

Opinion of the Court

I

- 1 In this Opinion the Court will confine itself, in accordance with the Commission's request, to the question whether the provisions which have been renegotiated following its Opinion of 14 December 1991 are compatible with the EEC Treaty.

II

- 2 One of the objectives of the agreement, in common with the version considered in that Opinion (referred to below as 'the former version'), is that of ensuring the homogeneous interpretation and application of the law in the EEA. That objective, set out in the penultimate recital in the preamble to the agreement and in Article 1, is to be achieved by incorporating in the law governing the EEA provisions that are textually identical to the corresponding provisions of Community law and by means of the new provisions governing the settlement of disputes.
- 3 The new provisions of the agreement provide for the following mechanisms.
- 4 Article 108(2) provides that the EFTA States are to establish a court to be known as 'the EFTA Court'. Under a separate agreement to be concluded between the EFTA States, the EFTA Court is to be given jurisdiction, *inter alia*, to entertain actions concerning the surveillance procedure with regard to the EFTA States and appeals against decisions taken by the EFTA Surveillance Authority in the competition field and to settle disputes between two or more EFTA States.
- 5 According to Article 6, which has not been amended, the provisions of the agreement are, in their implementation and application, to be interpreted in conformity with rulings of the Court of Justice given prior to the date of signature of the agreement which relate to the corresponding provisions of the EEC Treaty, the ECSC Treaty and measures of Community secondary legislation.

- 6 In order to achieve the objective of reaching the most uniform interpretation possible of the provisions of the agreement and of the corresponding provisions of Community law, Article 105(2) of the agreement provides that the Joint Committee is to keep the development of the case-law of the Court of Justice and of the EFTA Court under constant review. The Joint Committee is to act so as to preserve the homogeneous interpretation of the agreement. According to a 'procès-verbal agréé ad article 105', decisions taken by the Joint Committee under that article are not to affect the case-law of the Court of Justice.

- 7 Article 105(3) provides that the procedure laid down in Article 111 may be applied if, within two months after a difference between the case-law of the two courts has been brought before it, the Joint Committee has not succeeded in preserving the homogeneous interpretation of the agreement.

- 8 Article 111 makes provision for a procedure for the settlement of disputes concerning the interpretation or application of the agreement. According to paragraphs 1 and 2 of Article 111, the Community or an EFTA State may bring any such matter in dispute before the Joint Committee, which may settle it.

- 9 Under Article 111(3), if the dispute is about the interpretation of provisions of the agreement which are identical in substance to corresponding rules of Community law and it has not been settled within three months after it has been brought before the Joint Committee, the Contracting Parties involved in the dispute may agree to request the Court of Justice to give a ruling on the interpretation of the relevant rules.

- 10 Article 111(4) lays down the circumstances in which Contracting Parties may submit their disputes to arbitration. The dispute must concern the scope or duration of safeguard measures or the proportionality of rebalancing measures and the Joint Committee must have failed to resolve it within a period of three months from the date when the matter was brought before it. Article 111(4) further states that the arbitration is to be carried out in accordance with the procedures laid down in Protocol 33; no question of interpretation of provisions of the agreement

which are identical in substance to corresponding rules of Community law may be dealt with in such procedures; and the arbitration award is binding on the parties to the dispute.

- 11 Lastly, Protocol 34, to which Article 107 of the agreement refers, contains provisions under which the EFTA States may authorize their courts to request the Court of Justice to decide on the interpretation of a provision of the agreement which is identical in substance to a provision of Community law.

III

- 12 By comparison with the former version of the agreement, the new provisions on the system for the settlement of disputes differ essentially in the following respects.
- 13 First, the agreement no longer sets up an EEA Court. The EFTA Court will have jurisdiction only within the framework of EFTA and will have no personal or functional links with the Court of Justice.
- 14 Secondly, the agreement provides for two procedures, the first being designed to preserve the homogeneous interpretation of the agreement, the other being concerned with the settlement of disputes between Contracting Parties. In the course of that dispute-settlement procedure, the Court of Justice may be asked to give a ruling on the interpretation of the relevant rules.
- 15 Thirdly, under Article 107 and Protocol 34, the EFTA States may authorize their courts to ask the Court of Justice to give a decision and not, as the former version of the agreement had it, to 'express itself' on the interpretation of a provision of the agreement.

- 16 Fourthly, the agreement no longer contains any provision requiring the Court of Justice to pay due account to decisions of other courts.

IV

- 17 In its Opinion of 14 December 1991 the Court held that the divergences between the aims and context of the agreement and those of Community law stood in the way of the achievement of the objective of homogeneity in the interpretation and application of the law in the EEA. It was in the light of that contradiction that the Court held that the proposed system of courts was liable to undermine the autonomy of the Community legal order in pursuing its own particular objectives.

- 18 Since these divergences remain, the question is whether the new provisions of the agreement replacing those which the Court regarded as incompatible with the autonomy of the Community legal order are liable to raise similar objections.

- 19 In that context, it is to be noted that the agreement no longer provides for the creation of an EEA Court, but proposes that an EFTA Court be established by a separate agreement between the EFTA States. Contrary to what was proposed in the case of the EEA Court, the EFTA Court will not hear disputes between Contracting Parties and will exercise its jurisdiction only within EFTA.

- 20 It therefore remains to be considered whether the procedures provided for in Articles 105 and 111 of the agreement for the settlement of disputes are compatible with the EEC Treaty and, in particular, with Article 164 thereof.

- 21 In order to achieve the most uniform interpretation possible of the provisions of the agreement and those of Community law whose substance is incorporated in the agreement, Article 105 of the agreement empowers the Joint Committee to keep under constant review the development of the case-law of the Court of Justice of the European Communities and of the EFTA Court and to act so as to preserve the homogeneous interpretation of the agreement.
- 22 If that article were to be interpreted as empowering the Joint Committee to disregard the binding nature of decisions of the Court of Justice within the Community legal order, the vesting of such a power in the Joint Committee would adversely affect the autonomy of the Community legal order, respect for which must be assured by the Court pursuant to Article 164 of the EEC Treaty, and would therefore be incompatible with the Treaty.
- 23 However, according to the 'procès-verbal agréé ad article 105', decisions taken by the Joint Committee under that article are not to affect the case-law of the Court of Justice.
- 24 That principle constitutes an essential safeguard which is indispensable for the autonomy of the Community legal order.
- 25 Consequently, the power which Article 105 confers on the Joint Committee for the purposes of preserving the homogeneous interpretation of the agreement is compatible with the EEC Treaty only if that principle is laid down in a form binding on the Contracting Parties.
- 26 Under Article 111, the Joint Committee is empowered to settle any dispute brought before it by the Community or an EFTA State on the interpretation or application of the agreement, including, pursuant to Article 105(3), disputes relating to a difference in case-law which the Committee has been unable to settle under the procedure laid down in Article 105.

- 27 The fact that such a power is conferred on the Joint Committee raises once again the problem mentioned in paragraph 22 of this Opinion.
- 28 In that regard, however, it is to be noted that Article 105(3) establishes a link between the procedure provided for in that article and that provided for in Article 111 of the agreement, and that, because of that link, those two provisions must be interpreted systematically and consistently. Such an interpretation necessarily implies that the principle set out in the 'procès-verbal agréé ad article 105' will also apply where the Joint Committee tries to settle a dispute in accordance with Article 111 by finding a solution acceptable to the Contracting Parties.
- 29 It follows that the powers conferred on the Joint Committee by Article 111 do not call in question the binding nature of the Court's case-law or the autonomy of the Community legal order, since it has been established that the principle set out in the 'procès-verbal agréé ad article 105' is binding on the Contracting Parties.
- 30 The interpretation according to which the Joint Committee is bound to comply with the aforementioned principle in the context of Article 111 is the only interpretation that is consistent with the jurisdiction to interpret the relevant rules conferred on the Court of Justice by Article 111(3).
- 31 The question then arises as to whether it is compatible with the Treaty to confer that jurisdiction on the Court of Justice.
- 32 The powers conferred on the Court by the Treaty may be modified pursuant only to the procedure provided for in Article 236 of the Treaty. However, an international agreement concluded by the Community may confer new powers on the Court, provided that in so doing it does not change the nature of the function of the Court as conceived in the EEC Treaty.

- 33 It was in that context that the Opinion of 14 December 1991 accepted that an international agreement concluded by the Community might confer on the Court jurisdiction to interpret the provisions of such an agreement, provided that the Court's decisions have binding effects. The function of the Court as conceived in the EEC Treaty is that of a court whose decisions are binding.
- 34 Admittedly, the aim of requesting a ruling from the Court of Justice pursuant to Article 111(3) of the agreement is not to entrust the Court with the settlement of the dispute, which continues to be the responsibility of the Joint Committee. Nevertheless, the interpretation to be given by the Court of Justice is binding, as is clear from the very wording of the two language versions of the agreement submitted to the Court, which use the French expression 'se prononcer' and the English 'give a ruling'.
- 35 It follows that, if the Court is called upon to give a ruling pursuant to Article 111(3) of the agreement, the Contracting Parties and the Joint Committee alike will be bound by the Court's interpretation of the rules at issue. Consequently, the jurisdiction conferred on the Court by that provision for the purposes of interpreting the provisions of the agreement at the request of the Contracting Parties in dispute is compatible with the EEC Treaty.
- 36 As for the arbitration procedures, it is sufficient to observe that, according to Article 111(4) of the agreement, no question of interpretation of provisions of the agreement which are identical to provisions of Community law may be dealt with by such procedures. It follows that the settlement of disputes by arbitration is not liable adversely to affect the autonomy of the Community legal order.

V

- 37 As regards the provisions of the agreement under which EFTA States may authorize their courts to request the Court of Justice to decide on the interpre-

tation of a provision of the agreement, it is to be noted that the wording of Article 107 ensures that the answers which the Court of Justice may be called upon to give will be binding. Consequently, that mechanism satisfies the requirements set out in the Opinion of 14 December 1991 and is therefore compatible with Community law.

VI

38 Finally, it is necessary to assess the compatibility with the EEC Treaty of the rules contained in Article 56 of the agreement with regard to the sharing of responsibilities in the competition field between the EFTA Surveillance Authority and the Commission of the European Communities.

39 It follows from the Court's case-law (judgment in Case 22/70 *Commission v Council* [1971] ECR 263 ('the ERTA case'), judgment in Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279 and Opinion 1/76 [1977] ECR 741, paragraph 3) that the Community's authority to enter into international agreements arises not only from an express attribution by the Treaty, but also from other provisions of the Treaty and measures taken pursuant to those provisions by the Community institutions.

40 Consequently, the Community is empowered, under the competition rules in the EEC Treaty and measures implementing those rules, to conclude international agreements in this field.

41 That power necessarily implies that the Community may accept rules made by virtue of an agreement as to the sharing of the respective competences of the Contracting Parties in the field of competition, provided that those rules do not change the nature of the powers of the Community and of its institutions as conceived in the Treaty.

42 It follows that Article 56 of the agreement is compatible with the EEC Treaty.

In conclusion,

THE COURT

gives the following opinion:

The following are compatible with the Treaty establishing the European Economic Community:

- (1) The provisions of the agreement which deal with the settlement of disputes, as long as the principle that decisions taken by the Joint Committee are not to affect the case-law of the Court of Justice is laid down in a form binding on the Contracting Parties;
- (2) Article 56 of the agreement, dealing with the sharing of competences in the field of competition.

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| Due | Joliet | Schockweiler |
| President | President of the Chamber | President of the Chamber |
| Grévisse | Kapteyn | Mancini |
| President of the Chamber | President of the Chamber | Judges |
| Moitinho de Almeida | Rodriguez Iglesias | Díez de Valasco |
| Judges | Judges | Judges |
| Zuleeg | Murray | Edward |
| Judges | Judges | Judges |

Delivered in open court in Luxemburg on 10 April 1992.

J.-G. Giraud
Registrar