instore this de iure veto right for audiovisual services through the Treaty of Nice it also used the process of mandate formulation from the Council to the Commission to create a further audiovisual service safegard.

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[159] See for example PESCATORE (2001), p. 265 who calls it the "most startling provision of the legal bricolage performed at Nice". Obviously, the internal DG Trade's opinion about this reform deviates significantly from the publicly available rather harmonious statements referred to in the previous footnote.

[160] HAHN (1999), Para. 28 and HAHN (2002), Paras. 11 and 119-124 and HERRMANN (2001), p. 246.

[161] For the reference to Balkanization see HAHN (2002), Para. 120.

[162] PESCATORE (2001), p. XX.

3.4 The EC Negotiation Mandate for Seattle and Doha

After the changes performed in the Amsterdam Treaty, the next challenge of the EC in the context of the WTO was the preparation of the 1999 Seattle Ministerial. Through the mandate and its consequent supervision, - via the Council - the EC Member States limit the room for maneouver of the Commission during the WTO negotiations. It is usually formulated in a rather broad way but can still be used to establish clear signposts for the EC negotiators.

In the case of the EC, that the coordination problems between EC Member States when drawing up the EC negotiation mandate can actually be as difficult as the coordination problems during the ensuing WTO negotiations[163]. This may also be a reason that the mandate the Commission was given for the unsuccessful Seattle negotiations is still valid – without any renegotiation - for the Doha negotiations[164].

For our purposes two elements are important[165]: On the one hand, the relevant GATS mandate does not provide more than a rather broad indication of good will towards progressive service liberalization and the development of GATS rules. It reads as follows:

> *Negotiations should be comprehensive and bring about a deeper and broader package of improved commitments from all WTO members to market access and national treatment. Current imbalances in commitments across countries and service sectors should be reduced. Negotiations should also aim at strengthening of GATS disciplines with the aim of ensuring transparent and predictable regulatory environment. Any unfinished business […] should also be absorbed in the negotiations*[166].

It further aks the Commission to ensure the coherence of commitments by sectors and by mode of supply. As opposed to the proposal of the Commission, no particular attention is devoted to the liberalization of electronic cross-border or audiovisual services. But all in all,

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[163] See PAEMEN and BENSCH (1995), p. 95 f. and HOUSE OF LORDS (2001), p. 1.

[164] The negotiation mandate of the EC is contained in European Council, "Preparation of the Third WTO Ministerial Conference, - Council Conclusions", October 26, 1999. It is partially based on the Communication from the Commission to the Council and to the European Parliament, "The EU Approach to the Millennium Round", August 1999.

[165] See HOUSE OF LORDS (2001) for a more detailed explanation of the mandate.

[166] P. 4 of the mandate. This is an abbreviated version of the text. Brackets indicate that the author has omitted a part of the sentence. The other elements of the GATS mandate related to issues of interpretation and implementation, to the facilitation of developing country participation and to negotiation techniques

the EC Member States instruct the EC to go ahead with further service trade liberalization in all sectors.

In its very beginning, however, the mandate partly reverses the all-inclusive approach while disregarding the Commission's proposal and explicitly introducing a limit to the negotiators' ability to deal with trade matters relating to culture:

> *During the forthcoming WTO negotiations the Union will ensure, as in the Uruguay Round, that the Community and its Members States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audiovisual policies for the purpose of preserving their cultural diversity*[167].

Placed at the very beginning of the Seattle/Doha Mandate, it looks as if this cultural policy safeguard is based on a widely shared consensus between member states. But speeches that the French Minister of Culture subsequently held in the French Parliament show that a single EC Member State imposed its desire for a cultural exemption to the other member states[168]. Clearly, it is the first time that all EC members go into the negotiations with such a strict mandate on cultural industries. This holds despite of the fact that countries like the UK, the Netherlands and Sweden say that quotas are becoming obsolete and difficult to enforce and that therefore a mandate for audiovisual quotas should be discussed[169].

Until the last minute France declined to accept a formulation that only stressed the EC's desire to foster the cultural diversity during the GATS negotiations but that did not guarantee regulatory freedom[170]. As the French cultural minister TRAUTMAN made clear when addressing a French audience, French EC negotiators were ready to risk the overall progress of the trade round to defend its imperatives: *"Nous avons pris le risque, pour y parvenir, de ralentir la préparation de la conférence de Seattle […]. Le conflit aurait pu se prolonger plus*

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[167] P. 1 of the mandate. To maintain its flexibility, the Commission did not suggest the inclusion of such a broad mandate on cultural policy.

[168] Speech of CATHERINE TRAUTMANN (French Minister for Culture in 1999), "Sur le mandat donné à la Commission européenne pour préserver l'exception culturelle", Point presse OMC, October 28, 1999 and Le Monde, "L'exception culturelle n'est pas négociable", October 21, 1999.

[169] International Trade Reporter, Prodi meets Clinton Backed by Mandate Calling for a Comprehensive Trade Round, Volume 16, No. 42, October 27, 1999.

[170] Other EU Members implored France to back down from its hard-line position on cultural diversity issues, claiming it was playing into the hands of the US, which was not in favor of entering into a broad round of negotiations including competition policy and antidumping issues. See "EU fails to reach common negotiation position for WTO Meeting in Seattle; *International Trade Reporter*; Vol. 16, No. 40, p. 1659.

longtemps, mais heureusement, notre intransigeance et la pression conjuguée du calendrier ont porté leurs fruits. Les derniers réticents ont préféré ne pas prendre le risque de ruiner des mois d'efforts […] en s'opposant à nos légitimes revendications."[171].

According to the French interpretation, this part of the mandate makes sure that no liberalization – not even partial commitments in selected audiovisual services - in the EC's audiovisual sector will be undertaken[172]. Hence, the Commission cannot be put under pressure by other WTO Member States to make specific commitments of any sort nor can it make concession concerning the abolition of current MFN exemptions. Most importanty, this restrictive approach also applies to e-commerce related fields and can also be used to any surfacing new GATS issues (subsidy or investment agreement). for mandate related info.

In fact, during the Uruguay Round a much weaker political "audiovisual" constraint in the EC mandate and the resulting refusal to liberalise from the EC, sufficed to almost lead to the breakdown of the whole Uruguay Round negotiations in the last minute[173]. Thus, it is not surprising that the French negotiators pressured the other EC Member States to take over an unchanged Seattle mandate for the Doha Round[174]. Both the Commission and all EC member states know how difficult it is to negotiate such an agreement between for the EC and that any re-opening of an issue can lead to a chain reaction on other topics that everyone has an incentive to avoid.

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[171] "To obtain what we wanted with respect to this mandate of cultural exception we took the risk to considerably slow the preparations for Seattle. The conflict between the Member States over this issue could have taken much longer, but fortunately our persistence and the pressure coming from the nearing deadline helped. The last EC member states that still questioned our approach preferred not to ruin months of intensive preparations through opposing our legitimate case.", literal translation of the author.

[172] The public interventions quoted hereafter also make clear that French officials erroneously maintain that this mandate will serve to "preserve the exception culturelle". In reality, the cultural exception has already been discarded in 1994.

[173] See PAEMEN & BENSCH (1995), p. 245-246. TRAUTMAN made clear that this mandate is much sharper than the one during the Uruguay negotiations: *"Je vous le dis avec force, il est sans précédent que les Etats membres de l'Union européenne s'entendent aussi clairement pour que l'exception culturelle reste la règle. Nous sommes incontestablement mieux partis que lors du cycle précédent.*" Speech of CATHERINE TRAUTMANN (French Minister for Culture in 1999), "Sur le mandat donné à la Commission européenne pour préserver l'exception culturelle", Point presse OMC, October 28, 1999 and Le Monde, "L'exception culturelle n'est pas négociable", October 21, 1999.

[174] NZZ, "Die EU halt an ihrem WTO-Mandat fest", September 8, 2001. VIVIANE REDING (Commissioner DG Education and Culture) noted at another occasion that the "[…] freedom of action [to develop policies for the audiovisual sector] is at the heart of the negotiating mandate which was adopted by the Council for the Seattle Ministerial Conference and is still valid for the Doha conference. Speech on "Cultural Policy and WTO", 58th Mostra Internazionale d'Arte Cinematographica, Venice, September 7, 2001, DG EAC C.1/XT D (2001), p. 2.

Both this hard fight for the mandate and the fight for a changed Treaty of Nice show that France has come to realize that a diminishing number of member states continued to share French views on audiovisual matters[175]. To prevent being outvoted in such matters by a grouping of liberal EC member states in the future, the safest means is the introduction of a *de jure* veto right[176]. The fact that the French have have to work hard to convince the other member states of stringent audiovisual policy measures has recently been publicly acknowledged by the new French Minister of Culture[177]. From a bureaucracy theory perspective it has also be argued that the French trade official are not keen on losing the their influence on cultural negotiations[178].

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[175] MEUNIER & NICOLAIDIS (2001), p. 1 and 2. But it is important to note that in audiovisual matters all EC member states introduced provisions to safeguard cultural matters from becoming a Community concern (Art. 151 or the Protocol on Broadcasting).

[176] The same reasoning may apply to decisions concerning international investment agreements.

[177] Press Conference of JEAN-JACQUES AILLAGON, French Minister of Culture and Communication, July 4, 2002, downloaded from http://www.culture.gouv.fr/culture/actualites/, p. 18 f. in September 2002.

[178] MEUNIER & NICOLAIDIS (1998), p. 7 refer to the French trade bureaucracy DREE that is jealous of its prerogatives and that therefore has exploited the growing mistrust of successive French governments with respect to the Commission to work against an increasing delegation of express trade negotiations powers to the Commission.

Conclusion

The rather unproblematic preparatory work of the Doha service agenda and the first initial requests of the EC casts doubt over extremely gloomy predictions that the primary effect of the Nice Treaty will be to paralyse the decisional process inside the EC and thus hamper a flexible defence of the community's trade interests[179]. But this may be because the "audiovisual matter" or regulatory issues pertaining to further service market integration had – until recently – not yet been discussed in the 133 committee.

Of course, it is important to note that most EC and also WTO members are reluctant to liberalize specific service sectors. Also, the German *Bundestag* expressed concerns with respect to the continued liberalization of all service sectors without the participation of democratically elected institutions[180]. This holds particularly because the Treaty of Nice did not increase the importance of the European Parliament (EP) in trade matters[181]. Thus, it is understandable that the national Parliaments ask for transparency and participation during the negotiations and that in the federal states all central and federal institutions shall be involved in the process[182].

But despite these member state considerations it remains an open question whether the described fragmentation of commercial policy competences along modes of service distribution and now also along sectoral lines is a beneficial approach. There are justified fears that this special sectoral treatment will embed these exemptions, encourage piecemeal country by country approaches and prevent further GATS liberalization in these sectors[183]. This coupling of low-supranational competence paired with unanimity voting will almost

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[179] See for some of these gloomy predictions PESCATORE (2001), p. 266-267.

[180] German *Bundestag*, 14th Legislative Period: Question and Reply "WTO service negotiations GATS 2000", Printed Matter 14/6702, July 18, 2001, p. 3.

[181] The Commission's proposal to accord the right to the EP to receive more information was turned down (see HERRMANN, 2001, p. 274). And so it remains optional to give a hearing to the European Parliament Art. 300, Para. 3, subsection 2. In practice, it will probably again be heard without exception.

[182] German *Bundestag*, 14th Legislative Period: Motion and Decision "Transparency, open markets, fairness and sustainable development", Printed Matter 14/1861, October 27, 1999, p. 5 and German *Bundestag*, 14th Legislative Period: Question and Reply "Education and training sector as part of the WTO agreement on services (GATS)", Printed Matter 14/7126, October 12, 2001, p. 2.

[183] See HOLMES & ROLLO (2002), p. 5 and HAUSER & WUNSCH (2001), p. 188 – 190.

always lead to the most protectionist member state determining the overall negotiation position of the EC[184]. Hence, the negotiators' hands are tied and the service negotiations may not produce an outcome that is much more liberal than the status quo[185].

With respect to audiovisual service negotiations the case has been made that France successfully instored several security valves that assure them that even a majority of EC Member States is unlikely to be able to overturn their desire of absent EC commitments for audiovisual services. This fact of missing external competences for cultural services is reinforced by the fact that the weak internal EC mandate for culture does not allow to conclude that powers of the EC in the audivisual service negotiations are implied[186]. It is thus a popular misconception that cultural and audiovsual commitments are not in the control of cultural policy makers but in hands of trade policitians[187]. But it must be clear that – like during the Uruguay Round – this kind of defensive attitude will always have a high political price attached to it.

One such price may be that a predictable trade framework for digital products will not be established any time soon. Moreover, the public display of vehement French protectionism in one service sector invites other EC Member States (as an intra-EC package deal) or other WTO partners to identify an own service sector that deserves protection[188]. One can easily imagine that successful attempts of country-specific sectoral carve-outs from the GATS will not contribute to a multilateral trade framework that will pave the way for increased international service trade. In any case the audiovisual protectionism will surely radiate over to other parts of the GATS negotiations. This may not create the ideal framework for the mandated development of horizontal GATS rules (rules on domestic regulation, etc.) or the successful negotiation of other important specific commitments, such as GATS Mode 4.

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[184] In this scenario, the most conservative member state has preferences that are less liberal than the status quo.

[185] See MEUNIER (1998), p. 85 ff. or MEUNIER (2000), p. 115-117 for this scenario.

[186] In fact, the EC has even accussed of overstepping its competences in cultural matters when establishing the current EC measures for a common broadcasting area like the Television without Frontiers Directive. Sources are missing.

[187] "Towards a transversal strategy for promoting Cultural Diversity", Report by the Council of Europe, http://culture.coe.fr/postsummit/nti/en/documents/eStrategy_cccult(2001)15.htm downloaded on 24.9.1002, p. 8.

[188] It has been argued that the political price for audiovisual protection during the Uruguay round to be paid by Europe was the lack of US commitments for maritime services. With the US Congress being very attentive to the protectionist claims of the maritime industry, it is very likely that this "one-on-one trade-off of protectionist service sectors" will again play a role in the current negotiations.

Finally, the lack of compromise of a single EC Member States with the majority of other EC Member States may lead to serious EC-internal ruptures. This holds especially if the industries of other EC Member States push their governments for a more liberal stance. To the great surprise of many, even for audiovisual services such a scenario is not far-fetched. In fact, Bertelsmann from Germany and record labels from the UK and the Netherlands that are ready to break the "European taboo" on audiovisual trade liberalization for greater market access abroad have created the first uncertainties with their national trade negotiators how to react to such export interests[189].

The next round of GATS negotiations will most likely involve complex negotiations of sector-specific reference papers and a GATS discipline for domestic regulations. If it is to produce meaningful liberalization commitments the leadership of a united and cooperative Europe will be an essential building block for success. But internal EC conflicts produced by the lack of compromise and the veto rights of one single member state will make it very difficult to speak with "one single voice", to maintain credibility of the EC negotiators and thus to incite other WTO trade partners to undertake world-welfare enhancing service trade liberalization.

[189] With the UK being more interested in financial service trade than most other EC Member States, similar disagreements will soon surface in the further liberalisation of this service category.

Annex: The Evolution of Art. 133

TREATY OF ROME, 1957: Article 113 (later Art. 133)

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.

3. Where agreements with one or more States or international organizations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

The relevant provisions of Article 228 shall apply.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

+ TREATY OF AMSTERDAM: new Para. 5 of Art. 133 (ex Art. 113)

(5) 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 inter national negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs.

The above version of Art. 133 with the new Para. 5 is the current version of the treaty article. The ratification of the Treaty of Nice (not before the end of 2002) nullifies this new Para. 5.

+ TREATY OF NICE: A new Art. 133 Para. 5 replaces the old Para. 5 introduced through the Amsterdam Treaty and two new paragraphs (6. and 7.) are added to the original Art. 133 (Paras. 1-4). Art. 7 that related to commercial policy in relation to intellectual property is not displayed.

3, Para. 3 is supplemented by Subparagraph 1, Sentence 2: The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules.

3. Para. 3 is supplemented by Subparagraph 2, Sentence 2: The Commission shall report regularly to the special committee on the progress of negotiations.

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

By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.

The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.

This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations insofar as such agreements comply with Community law and other relevant international agreements.

6. 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 harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

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.

(7) ---------- (Para. 7 concerning intellectual property rights is not reprinted here)----------

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