Opinion 1/76 of the Court of Justice (26 April 1977)

Caption: In its Opinion 1/76, the Court of Justice rules on the distribution of powers between the Communities and the Member States in the field of external relations. 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 has authority to enter into the international commitments necessary for the attainment of that objective, even in the absence of an express provision in that connection.

Source: Reports of Cases before the Court. 1977. [s.l.].

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Opinion of the Court of 26 April 1977

Opinion given pursuant to Article 228 (1) of the EEC Treaty

'Draft Agreement establishing a European laying-up fund for inland waterway vessels'

Opinion 1/76

1. International agreements — Conclusion thereof by the Community — Authority
(EEC Treaty, Article 210)

2. International agreements — Agreement on navigation on the Rhine — Conclusion thereof by the Community — Participation of Member States in the conclusion thereof — Justification for and limits thereof
(EEC Treaty, second paragraph of Article 234; revised Convention of Mannheim for the Navigation of the Rhine of 17 October 1868 and Convention of Luxembourg of 27 October 1956 on the Canalization of the Moselle)

3. International agreements — Agreements concluded with the participation of the Member States — Effect of agreements by virtue of the conclusion thereof by the Community
(EEC Treaty, Article 228 (2))

4. Common policy — Transport — Inland navigation — Attainment thereof — Agreement with third countries — Public international organism — European laying-up fund for inland waterway vessels — Establishment thereof with the participation of the Community — Grant of powers of decision — Legality
(EEC Treaty, Articles 74 and 75)

5. European laying-up fund for inland waterway vessels — Structure of the organs thereof — Role of the institutions of the Community and the Member States vis-à-vis one another — Decision-making procedure — Alteration of the structure of the Community and of the Community decision-making procedure — Adverse affect on the requirements of unity and solidarity — Incompatibility with the Treaty
(EEC Treaty, Preamble, paragraph 2; Articles 3 and 4)

6. European laying-up fund for inland waterway vessels — Direct applicability of measures adopted — Only executive powers — (Question not settled)

7. European laying-up fund for inland waterway vessels — Provisions concerning jurisdiction — Fund Tribunal — Possible conflict of jurisdiction with the jurisdiction of the Court of Justice — Impossible for the judges of the Court to serve on the Fund Tribunal
(EEC Treaty, Article 177)

1. 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 has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion. This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality. Although the internal Community measures are only adopted when the international agreement is concluded and made enforceable, the power to bind the Community *vis-à-vis* third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is necessary for the attainment of one of the objectives of the Community.

2. The participation of specific Member States, together with the Community, in the conclusion of an agreement concerning inland navigation is justified, as regards navigation on the Rhine, by the existence of certain international conventions which preceded the EEC Treaty and are capable of forming an obstacle to the attainment of the scheme laid down by the agreement. The participation of these States must however be considered as being for the sole purpose of carrying out the undertaking to make the amendments necessitated by the implementation of the scheme concerned. Within these limits, that participation is justified by the second paragraph of Article 234 of the Treaty and cannot therefore be regarded as encroaching on the external power of the Community.

3. The legal effect with regard to the Member States of an agreement concluded by the Community within its sphere of jurisdiction results, in accordance with Article 228 (2) of the Treaty, exclusively from the conclusion thereof by the Community.

4. In order to attain a common policy, such as the common transport policy governed by Articles 74 and 75 of the Treaty, the Community is not only entitled to enter into contractual relations with a third country but also has the power, while observing the provisions of the Treaty, to cooperate in setting up an international organism, to give the latter appropriate powers of decision and to define, in a manner appropriate to the objectives pursued, the nature, elaboration, implementation and effects of the provisions to be adopted within such a framework.

5. The conclusion of an international agreement by the Community cannot have the effect of surrendering the independence of action of the Community in its external relations and changing its internal constitution by the alteration of essential elements of the Community structure as regards the prerogatives of the institutions, the decision-making procedure within the latter and the position of the Member States *vis-à-vis* one another. More particularly, the substitution, in the structure of the organs of the proposed fund, of several Member States in place of the Community and its institutions, the alteration of the relationship between Member States as laid down by the Treaty, in particular by the exclusion or non-participation of certain States in the activities provided for and the grant of special prerogatives to certain other States in the decision-making procedure are incompatible with the constitution of the Community and more especially with the concepts which may be deduced from the recitals of the preamble to and from Articles 3 and 4 of the Treaty. An international agreement the effect of which is also to contribute to the weakening of the institutions of the Community and to the surrender of the bases of a common policy and to the undoing of the work of the Community is incompatible with the provisions of the Treaty.

6. The question whether the grant to a public international organ separate from the Community of the power to adopt decisions which are directly applicable in the Member States comes with the powers of the institution does not need to be solved, since the provisions of the agreement concerned define and limit the powers in question so clearly and precisely that they are only executive powers.

7. An international agreement concluded by the Community is, so far as the latter is concerned, an act of one of the institutions within the meaning of subparagraph (b) of the first paragraph of Article 177 of the Treaty and therefore the Court has jurisdiction to give a preliminary ruling on the interpretation of such an agreement. Since it is possible that a conflict may arise between the provisions concerning jurisdiction set out in the Treaty and those laid down within the context of the proposed agreement according to the interpretation which might be attached to the provisions of the latter, the Fund Tribunal could only be established within the terms concerned on condition that judges belonging to the Court of Justice, who are under an obligation to give a completely impartial ruling on the contentious questions which may be brought before the Court, are not called upon to serve on it.

On 15 September 1976 the Court of Justice received a request for an opinion submitted by the Commission of the European Communities pursuant to the second paragraph of Article 228 (1) of the Treaty establishing the European Economic Community, according to which:

‘The Council, the Commission or a Member State may obtain beforehand the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 236.’

Statement of the question

In this request the Commission has asked for the opinion of the Court as to whether a draft Agreement establishing a European laying-up fund for inland waterway vessels is compatible with the provisions of the Treaty.

The draft Agreement was the subject of negotiations between the Commission, acting on behalf of the Community in accordance with a decision of the Council, and Switzerland, with the participation of delegations from the six Member States (Belgium, the Federal Republic of Germany, France, Luxembourg, the Netherlands and the United Kingdom) who are parties either to the revised Convention for the Navigation of the Rhine of 17 October 1968 (hereinafter referred to as ‘the Mannheim Convention’) or to the Convention for the Canalization of the Moselle of 27 October 1956. When the negotiations had been completed, the draft Agreement with the Statute of a Fund annexed thereto was initialled by the representatives of the parties on 9 July 1976.

The Commission has stated as the grounds for its request for an opinion that the system envisaged involves for the Community a certain delegation of powers of decision and judicial powers to bodies which are independent of the common institutions. Whilst considering that that delegation is compatible with the Treaty, the Commission, out of concern for legal certainty, has considered it appropriate to consult the Court under Article 228, in view of the innovation represented by such delegation of powers and of the precedent which it is likely to constitute for any other subsequent agreements.

The text of the Agreement and of the Statute of the Fund which is an integral part thereof were annexed to the request for an opinion. The Commission has also submitted to the Court the proposal for a regulation which it has sent to the Council for the purposes of the conclusion of the Agreement. In addition these documents have been published for information in the Official Journal of the European Communities

(OJ C 208 of 3.9.1976, pp. 2 to 22).

In accordance with Article 107 of the Rules of Procedure of the Court, the request for an opinion was served on the Council and the Member States. Written observations were submitted by the Council and by the Governments of Denmark and of the United Kingdom. The Commission submitted additional observations in a subsequent communication. The Advocates-General were heard on 18 January 1977 by the Court sitting in the Deliberation Room in accordance with Article 108 (2) of the Rules of Procedure.

Analysis of the draft Agreement, the Statute annexed thereto and the proposal for a regulation concluding the Agreement

The objective of the Agreement is to introduce a system intended to eliminate the disturbances arising from the surplus carrying capacity for goods by inland waterway in the Rhine and Moselle basins and by all the Netherlands inland waterways and the German inland waterways linked to the Rhine basin. The system consists in formulating an arrangement for the temporary laying-up of a part of the available carrying capacity in return for financial compensation to carriers who voluntarily withdraw vessels from the market for a certain period. This withdrawal of the temporary excess carrying capacity should prevent excessive competition with a consequent slump in freight rates; by maintaining rates at an economic level, the action proposed will enable waterway undertakings to operate under normal working conditions and to use their vessels in a manner better adapted to the needs of the consumer. A Fund (called the ‘laying-up fund for inland waterway vessels’) is responsible for compensation and is financed by contributions imposed on all vessels using the inland waterways which are subject to the system.

The provisions of the Statute state precisely and in detail which categories of vessel are subject to the proposed system. In addition they determine the contribution to be levied and the conditions of payment and fix the basic rate for contributions for the first year at a sum equivalent to DM 0.0175. The daily contribution for each vessel is calculated from this on the basis of its tonnage and engine power, multiplied by certain adjustment coefficients fixed for each category of vessel. The basic rate and the adjustment coefficients may be altered by the Supervisory Board within the prescribed limits and under the prescribed conditions. The rules for the laying-up of vessels are also the subject of detailed provisions in the Statute.

The essential framework of the system is the ‘European laying-up fund for inland waterway vessels’, established by the draft Agreement and governed by the Statute annexed to the Agreement of which it forms an integral part. The Fund is classified as an ‘international public institution’ having legal personality and enjoying the most extensive legal capacity accorded to legal persons (Article 1 of the Statute). The organs of the Fund are the Supervisory Board and the Board of Management assisted by a Director (Article 26). In addition a court called ‘Fund Tribunal’ is established (Article 42).

The Supervisory Board consists of one representative from each of the Member States, with the sole exception of Ireland which has expressed the wish not to be represented, and from Switzerland, as well as one representative from the Commission who acts as chairman. Each member has one vote except the chairman who takes part in the discussion but does not have the right to vote. Except where the Statute otherwise provides, the Board takes decisions by a simple majority of the votes cast. This majority must include the affirmative votes of at least three of the representatives of the following States: Belgium, FR of Germany, France, the Netherlands and Switzerland. Certain important decisions require a unanimous decision of all members (Article 27).

The Board of Management consists of members appointed by the Governments of the States of which they are nationals, the seats being allocated as follows: four members each for FR of Germany and the Netherlands, two members each for Belgium, France and Switzerland, and one member for Luxembourg. Its membership must be representative of the most important categories of inland waterway carriers. Each member has one vote. Decisions are taken by a two-thirds majority of the votes cast (Article 28). The Director of the Fund is appointed by the Supervisory Board on a proposal from the Board of Management (Article 34).

The Fund Tribunal consists of seven judges appointed for a term of five years, one judge to be appointed by Switzerland and six other judges by all the other Contracting Parties (Article 42 (2)). The proposal for a regulation submitted to the Council by the Commission for the purposes of the conclusion of the Agreement and its implementation provides however that these six other judges shall be nominated by the Court of Justice from among its number (Article 6 of the proposal for a regulation).

The Court of Justice shall place its buildings, technical services and the services of its registry at the disposal of the Fund Tribunal. The Tribunal shall itself adopt the provisions necessary for its functioning, in particular its rules of procedure (regulation, Article 6; Statute, Article 42 (4)).

The Supervisory Board, which shall 'safeguard the public interest and shall ensure that the aims and provisions of the Agreement and of the Statute are observed', shall prepare, on a proposal by the Board of Management and within the limits laid down by the Statute, the basic rates of contribution and shall approve expressly or by implication the decisions of the latter relating to the length of laying-up periods and the rates of compensation (Articles 29 to 31). The Board of Management shall be responsible for the administration and the financial management of the Fund and shall ensure that the decisions of the Supervisory Board are carried out (Article 29). The Director of the Fund shall take the decisions concerning contributions or laying-up compensation in each individual case (Article 35).

Decisions of the organs of the Fund having general application shall be 'binding in their entirety and directly applicable in all Member States of the European Economic Community and in Switzerland' (Article 39). They shall be published in the official gazettes of the European Communities and of Switzerland (Article 40). Decisions which impose a pecuniary obligation on the owner or operator of a vessel shall be enforceable and shall be recognized as such in all the Member States and in Switzerland (Article 46).

An objection may be made to the Board of Management against a decision taken by the Director in an individual case (Article 35). An appeal may be brought by natural or legal persons who can establish an interest against the reasoned decisions of the Board of Management before the courts designated for that purpose by the States in which the headquarters or a branch office of the Fund is situated. Tribunals set up under the Mannheim Convention and the Convention on the Canalization of the Moselle may be declared to have jurisdiction in this connexion (Article 41).

The Member States of the Community, Switzerland and the Commission may bring before the Fund Tribunal proceedings for annulment against the acts of the organs of the Fund. They may moreover bring an action for failure to act in any case in which the Supervisory Board fails to take decisions in infringement of the Agreement or of the Statute (Article 43). An action for failure to fulfil an obligation may be brought against any Member State or Switzerland by any other State represented on the Supervisory Board and by the Commission (Article 45).

In addition, the Fund Tribunal shall have jurisdiction to give preliminary rulings concerning the interpretation of the Agreement and of the Statute and concerning the validity and interpretation of decisions taken by the organs of the Fund in order to ensure uniform application of these provisions in all the States concerned. Any appellate court or tribunal of a Member State or Switzerland may request the Tribunal to give a preliminary ruling on any such question. However the Swiss delegation has expressed reservations concerning the restriction of this power to appellate courts or tribunals. It is obligatory to bring the question before the Tribunal if it is raised before a national court or tribunal against whose decisions there is no judicial remedy under national law (Article 44).

The Agreement and the Statute shall be enforceable in the territory of the nine Member States, including therefore the three Member States which, as such, are not parties to the Agreement, and of Switzerland (Agreement, Article 4). The Agreement shall remain in force for a period of five years and may be renewed for further periods (Article 5).

The Contracting States which are parties to the Mannheim Convention and the Convention on the

Canalization of the Moselle undertake to adopt the amendments to those instruments, made necessary by the Agreement (Article 3). In both cases this involves certain articles relating to jurisdiction and, in the case of the Mannheim Convention, the provision which prohibits the imposition of any duty based solely on use of the inland waterways.

Under the regulation which the Commission has proposed that the Council should adopt in relation to the conclusion and the implementation of the Agreement, any question involving a point of principle relating to the Fund or a point relating to the common transport policy which is raised before the Supervisory Board may be submitted to the Council which shall consider the matter and shall act by a qualified majority on a proposal by the Commission with a view to establishing common guidelines. In such a case, the Member States represented on the Supervisory Board of the Fund shall adhere to the guidelines or decisions adopted by the Council. (Regulation, Article 5.) Any renewal of the Agreement and any extension of its territorial scope shall be subject to prior and obligatory approval of the Council (Articles 3 and 4).

Summary of the observations submitted by the Institutions and the Governments

A — The Commission

In its request for an opinion the Commission examines in particular three problems which arise concerning the compatibility of the draft Agreement with the Treaty.

The first of these problems concerns *the legal basis of the conclusion of the Agreement and the justification for the participation of certain Member States*. In this connexion the Commission points out that the system proposed comes within the framework of the common transport policy laid down in Articles 74 and 75 of the Treaty. Therefore it would have been possible to introduce it autonomously by a means of a regulation adopted under Article 75 of the Treaty, if it had not been considered necessary to make Switzerland a party to the system in order to make the system effective.

Since the Court has recognized in its judgment of 31 March 1971 in Case 22/70, *AETR* [1971] ECR 263, that Article 75 gives the Community power to enter into agreements with third States which are necessary for the attainment of the common transport policy, it was possible to envisage a bilateral agreement between the Community and Switzerland. However the Council considered it preferable to introduce the system proposed by means of a multilateral agreement to which not only the Community and Switzerland would be parties but also the signatory States to the Conventions on the Navigation of the Rhine and the Moselle. In fact certain aspects of the system could raise problems of compatibility with the duties of the Contracting States under those conventions and require their adaptation to the new system.

Therefore the Commission considers as regards the first of the problems examined that:

— as far as the Community is concerned, the draft Agreement may be concluded by the Council by means of a regulation which must be based on Article 75 of the Treaty and adopted according to the procedure laid down by that article;

— the participation in the draft Agreement by the six Member States bound respectively by the revised Convention on the Navigation of the Rhine and by the Convention on the Canalization of the Moselle may be justified in as far as that Agreement contains provisions concerning the amendment of those conventions.

The second question on which the Commission submits observations concerns *the power of decision given to the organs of the Fund* established by the draft Agreement. The problem is more precisely whether the grant by the Community to organs which are independent of the common institutions of the power to take decisions having general effect which are directly applicable in the Member States without the compulsory

intervention of the institutions of the Community as such is compatible with the provisions of the Treaty relating to the institutions.

The Commission considers that such a grant of power to an international organ is compatible with the Treaty in so far as it concerns powers of management which are strictly limited and is a necessary consequence of the external powers given to the Community.

In this respect, the Commission specifies that the grant of powers of decision by an international agreement to bilateral or multilateral organs consisting of representatives of the Contracting Parties is not new or likely to raise problems of compatibility with the Treaty. The essential innovation lies in the direct applicability of the decisions taken by such an organ. In the opinion of the Commission, however, this new feature, in accordance with the present development of public international law, is not incompatible with the Treaty since it is linked to the exercise of the external powers of the Community.

The Commission claims that once external powers are given by the Treaty to the Community the latter must necessarily be entitled to exercise those powers in the same conditions and according to rules which are as extensive as those governing the external powers of the Member States from which they have been withdrawn; these conditions must therefore include the possibility of granting to organs set up within the framework of an international agreement the power to take decisions which are directly applicable within the legal system of the Community.

The Commission adds that there are obvious restrictions on the legality of such a grant of powers. First, it must not constitute a surrender of powers given by the Treaty to the common institutions. Moreover it must be conferred in conditions which are compatible with the interests of the common policy within which the agreement in question falls.

These restrictions have been observed in this case. The Community as such will take a full part in the functioning of the system. The institutions of the Community will be able to exercise indirectly an appropriate influence on the action of the Fund because of the membership of the Supervisory Board of the Fund and the possibility of appeal to the Council of the Community with regard to questions of special interest.

The third problem raised by the Commission concerns *the organization and the powers of the Fund Tribunal*. In this connexion the Commission states that the provisions concerning the composition and the working of the Tribunal reflect the concern to ensure compliance with the legal procedures of the Court of Justice whilst meeting the need for a Swiss judge to take part in the system of judicial review established by the draft Agreement.

The provisions defining the judicial powers are, according to the Commission, based on the provisions of the EEC Treaty, which provided them with a model, and of which they are for the most part a simple reproduction adapted to the particular features of the new court.

Article 44 of the Statute concerning requests for preliminary rulings was drafted so as not to prejudice the powers of the Court of Justice under Article 177 of the Treaty. In this connexion, however, the Commission recalls that requests for preliminary rulings under the Statute may concern not only the interpretation and the validity of certain measures taken by the organs of the Fund but also the interpretation of provisions of the Agreement and the Statute themselves, that is, measures of Community law concerning which a request for a preliminary ruling may be brought before the Court of Justice under Article 177. With regard to the latter point the question which therefore arises is how to reconcile the powers of the Court of Justice with those of the Fund Tribunal. The system is capable of two interpretations between which it would be for the Court of Justice to choose at the appropriate time unless it preferred to give a ruling thereon immediately within the context of this request for an opinion.

According to one interpretation a request for a preliminary ruling brought before the Fund Tribunal is superimposed, within the Community legal system, on the request for a preliminary ruling laid down in

Article 177. In other words, if a court of a Member State referred to the Court of Justice a question concerning the interpretation of a contested provision of the Agreement or of the Statute, the Court of Justice would itself have to bring the matter before the Fund Tribunal before replying thereto.

According to another interpretation, national courts of the Member States would have to refer their questions for preliminary rulings directly to the Fund Tribunal whether those questions concern decisions made by the organs of the Fund or provisions of the Statute or the Agreement. This interpretation of course would imply the surrender of a part of the jurisdiction of the Community to an international body, but the Commission does not consider that this problem is different with regard to the judicial branch from that with regard to the legislative and executive branches of the Community. It follows from the draft documents that the limitations which are necessary with regard to such surrender of power are observed with regard to both branches.

Finally, the Commission makes an additional observation on the word ‘appellate’ in the second paragraph of Article 44. If this word is retained in the final text, lower national courts would not have the right to refer questions for preliminary rulings to the Fund Tribunal. On the other hand these courts in the Member States of the EEC, but not in Switzerland, will be able to refer questions to the Court of Justice under Article 177. Such a situation could lead to conflicts of jurisdiction or divergent interpretations. The Commission therefore has certain doubts as to the compatibility of the provision with the Treaty. It did not wish to delay the conclusion of the negotiations by insisting on this specific point but it asks for the Court’s opinion thereon.

In its additional communication of 25 November 1976, the *Commission* elaborated its previous observations on *the external jurisdiction of the Community*, particularly in view of the judgment of the Court of 14 July 1976 in Joined Cases 3, 4 and 6/76, *Cornelis Kramer and Others*, [1976] ECR 1279.

From an analysis of the case-law of the Court on the power of the Community to enter into international commitments, the Commission considers that it is possible to infer that such power exists once the Treaty provides for an internal power even if the latter has not yet been the subject of developments of secondary legislation. Thus there is nothing to prevent the Community, as in the present case, from concluding the agreement with the third State and adopting the necessary internal measures at the same time. The procedure in two stages which was the hypothesis in the *AETR* Case is not therefore mandatory as the only one applicable.

The Commission draws the conclusion from this argument that from the time when the Community has, in a specific field governed by the Treaty, for example the implementation of common policies or the harmonization of legislation, a power under the Treaty to lay down common rules applicable within the Community and when it appears necessary for third countries to be associated with it for the purposes of the application of the same rules, it must have the choice, according to the facts and with the same powers of either:

— laying down those rules first of all autonomously and only afterwards negotiating and concluding with the third countries concerned an agreement for the extension of those rules to those countries;

— or, even if there have been no previous developments of secondary law in the field in question, negotiating and concluding with the countries concerned an agreement to introduce at one and the same time common rules into the Community and identical rules into those countries.

B — The Council

As an introduction to its observations, the Council notes the effect which its action with regard to the conclusion of the Agreement may have on the future application of the Treaty. It declares that it does not

wish to adopt a viewpoint on the various questions submitted to the Court but hopes to assist in putting these questions as clearly and fully as possible.

As regards *the legal basis of the conclusion of the Agreement as far as the Community is concerned and the justification for the participation of certain Member States*, the observations of the Council express doubt as to the relevance of this question. The solution which the Council adopted with regard to the negotiation of the Agreement and which the Commission proposes with regard to the conclusion thereof is not such as to raise questions of compatibility with the Treaty or to call in question the power of the Community or of one of its institutions to conclude the Agreement.

However, if the Court had to give its opinion on the question, the Council asks it to specify whether the conclusion of the Agreement by regulation of the Council based on Article 75 of the Treaty must be considered:

— as a measure of transport policy taken in direct implementation of that article;

— or as the exercise of an exclusive external power resulting from the existence of hypothetical common rules laid down in application of the Treaty, which rules may be affected by the conclusion of the Agreement.

The Council examines the judgment of the Court in Case 22/70, *AETR*, and declares that it has understood it as meaning that before any common rules have been laid down the Member States are not prohibited from concluding, within the framework of common action, international agreements in the field of transport. In the present situation no Community rules have yet been laid down with regard to the temporary laying-up of inland waterway vessels.

The problem concerning *the power of decision given to the organs of the Fund* constitutes, in the opinion of the Council, the essential point to be settled by the Court. This is a problem which comes within Community constitutional law and the answer to which must be sought in the Treaty itself; it is not a problem of public international law. The decisions which are taken by the organs of the draft Agreement cannot be considered as the action of the Community institutions whatever the influence which they may in fact exert on their adoption. The feature which distinguishes a transfer of powers from a limited delegation of power is the direct applicability of the decisions adopted by the organs. There is no doubt that the Community may, in accordance with the Treaty, enter into international commitments and restrict the exercise of its power. It is however doubtful whether the Community may in addition transfer its own powers to external organs.

The Council recalls that certain States have had to amend their constitutions to enable them to transfer their powers to the institutions of the Community and considers that a simple parallel between the problem now before the Court and that which the Member States had to resolve when the Treaty was concluded or when they acceded thereto cannot supply an unequivocal answer to the question whether the draft Agreement is compatible with the Treaty in its present form or whether the conclusion of the Agreement requires that it be amended beforehand.

Only the Treaty can supply an answer to the question which has been raised. The Council mentions the provisions concerning the four institutions and their tasks and observes that it is possible to consider that these tasks must be performed by the institutions to which they have been given without their being able in their turn to make them over at will to organs outside the Community.

As regards the limitations to which the legality of the transfer of powers must be subject, according to the observations put forward by the Commission, the Council for its part considers that the precautions designed to ensure compliance with these limitations do not in any way change the nature of the procedure which is that of a transfer of powers.

In connexion with *the organization and the jurisdiction of the Fund Tribunal*, the Council observes that this also raises a problem of the transfer of powers by the Community institutions. Following this line of thought, the Council mentions Article 219 of the Treaty whereby Member States undertake not to submit a dispute concerning the interpretation or application of the Treaty to any method of settlement other than those provided for therein.

The Council refers to the two interpretations which the Commission considers possible in connexion with Article 44 of the Statute concerning requests for a preliminary ruling and considers that finally it will be for the Fund Tribunal to give the correct interpretation of that article. Under these circumstances, the question which arises is whether an international agreement, whereby a judicial organ outside the Community has power to determine the jurisdiction of the Court of Justice, is compatible with the Treaty.

The last question raised in the statement of the Council concerns the restriction which would deprive national courts of first instance of the power to refer questions to the Tribunal. If Article 44 is interpreted as meaning that the national courts can no longer refer to the Court of Justice a question for a preliminary ruling concerning the Agreement it is possible, according to the Council, to wonder whether the abovementioned restriction does riot have the effect of reducing the protection by the Court provided for in the Treaty.

C — The Government of Denmark

By way of introduction the Danish Government recalls the viewpoint which it adopted in the negotiations which took place under the direction of the Council. Whilst recognizing that the draft Agreement has no great practical effect with regard to Denmark but great importance for other Member States, it emphasizes that that Agreement must not constitute a precedent for the conclusion of future agreements whereby organs set up with the participation of third States have power to take decisions which are directly applicable in the Member States. With regard to the observations submitted by the Commission which, on the contrary, considers that the Agreement is capable of constituting a precedent for any further agreements, the Danish Government wishes to specify the considerations which, in its opinion, must be determinant as regards the delegation of powers, without seeking to express an opinion on the conclusions which, in this case, follow from these considerations.

The Danish Government shares the opinion that Article 75 of the Treaty constitutes the legal basis of measures intended to rationalize the carriage of goods by inland waterway. This does not however mean that a grant of power in this field to organs other than the Council and the Community is justified. Nor is such grant sufficiently justified by the external powers of the Community. Article 155, in its turn, authorizes the Council to entrust the Commission only with implementing measures and not with decisions of principle of a political nature. In addition, a delegation of power must not distort the Community structure or the institutional balance, which is a criterion laid down by the Court in its judgment of 17 December 1970 in Case 25/70 [1970] ECR 1161. However it does not follow that all delegation of powers is precluded. The Danish Government quotes the judgment of the Court of 29 November 1956 in Case 8/55, Recueil, 1955-1956, p. 312, from which it concludes that the powers expressly given to the Community imply the exercise of the powers necessary to give proper effect to the Treaty including, if necessary, a certain delegation of powers.

The power of delegation however is not unlimited. It must remain within the limits of what is necessary and must, moreover, be appraised in the light of the system actually contemplated, in particular the nature of the authority on whom the power is devolved and the nature of the powers which are transferred. The organ to which the powers are transferred must remain under the control and the supervision of the authority in which the original power was vested. If indeed a delegation may be permitted in favour of an organ which does not form part of the institutional structure of the Community, the principle of proportionality must be observed in that the conditions required for the purposes of acknowledging that the delegation is necessary and, therefore, of acknowledging its legality become more rigorous as the degree of autonomy of the organ increases.

As regards the nature of the delegated powers, the Danish Government considers that the latter must not include a discretionary power: see the judgments of the Court of 13 June 1958 in Joined Cases 9/56 and 10/56, *Meroni* (Recueil, 1958, p. 9). Moreover, and in particular, the direct effect which decisions taken under the delegation might produce is a factor which must be taken into account. In most of the Member States it has been considered wise to seek an express constitutional basis for the transfer to an international institution of the power to take decisions which are directly applicable within the national legal system. Such instances of 'surrender of sovereignty' have not been considered as coming within the power to bind the State externally by the conclusion of international treaties. Therefore the transfer from the Community to other international organizations of powers to take action with immediate effect in the national legal systems can only be acknowledged to a very limited extent and solely if the objectives of the Treaty cannot be adequately attained by other methods.

D — The Government of the United Kingdom

The Government of the United Kingdom states that the negotiations leading up to the settling of the draft Agreement were conducted in compliance with a decision of the Council taken before the accession of the United Kingdom to the Communities. The Government does not now wish to contest the validity of an act resulting from such a decision. It assumes that the Community has the necessary powers to enter into the negotiations and become party to the arrangements. Once this is accepted, the precise content of the provisions contained in the Agreement, including the powers given to the new institutions, is a matter to be settled between the parties. The draft Agreement and the Statute annexed thereto constitute, according to the Government of the United Kingdom, a scheme which balances the interests of all the prospective parties. Any variation now made in the terms agreed would upset a balance founded on considerations which are not before the Court.

As regards Chapter VI of the Statute concerning supervision by the courts, the Government of the United Kingdom understands it as meaning that the Fund Tribunal is to be given exclusive jurisdiction over all matters for which it is made competent. This provides the only satisfactory means of assuring the legal order of a scheme which involves Member States, the Community and a non-Member State. Any other interpretation of the meaning and effect of Chapter VI would not only result in inequalities between the parties to the agreement, but would also tend to produce a confused situation as between the Court of Justice and the Tribunal with inconsistent, incompatible or overlapping jurisdictions.

Additional information

In examining the texts submitted to it by the Commission, the Court has noted a discrepancy between two provisions relating to the appointment of the members of the Fund Tribunal in question. Under Article 42 (2) of the Statute, the seven judges who are members of the Tribunal will be appointed on the basis of one judge to be appointed by Switzerland and six other judges by all the other Contracting Parties. As regards the latter, Article 6 of the draft regulation concluding the Agreement provides, on the other hand, that the Court of Justice shall nominate them from among its number. It follows from the statement of reasons with which the draft regulation was submitted to the Council that the arrangement thus laid down in Article 6 was agreed by all the delegations at the time of the negotiations and was accepted by the Swiss delegation.

However, a similar indication does not appear in the statement of reasons with regard to another provision of the draft regulation which has been noticed by the Court, that is, Article 5 (1), which, in the following terms, aims to ensure a uniform position for the Community and the Member States represented on the Supervisory Board of the Fund:

'*Article 5*

1. When a question involving a point of principle relating to the Fund established by the Agreement or a point relating to the common transport policy is raised before the Supervisory Board, then, at the request of a Member State or the Commission, the question may be submitted to the Council which shall consider the

matter urgently and shall act by a qualified majority on a proposal by the Commission with a view to establishing common guidelines and shall, where necessary, take any decision it regards as appropriate.

Where the Council has given a decision on such a question, the Member States represented on the Supervisory Board of the Fund shall, meeting in the Supervisory Board, adhere to the guidelines or decisions adopted by the Council. In the meantime they shall abstain from taking up any position likely to prejudice or compromise the Council's deliberations on the question submitted'.

Therefore the Court requested the Commission to provide it with all information relating to the question whether, at the negotiations on the Agreement or subsequently, the Swiss delegation was informed of the contents of the abovementioned provision, and whether it accepted them.

The Commission complied with this request by a communication of 3 March 1977, from which it appears in particular that:

The proposal for a Council regulation concluding the draft Agreement was not formally communicated as such to the Swiss delegation; this was in accordance with the established practice followed by the Community with regard to the conclusion of agreements with third countries. However, the Swiss delegation was aware unofficially of the provisions of the proposed regulation, outside the negotiations properly so-called, and this information was confirmed, after the initialling of the agreement, by the publication of that proposal for a regulation in the Official Journal of the European Communities. In contrast to certain other provisions of the proposal for a regulation, the contents of Article 5 have not been formally examined with the other delegations, in particular with the Swiss delegation which has only had informal notice thereof and has not been asked to accept them. However, the Swiss delegation has raised an objection of principle to any formula which would be likely to endanger the independence and freedom of decision and action which, in its opinion, each of the members of the Supervisory Board of the Fund must have in the performance of his duties.

The reasoning of the Court

I

1 The object of the system laid down by the draft Agreement and expressed in the Statute annexed thereto is to rationalize the economic situation of the inland waterway transport industry in a geographical region in which transport by inland waterway is of special importance within the whole network of international transport. Such a system is doubtless an important factor in the common transport policy, the establishment of which is included in the activities of the Community laid down in Article 3 of the EEC Treaty. In order to implement this policy, Article 75 of the Treaty instructs the Council to lay down according to the prescribed procedure common rules applicable to international transport to or from the territory of one or more Member States. This article also supplies, as regards the Community, the necessary legal basis to establish the system concerned.

2 In this case however, it is impossible fully to attain the objective pursued by means of the establishment of common rules pursuant to Article 75 of the Treaty, because of the traditional participation of vessels from a third State, Switzerland, in navigation by the principal waterways in question, which are subject to the system of freedom of navigation established by international agreements of long standing. It has thus been necessary to bring Switzerland into the scheme in question by means of an international agreement with this third State.

3 The power of the Community to conclude such an agreement is not expressly laid down in the Treaty. However, the Court has already had occasion to state, most recently in its judgment of 14 July 1976 in joined Cases 3, 4 and 6/76, *Cornelis Kramer and Others*, [1976] ECR 1279, that authority to enter into international commitments may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provisions. The Court has concluded *inter alia* 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 has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion.

4 This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality. Although the internal Community measures are only adopted when the international agreement is concluded and made enforceable, as is envisaged in the present case by the proposal for a regulation to be submitted to the Council by the Commission, the power to bind the Community *vis-à-vis* third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the Community.

5 In order to attain the common transport policy, the contents of which are defined in Articles 74 and 75 of the Treaty, the Council is empowered to lay down 'any other appropriate provisions', as expressly provided in Article 75 (1) (c). The Community is therefore not only entitled to enter into contractual relations with a third country in this connexion but also has the power, while observing the provisions of the Treaty, to cooperate with that country in setting up an appropriate organism such as the public international institution which it is proposed to establish under the name of the 'European Laying-up Fund for Inland Waterway Vessels'. The Community may also, in this connexion, cooperate with a third country for the purpose of giving the organs of such an institution appropriate powers of decision and for the purpose of defining, in a manner appropriate to the objectives pursued, the nature, elaboration, implementation and effects of the provisions to be adopted within such a framework.

6 A special problem arises because the draft Agreement provides for the participation as contracting parties not only of the Community and Switzerland but also of certain of the Member States. These are the six States which are party either to the revised Convention of Mannheim for the Navigation of the Rhine of 17 October 1868 or the Convention of Luxembourg of 27 October 1956 on the Canalization of the Moselle, having regard to the relationship of the latter to the Rhine Convention. Under Article 3 of the Agreement, these States undertake to make the amendments of the two abovementioned conventions necessitated by the implementation of the Statute annexed to the Agreement.

7 This particular undertaking, given in view of the second paragraph of Article 234 of the Treaty, explains and justifies the participation in the Agreement, together with the Community, of the six abovementioned States. Precisely because of that undertaking the obstacle presented by the existence of certain provisions of the Mannheim and Luxembourg Conventions to the attainment of the scheme laid down by the Agreement will be removed. The participation of these States in the Agreement must be considered as being solely for this purpose and not as necessary for the attainment of other features of the system. In fact, under Article 4 of the Agreement, the enforceability of this measure and of the Statute extends to the territories of all the Member States including those who are not party to the agreement; it may therefore be said that, except for the special undertaking mentioned above, the legal effects of the agreement with regard to the Member States result, in accordance with Article 228 (2) of the Treaty, exclusively from the conclusion of the latter by the Community. In these circumstances, the participation of the six Member States as contracting parties to the Agreement is not such as to encroach on the external power of the Community. There is therefore no occasion to conclude that this aspect of the draft Agreement is incompatible with the Treaty.

II

8 The participation of these Member States in the negotiations, though justified for the abovementioned purpose, has however produced results extending beyond that objective which are incompatible with the requirements implied by the very concepts of the Community and its common policy. In fact, this situation seems to be at the root of an ambiguity concerning the field of application of the Agreement and the Statute. Thus, under Article 4, the Agreement and the Statute are enforceable on the territory of the nine Member States and Switzerland whilst the general obligations laid down in Article 6 concern the 'Contracting

Parties', that is, the Community as such and the seven contracting States.

9 In the Statute itself there are various groupings of those who are either given rights or placed under duties; sometimes all the Member States of the Community and Switzerland (as in Articles 39, 43, 45 and 46), sometimes the Member States, with one exception, and Switzerland (which is the scheme of the provision laid down in Article 27 on the composition of the Supervisory Board), sometimes the Community as such and Switzerland (in Article 40, concerning the publication of the measures adopted by the Fund) and sometimes five States to which a special function is reserved in the decision-making process (Article 27 (5) of the Statute). On the whole, the part played by the institutions of the Community is extremely limited: the Commission provides the chairman and the secretarial services for the Supervisory Board but without exercising a right to vote therein. The determinative functions in the operation of the Fund are performed by the States. In fact, under Article 27 (1) the Supervisory Board consists of 'representatives' who receive their 'powers' and 'authority' from the States concerned.

10 The Court considers that these provisions, and more particularly those on the organization and the deliberations of the Supervisory Board, the controlling organ of the Fund, call in question the power of the institutions of the Community and, moreover, alter in a manner inconsistent with the Treaty the relationships between Member States within the context of the Community as it was in the beginning and when the Community was enlarged.

11 More particularly, it is necessary to point out two factors in this connexion:

(a) The substitution in the structure of the organs of the Funds, of several Member States in place of the Community and its institutions in a field which comes within a common policy which Article 3 of the Treaty has expressly reserved to 'the activities of the Community';

(b) The alteration, as a result of this substitution, of the relationships between Member States, contrary to a requirement laid down right from the second paragraph of the recitals of the preamble to the Treaty, according to which the objectives of the Community must be attained by 'common action', given that under Article 4 that action must be carried out by the institutions of the Community each one acting within the limits of its powers. More precisely, the following appear to be incompatible with the concept of such common action:

— the complete exclusion, even voluntary, of a specific Member State from any participation in the activity of the Fund,

— the power reserved to certain Member States under the third subparagraph of Article 27 (1) of the Statute to take no part in a matter which comes within a common policy, and finally,

— the fact that, in the decision-making procedure of the Fund, special prerogatives are reserved to certain States by derogation from the concepts which, within the Community, obtain with regard to the adoption of decisions within the field of the common policy involved in this case.

12 Thus it appears that the Statute, far from restricting itself to the solution of problems resulting from requirements inherent in the external relations of the Community, constitutes both a surrender of the independence of action of the Community in its external relations and a change in the internal constitution of the Community by the alteration of essential elements of the Community structure as regards both the prerogatives of the institutions and the position of the Member States *vis-à-vis* one another. The Court is of the opinion that the structure thereby given to the Supervisory Board and the arrangement of the decision-making procedure within that organ are not compatible with the requirements of unity and solidarity which it has already had occasion to emphasize in its judgment of 31 March 1971 in Case 22/70, *Commission* v *Council* (AETR), [1971] ECR 263 and, at greater length, in its opinion 1/75 of 11 November 1975, [1975]

ECR 1355 and OJ C 268, p. 18.

13 The attempt belatedly to introduce into the functioning of the Supervisory Board by means of Article 5 of the draft regulation concepts which are closer to the requirements of the Treaty is no proper way to correct faults which are inherent in the structure of the Fund as set out in the text negotiated by the Commission.

14 The Court has examined all aspects of this question and it has duly considered the difficulties which may arise in the search for a practical solution to the problems posed by the organization of a public international institution managed by the Community and a single third country while maintaining the mutual independence of the two partners. Doubtless the specific nature of the interests involved may explain the desire, within the context of organs of management, to have recourse to administrative bodies more directly concerned with the problems of inland navigation. Does this objective justify the creation of a mixed organization in which the presence of national representatives on the Supervisory Board together with the chairman and the Swiss representative would ensure the defence of the interests of the Community? After considering the arguments for and against, the Court has reached the conclusion that it is no doubt possible to attain an appropriate balance in the composition of the organs of the Fund but that this must not result in weakening the institutions of the Community and surrendering the bases of a common policy even for a specific and limited objective. The possibility that the Agreement and the Statute, according to the statements of the Commission, might constitute the model for future arrangements in other fields has confirmed the Court in its critical attitude: the repetition of such procedures is in fact likely progressively to undo the work of the Community irreversibly, in view of the fact that each time the undertakings involved will be entered into with third countries. It was for these reasons that an adverse decision finally prevailed within the Court as regards this aspect of the proposal.

III

15 As regards the powers of decision given to the organs of the Fund, Article 39 of the Statute provides that decisions of the organs of the Fund having general application shall be binding in their entirety and directly applicable in all Member States of the Community and in Switzerland. The question has been raised whether the grant of such powers extending to all the territory of the Community to a public international organ separate from the Community comes within the powers of the institutions. More particularly, there arises the problem whether the institutions may freely transfer to non-Community organisms powers or part of the powers granted by the Treaty and thus create for the Member States the obligation to apply directly in their legal systems rules of law which are not of Community origin adopted in forms and under conditions which are not subject to the provisions and guarantees contained in the Treaty.

16 However, it is unnecessary in this opinion to solve the problem thus posed. In fact the provisions of the Statute define and limit the powers which the latter grants to the organs of the Fund so clearly and precisely that in this case they are only executive powers. Thus the field in which the organs may take action is limited to the sphere of the voluntary laying-up of the excess carrying capacity subject to the condition that financial compensation is paid by a Fund financed by contributions levied on the vessels using the inland waterways covered by the Fund. Here a further point arises out of the third paragraph of Article 1 of the Agreement according to which the Fund may not be used with the aim of fixing a permanent minimum level for freight rates during all periods of slack demand or of remedying structural imbalance. More particularly, the rate of contributions, that is, the basic rate and the adjustment coefficients, for the first year of the operation of the system is laid down in the actual terms of the Statute and subsequent amendments by decision of the Supervisory Board must either remain within certain limits or result from a unanimous decision.

IV

17 The legal system contained in the draft Agreement provides for the grant of certain powers to an organ, the Fund Tribunal, which, in particular by its composition, differs from the Court of Justice established by

the Treaty. The Tribunal is to be invested with power to give judgments relating to the activities of the Fund on applications lodged against the organs of the Fund or the States in conditions laid down in Article 43 of the Statute and on applications for a declaration that there has been a failure to fulfil an obligation brought against one of the States on the territory of which the Statute has binding force (but not the Community as such), in the conditions laid down in Article 45. Moreover, the Tribunal is to have power to give preliminary rulings on applications referred to it by the national courts in the conditions laid down in Article 44. With regard to the latter applications it is necessary to note that they may concern not only the validity and interpretation of decisions adopted by the organs of the Fund but also the interpretation of the Agreement and the Statute.

18 However, as the Court has had occasion to state, in particular in its judgment of 30 April 1974 in Case 181/73, *Haegemann* v *Belgian State*, [1974] ECR 449, an agreement concluded by the Community with a third State is, as far as concerns the Community, an act of one of the institutions within the meaning of subparagraph (b) of the first paragraph of Article 177 of the Treaty. It follows that the Court, within the context of the Community legal order, has jurisdiction to give a preliminary ruling on the interpretation of such an agreement. Thus the question arises whether the provisions relating to the jurisdiction of the Fund Tribunal are compatible with those of the Treaty relating to the jurisdiction of the Court of Justice.

19 According to the observations submitted to the Court, the rules on jurisdiction contained in the Statute may be interpreted in different ways. According to one interpretation, the jurisdiction of the Tribunal would replace that of the Court as regards the interpretation of the Agreement and Statute. According to another interpretation, the jurisdiction of the Tribunal and that of the Court would be parallel so that it would be for the national court of a Member State to refer the matter to one or other of the two legal organs.

20 It is not for the Court within the context of a request for an opinion pursuant to the second paragraph of Article 228 (1) to give a final judgment on the interpretation of texts which are the subject of a request for an opinion. In the present case, it is sufficient to state that it will be for the legal organs in question to make such an interpretation. It is to be hoped that there is only the smallest possibility of interpretations giving rise to conflicts of jurisdiction; nevertheless no one can rule out *a priori* the possibility that the legal organs in question might arrive at divergent interpretations with consequential effect on legal certainty.

21 It is not feasible to establish a legal system such as that provided for in the Statute, which on the whole gives individuals effective legal protection, and at the same time to escape the consequences which inevitably follow from the participation of a third State. The need to establish judicial remedies and legal procedures which will guarantee the observance of the law in the activities of the Fund to an equal extent for all individuals may justify the principle underlying the system adopted. While approving the concern reflected by the provisions of the Statute to organize within the context of the Fund legal protection adapted to meet the difficulties of the situation, the Court is however obliged to express certain reservations as regards the compatibility of the structure of the ‘Fund Tribunal’ with the Treaty.

22 In the case of the second interpretation set out in paragraph 19 above, the Court considers that a difficulty would arise from the implementation of Article 6 of the draft regulation because the six members of the Court required to sit on the Fund Tribunal might be prejudicing their position as regards questions which might come before the Court of Justice of the Community after being brought before the Fund Tribunal and *vice versa*. The arrangement suggested might conflict with the obligation on the judges to give a completely impartial ruling on contentious questions when they come before the Court. In extreme cases the Court might find it impossible to assemble a quorum of judges able to give a ruling on contentious questions which had already been before the Fund Tribunal. For these reasons, the Court considers that the Fund Tribunal could only be established within the terms of Article 42 of the Statute on condition that judges belonging to the Court of Justice were not called upon to serve on it.

In conclusion,

THE COURT

gives the following opinion:

The draft Agreement on the establishment of a European Laying-up Fund for Inland Waterway Vessels is incompatible with the EEC Treaty.

Kutscher
President

Donner
President of Chamber

Pescatore
President of Chamber

Mertens de Wilmars
Judge

Sørensen
Judge

Mackenzie Stuart
Judge

O'Keeffe
Judge

Bosco
Judge

Touffait
Judge

Luxembourg, 26 April 1977.

A. Van Houtte
Registar