Opinion 1/91

Opinion delivered pursuant to the second subparagraph of Article 228(1) of the Treaty

(Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area)

Summary of the Opinion

1. *International agreements — Agreement creating the European Economic Area — Different aims and context from those of Community law — Limited scope of the obligation to interpret the rules of the agreement in conformity with the Court's case-law on the corresponding provisions of Community law — Homogeneity of the rules of law throughout the European Economic Area not guaranteed*

2. *International agreements — Agreement creating the European Economic Area — System of courts — Jurisdiction of the Court of the European Economic Area to rule on the respective competences of the Community and the Member States — Unacceptable adverse effect on the autonomy of the Community legal system*

(ECSC Treaty, Art. 87; EEC Treaty, Arts 164 and 219)

3. *International agreements — Agreements concluded by the Community — Agreement creating a judicial institution delivering decisions binding on the Community — Compatibility with Community law — Exception — System of courts provided for in the Agreement creating the European Economic Area — System liable to condition the future interpretation of the Community rules on free movement and competition — Conflict with the foundations of the Community*

(EEC Treaty, Art. 164)

4. *International agreements — Agreement creating the European Economic Area — Possibility for courts in States of the European Free Trade Association to ask the Court to interpret the agreement — Permissibility — Lack of binding effect of the Court's answers — Not permissible*

5. *Procedure — Intervention — Right of intervention — Extension to the States of the European Free Trade Association in the context of the European Economic Area — Recourse to an amendment of the Protocol on the Statute of the Court*
(EEC Treaty, Art. 188, second para, and Art. 236; Statute of the Court of Justice of the EEC, Arts 20 and 37)

6. *International agreements — Agreement creating the European Economic Area — System of courts — Incompatibility with Community law — Recourse to an amendment of Article 238 of the Treaty to cure the incompatibility — Not permissible*
(EC Treaty, Arts 164 and 238)

1. The fact that the provisions of the agreement relating to the creation of the European Economic Area and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives.

With regard to the comparison of the objectives of the provisions of the agreement and those of Community law, it must be observed that the agreement is concerned with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties. In contrast, as far as the Community is concerned, the rules on free trade and competition have developed and form part of the Community legal order, the objectives of which go beyond that of the agreement. Indeed, the EEC Treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union and the objective of all the Community treaties is to contribute together to making concrete progress towards European unity.

The context in which the objective of the agreement is situated also differs from that in which the Community aims are pursued. The European Economic Area is to be established on the basis of an international treaty which merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the intergovernmental institutions which it sets up. In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of

the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions.

It follows that homogeneity of the rules of law throughout the European Economic Area is not secured by the fact that the provisions of Community law and those of the corresponding provisions of the agreement are identical in their content or wording.

Neither will the interpretation mechanism provided for in the provisions of the agreement, which stipulate that the rules of the agreement must be interpreted in conformity with the case-law of the Court of Justice on the corresponding provisions of Community law, enable the desired legal homogeneity to be achieved. On the one hand, that mechanism is concerned only with rulings of the Court of Justice given prior to the date of signature of the agreement, which will give rise to difficulties in view of the evolving nature of the Court's case-law. On the other hand, although the agreement does not clearly specify whether it refers to the Court's case-law as a whole, and in particular the case-law on the direct effect and primacy of Community law, it appears from a protocol to the agreement that the Contracting Parties undertake merely to introduce into their respective legal orders a statutory provision to the effect that the rules of the agreement are to prevail over contrary legislative provisions with the result that compliance with the case-law of the Court of Justice does not extend to essential elements of that case-law which are irreconcilable with the characteristics of the agreement.

2. As the Court of the European Economic Area has jurisdiction in relation to the interpetation and application of the agreement, it may be called upon to interpret the expression 'Contracting Parties'. As far as the Community is concerned, that expression covers the Community and the Member States, or the Community, or the Member States. Consequently, that court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement. To confer that jurisdiction on that court is incompatible with Community law, since it is likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty. Under Article 87 of the ECSC Treaty and Article 219 of the EEC Treaty, the Member States have undertaken not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in therein.

3. Where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice, *inter alia* where the Court of Justice is called upon to rule on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order.

An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created by such an agreement as regards the interpretation and application of its provisions.

As far as the Agreement creating the European Economic Area is concerned, the question arises in a particular light. Since it takes over an essential part of the rules which govern economic and trading relations within the Community and which constitute, for the most part, fundamental provisions of the Community legal order, the agreement has the effect of introducing into the Community legal order a large body of legal rules which is juxtaposed to a corpus of identically-worded Community rules. Furthermore, in so far as it is intended to secure uniform application and equality of conditions of competition, it necessarily covers the interpretation both of the provisions of the agreement and of the corresponding provisions of the Community legal order.

Although, under the agreement, the Court of the European Economic Area is under a duty to interpret the provisions of the agreement in the light of the relevant rulings of the Court of Justice given prior to the date of signature of the agreement, the Court of the European Economic Area will no longer be subject to any such obligation in the case of decisions given by the Court of Justice after that date. Consequently, the agreement's objective of ensuring homogeneity of the law throughout the European Economic Area will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law.

It follows that in so far as it conditions the future interpretation of the Community rules on the free movement of goods, persons, services and capital and on competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community. As a result, it is incompatible with Community law.

4. Although it is true that there is no provision of the EEC Treaty which prevents an international agreement from conferring on the Court of Justice jurisdiction to interpret the provisions of such an agreement for the purposes of its application in non-member countries and that no objection on a point of principle can be made to the freedom which the States of the European Free Trade Association are given under the agreement to authorize or not to authorize their courts and tribunals to ask the Court of Justice questions or to the fact that there is no obligation on the part of certain of those courts and tribunals to make a reference to the Court of Justice, it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the States of the European Free Trade Association are to be purely advisory and without any binding effects. Such a situation would change the nature of the

function of the Court of Justice as it is conceived by the Treaty, namely that of a court whose judgments are binding.

5. Since the right to intervene in cases pending before the Court of Justice is governed by Articles 20 and 37 of the Protocol on the Statute of the Court of Justice of the EEC, which may be amended by the Community institutions under the procedure provided for in the second paragraph of Article 188 of the EEC Treaty, it is not necessary to amend the EEC Treaty, pursuant to Article 236 thereof, in order to give the countries of the European Free Trade Association the right to intervene.

6. Article 238 of the EEC Treaty does not provide any basis for setting up under an international agreement a system of courts which conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community. For the same reasons, an amendment of Article 238 could not cure the incompatibility with Community law of the system of courts to be set up by the agreement.