DEVELOPMENTS

Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters: Opinion 1/03 of 7 February 2006

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A. Introduction[1]

On March 5, 2003, the Council of the European Union (hereafter the 'Council') submitted a request for an opinion to the European Court of Justice pursuant to Article 300 (6) EC. This request was intended to clarify whether the Community had an exclusive or shared competence to conclude a new convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters intended to replace the existing Lugano Convention (hereafter the 'new Lugano Convention' or the 'envisaged agreement').

B. Summary of Opinion 1/03

I. The Background to the Request for Opinion 1/03

The legal and historical background of this request is as follows. The fourth indent of Article 293 EC (ex 220 EC) provides that Member States shall, insofar as is necessary, enter into negotiations with each other with a view to securing the simplification of formalities governing the reciprocal recognition and enforcement of judgment of courts or tribunals and of arbitration awards. Pursuant to this provision, Member States concluded, in Brussels on 27 September 1968, a Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the Brussels Convention). On 16 September 1988, the EFTA

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countries and the Members States of the European Union concluded the Lugano Convention. This latter convention instituted a system similar to that of the Brussels Convention between the parties to that Convention and the EFTA countries. Following the accession to the European Union of several EFTA countries, only a handful of states party to the Lugano Convention were not members of the European Union, namely, Iceland, Norway, Switzerland, and Poland (that latter State being nevertheless a member of the European Union since 1 May 2004).

In December 1997, the Council initiated a revision process of both the Brussels and the Lugano Conventions by appointing an ad hoc group of representatives of the Member States and of Iceland, Norway and Switzerland. This ad hoc group agreed on a text in April 1999. However, as a result of the amendment of the EC Treaty by the Treaty of Amsterdam, it was no longer possible to incorporate the changes to the Brussels Convention proposed by the ad hoc group on the basis of Article 293 EC. Hence, on the basis of a Commission proposal, the Council adopted Regulation No 44/2001 on 22 December 2000 pursuant to Articles 61(c) and 67(1) EC. This regulation, which entered into force on 1 March 2002, replaced the Brussels Convention and applies between the Member States, with the exception of Denmark[2]. With regard to the Lugano Convention, in October 2002 the Council authorised the Commission to begin negotiations with a view to concluding a convention between the Community and, in light of the protocol applicable to it, Denmark, on the one hand, and Iceland, Norway, Switzerland, and Poland, on the other. The envisaged agreement aims at establishing a new Lugano Convention, which would, to the extent possible, align the substantive provisions of the agreement envisaged with the provisions of Regulation No 44/2001.

II. General Statements on Community Competences

Before entering into a detailed analysis of the issue brought to its attention, the Court recalled the legal principles governing Community competences, as developed by its case law. It stressed that the competence of the Community to conclude international agreements is not derived solely from the express provisions of the Treaty. According to Opinions 1/76[3] and 2/91[4], whenever Community law has created powers within its internal system for the purpose of attaining a specific objective, the Community has authority to undertake international commitments

[2] Pursuant to the Danish Protocol, Regulation No 44/2001 does not apply to Denmark.

[3] Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, 1977 E.C.R. 741, para. 3.

[4] Opinion 2/91, *ILO Convention on safety in the use of chemicals at work*, 1993 E.C.R. I-1061, para. 7.

necessary for the attainment of that objective, even in the absence of an express provision to that effect. The Court added that in such circumstances, the Community competence to undertake international commitments is exclusive. It also results from Case 22-70 *Commission v Council (ERTA)*[5] that where common rules have been adopted, the Members States no longer have the right, acting individually or even collectively, to undertake obligations with non-member countries which affect those rules. In such a case, the Community has exclusive competence to conclude international agreements. In that regard, the court emphasised that any exclusive competence which is not expressly conferred by the Treaty must be based on the conclusion that the international agreement is capable of affecting Community rules. Therefore a specific analysis of the relationship between the agreement envisaged and the Community rules in force is required. In certain cases, a comparative analysis of the areas covered by both the Community rules and by the envisaged agreement may suffice to rule out any effect on the former. However, it is not necessary that those two areas completely overlap for Community rules to be affected. Where the international agreement concerns an area which is already covered to a large extent by Community rules, the assessment must be based not only on the scope of the rules in question but also on their nature and content. The Court stressed that this analysis aims to ensure the uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law. It added that it is also necessary to take into account the future development of Community law in so far as the latter is foreseeable.

After having reviewed those principles, the Court set out to examine whether the envisaged agreement was liable to affect Community rules. Since both Regulation 44/2001 and the envisaged agreement contain two parts relating to the rules on jurisdiction of courts, and the rules on the recognition and enforcement of judgments respectively, the Court analysed those two aspects in turn.

III. The Rules Concerning Jurisdiction of Courts

Concerning the rules relating to the jurisdiction of courts, the Court noted that the purpose of Regulation No 44/2001 is to unify the rules on jurisdiction in civil and commercial matters. These rules apply not only to intra-Community disputes but also to those, which have an international element. Their objective is to eliminate obstacles to the functioning of the internal market, which may stem from disparities between national legislations on the subject. The regulation sets up a unified

[5] 1971 E.C.R. 263.

system, which governs not only the relations between different Member States but also relations between a Member State and a non-member country. In that context, the Court recalled that it had previously held in Case C-281/02 *Owusu*[6] that the Brussels Convention applied to situations involving international elements. For instance, the legal relationship can be international in nature when both the claimant and the defendant are domiciled in a Contracting State and the events at issue occur in a non-Contracting State. Indeed, such a situation may raise questions in the Contracting State relating to the determination of international jurisdiction. Moreover, the rules of the Brussels Convention concerning exclusive jurisdiction or express prorogation of jurisdiction were also likely to apply to legal relationships involving one Contracting State and one or more non-Contracting States. Equally, the rules on lis pendens and related actions or those on recognition and enforcement have been held in the *Owusu*[7] case to apply to proceedings or judgments which could concern international disputes involving a Contracting State and a non-Contracting State. On the basis of those findings, the Court held that, given the unified and coherent system of rules on jurisdiction, which Regulation No 44/2001 provides for, any international agreement also establishing a unified system of rules on conflict of jurisdiction is capable of affecting Community law.

This being said, the Court nevertheless went on to analyse the new Lugano Convention. It noted that its provisions aim to implement the same system as that of Regulation No 44/2001 by using the same jurisdictional rules. In that respect, governments of the Member States contended that as the two legal instruments are consistent, the new Lugano Convention does not affect Community rules. The Court accepted that, in determining whether the envisaged agreement may affect Community rules, account should be taken of the fact that the purpose and wording of Regulation No 44/2001 and the provisions of the envisaged agreement are the same. However, the Court observed that this circumstance does not prevent the new Lugano Convention from affecting those Community rules. In particular, provisions of the new Lugano Convention which are similar to Article 22 and 23 of Regulation No 44/2001 result in a different choice of court with jurisdiction than would have been selected under Regulation 44/2001. Indeed, in the absence of the envisaged Convention, where the defendant is domiciled in a Member State, that latter State would be the appropriate forum, whereas under the Convention, the appropriate forum would be the court of the non-member country.

[6] Case C-281/02, *Owusu,* 2005 E.C.R. I-1383, paras 25-26.

[7] Op. cit., paras 28-29.

Regarding the so-called 'disconnection clause' contained in the new Lugano Convention, which provides that the agreement does not affect the application by the Member States of the relevant provisions of Community law, the Court noted that such a clause does not constitute a guarantee that Community rules are not affected by the provisions of the agreement. On the contrary, this clause provides an indication that those rules are affected. The Court stressed that, in any event, such a clause does not in itself provide an answer, before the agreement envisaged is concluded, to the question of whether the Community has exclusive competence to conclude that agreement. The Court also stressed that the disconnection clause does not have the purpose of ensuring that Regulation No 44/2001 is applied whenever possible. It rather regulates in a consistent manner the relationship between that regulation and the new Lugano Convention. Furthermore, the Court noted that the disconnection clause contained in the current Lugano Convention, which the disconnection clause in the envisaged agreement would be similar to, includes exceptions that may prevent the application of the rules of jurisdiction laid down by Regulation No 44/2001. With respect to those exceptions, the Irish government submitted that it would be sufficient for the Community alone to negotiate the provisions relating to those exceptions, with the Member States retaining competence to conclude the other provisions of that agreement. The Court however replied that it had previously found that the main provisions of the envisaged agreement are capable of affecting the unified and coherent nature of the rules of jurisdiction laid down by Regulation No 44/2001.

IV. The Rules on Recognition and Enforcement of Judgments

With regard to the rules on the recognition and enforcement of judgments in civil and commercial matters, the Court stated that, in Regulation No 44/2001, those rules are closely linked to those on jurisdiction and do not constitute a distinct and autonomous system, as most of the governments had submitted. It noted that the simplified mechanism of recognition and enforcement set out in Article 33(1) of Regulation No 44/2001, which pursuant to Article 35(3) of that regulation, leads in principle to the lack of review of the jurisdiction of courts of the Member State of origin, rests on the mutual trust between the Member States, in view of the rules of direct jurisdiction set out in Chapter II of that regulation. Such a link between the recognition and enforcement of judgments and the rules on jurisdiction was confirmed in several provisions of Regulation No 44/2001. For instance, Article 35(1) maintains the review of the jurisdiction of the courts of origin where the provisions of that regulation concerning exclusive jurisdiction and jurisdiction in relation to insurance and consumer contracts are at stake. The Court noted that Article 71(2)(b) and Article 72 of Regulation No 44/2001 also establish such a relationship between the rules on jurisdiction and those on the recognition and

enforcement of those judgments. According to the Court, it was thus apparent from the analysis of Regulation No 44/2001 alone that because of the unified and coherent system which it establishes for the recognition and enforcement of judgments, the envisaged agreement was capable of affecting those rules.

The Court confirmed those findings on the basis of the provisions contained in the current Lugano Convention, as the final text of the new Lugano Convention did not exist at the time Opinion 1/03 was rendered. It noted that this convention sets out the principle that a judgment given in a Contracting State is to be recognised in the other Contracting States without any special procedure being required. According to the Court, such a principle necessarily affects Community rules since it enlarges the scope of recognition of judicial decisions without any special procedure being foreseen to that effect by Regulation No 44/2001. This rule has the effect of increasing the number of cases in which judgments delivered by non-community member courts, whose jurisdiction does not arise from the application of Regulation No 44/2001, will be recognised.

The Court concluded that the Community rules on the recognition and enforcement of judgments are indissociable from those on the jurisdiction of courts, as together they form a unified and coherent system. The new Lugano Convention would consequently affect the uniform and consistent application of Community rules as regards both the jurisdiction of courts and the recognition and enforcement of judgments and the proper functioning of the unified system established by those rules. Therefore, the Community was held to be exclusively competent to conclude the new Lugano Convention.

C. Comment

Before the entry into force of the Treaty of Amsterdam, the EC Treaty did not confer any competence upon the Community to ensure mutual recognition and enforcement of judgments. As could be inferred from Article 293 EC (formerly Article 220 EC), such competence was entirely reserved to the Member States. However, Member States were nonetheless under the collective obligation to achieve, insofar as was necessary, reciprocal recognition and enforcement of judgments and for that purpose to enter into negotiations with each other. In 1968, in compliance with that obligation, Member States concluded the Brussels Convention.

The Treaty of Amsterdam, which entered into force in 1999, conferred new competences upon the Community, allowing it to legislate in the field of judicial cooperation in civil matters. This new conferral of powers changed the course of the

revision process of both the Brussels and the Lugano Conventions initiated by the Council in December 1997. Instead of giving rise to a new convention between the Member States, the revision of the Brussels convention culminated, on 22 December 2000, in the adoption of Regulation No 44/2001 on the bases of Articles 61(c) and 67(1) EC.

The revision of the Lugano Convention, however, could not be undertaken on the basis of the powers newly conferred upon the Community. Indeed, the new Lugano Convention was designed to establish a system of rules on jurisdiction and recognition and enforcement of judgments between the Member States and third countries. Arguably, contrary to Regulation No 44/2001, the new Lugano Convention was, strictly speaking, neither intended nor necessary to ensure the proper functioning of the internal market and did not fall, consequently, under the scope of Article 65 EC. Unlike the case under the Euratom Treaty, which provides for a system of parallel internal and external competences[8], sometimes referred to as '*in foro interno, in foro externo*', the EC Treaty does not expressly foresee a general competence for the Community to act on the international level in fields for which internal powers have been attributed. However, as Opinion 1/03 illustrates, the adoption of Regulation No 44/2001 necessarily impacted upon Member States' competence to conclude with third countries an agreement replacing the Lugano Convention.

In that respect, it might be useful to briefly underline that Community competences have three main features. First, they are limited by the principle of attribution. The scope and nature of Community competences are indeed restrictively specified by conferment by the Treaty and are hence not of a general character. Second, Community competences are conferred in order to allow the Community to achieve certain objectives and must therefore be viewed in light of their ends and functions. Article 5 EC expresses both the principle of attributed competences and the purpose-related nature of Community competences as follows: 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein'. Thirdly, the exercise of Community powers gives rise to norms which take precedence over national rules in accordance with the principle of primacy of Community law. These second and third features of Community competences lie at the basis of Community implied (or derived) powers.

[8] *See*, Article 101 of the Euratom Treaty which provides that the Community 'may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organisation or a national of a third State'.

As the Court recalled in Opinion 1/03, implied powers may stem from two distinct situations and, consequently, there are two kinds of implied powers. These powers were first acknowledged in 1971 in *Commission v Council* (ERTA)[9] in situations where rules had been adopted by the Community by virtue of its concurrent powers. In this judgment, the Court held that 'each time the Community […] adopts provisions laying down common rules […], the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules'[10]. According to the Court, 'when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system'[11]. In support of its findings, the Court also invoked the Member States' obligation of loyal cooperation under the then Article 5 EC (now Article 10 EC) which allowed it to conclude that 'to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope'[12].

The principle of pre-emption, established by what is usually referred to as the ERTA doctrine, stems from a logic similar to the one which necessitated the development of the principle of primacy in the early case law, i.e. the concern to ensure the '*effet utile*' of Community law[13]. Moreover both the ERTA doctrine and the principle of primacy are supported by the principle of Community loyalty embedded in Article 10 EC (formally Article 5 EC). However, the ERTA doctrine should be distinguished from the principle of primacy. Indeed, while the latter is a rule of hierarchy, governing only direct conflicts between national and Community norms, the former is a rule of regulatory competence concerned with interferences with Community legislation by national rules adopted within areas already regulated at a Community level. While the principle of primacy comes into play in situations where the Community adopts measures in areas which the Member States were the first to regulate, the principle of pre-emption will prohibit Member States from adopting measures in areas which the Community has already regulated.

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

[10] *Id,* para. 17.

[11] *Id,* para. 18.

[12] *Id,* para. 22.

[13] If the principle of *effet utile* was explicitly raised in Case 6/64, *Costa v. ENEL,* 1964 E.C.R. 585, it should however be noted that it has not been mentioned in Case *ERTA*.

It results from the ERTA doctrine that the Community's exercise of its concurrent powers affords it, by the same token, exclusive jurisdiction over the adoption, either internally or externally, of further rules liable to affect existing secondary Community law. Therefore, although the EC Treaty does not always provide for a legal basis allowing the Community to conclude international agreements on any specific matter, the ERTA doctrine can be viewed as nonetheless establishing a parallelism between Community internal and external jurisdiction (*in foro interno, in foro externo*). However, this is only to the extent that Community concurrent powers have been exercised internally and in so far as the Community legislation thus adopted may be affected or altered by independent actions of Member States in relation to third countries.[14]

That being said, it is worth stressing that it might not be strictly necessary that Community internal measures be already enacted for the ERTA doctrine to apply. Indeed, it is submitted that the ERTA doctrine could also apply in a situation where an internal measure and an external measure affecting the rules of the former are to be adopted in a concomitant way. Let us take the example of Opinion 1/03 and imagine a situation where both the regulation implementing a system of rules on jurisdiction and recognition and enforcement of judgments as between Member States (i.e. Regulation No 44/2001) and the new Lugano Convention setting up such a system between the Member States and third countries, were to be adopted and concluded at the same time. Although no Community measure would be in force at the time of the conclusion of the international agreement, the latter would nonetheless be liable to affect and alter the scope of the Community rules that are about to be adopted. In that perspective, the conclusion of the international agreement by the Member States could arguably run counter to their obligation under Article 10 EC since the convention in question is capable of interfering with the realisation of the objectives pursued by the not yet adopted Community regulation. Consequently, Member States should also be precluded from entering into obligations vis-à-vis third countries outside the Community framework when the international convention at issue covers an area which is covered by a Community internal measure about to be adopted. In that regard, although the Court has not had the opportunity to consider this issue in such a factual situation,

[14] For a useful restatement of the ERTA doctrine, *see also* the Opinion of Advocat General Poiares Maduro issued on 18 January 2006 in Case C-459/03, *Commission v Ireland,* 2006, not yet reported, which stresses that 'where the Treaty provides for concurrent competence, both the Community and the Member States are allowed to undertake obligations themselves with third countries. However, once the Community has undertaken such obligations, or once it has adopted internal measures, Member States are prohibited from undertaking obligations which could affect the common rules thus established' (para. 23).

it is noteworthy that in Opinion 1/03, the Court stressed that when determining the competence for the conclusion of an agreement with third countries, it is also necessary to take into account the future development of Community law in so far as the latter is foreseeable.

The ERTA doctrine aside, implied powers may also flow from the interpretation of a legal basis expressly provided for in relation to its objective(s). In this case, the recognition of implied powers stems from a teleological approach on the Court of Justice's part which extends the scope of an existing legal basis in order to ensure its *effet utile*. Such an implied power remains therefore closely linked to the express provision of the considered legal basis. This approach was originally developed in *Kramer*[15] and in Opinion 1/76[16]. More specifically, in the latter Opinion, the Court held that 'whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community 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'[17]. As the Court stressed in Opinion 1/03, it is submitted that when such an implied competence exists in relation to the conclusion of an international agreement, the Community may act alone, without the intervention of Member States, as it does when it adopts internal measures on the basis of concurrent competence.

Because of the questions brought to its attention, the Court of Justice has often dealt with the issue of the existence of an implied competence together with the issue of the exclusive nature of it. However, it should be emphasised that the existence of an implied competence and the exclusive or concurrent nature of such competence are two distinct issues which should not be confused. If it results from the ERTA doctrine that the Community enjoys an exclusive implied competence to conclude international conventions capable of affecting Community measures which have already been adopted, such is not the case concerning implied competence in the sense of Opinion 1/76. Indeed, the fact that the Community has an implied competence, in the sense of Opinion 1/76, to enter into international commitments necessary for the attainment of Community objectives does not mean that such competence is exclusive. If a concurrent competence has been attributed to the Community at an internal level in a specific area, its potential derived competence to act at the external level will also be concurrent. Consequently, Member States are

[15] Joint Cases 3, 4 and 6-76, *Kramer*, 1976 E.C.R. 1271.

[16] *Op. cit.*

[17] *Id.*, para. 3.

not precluded from entering into international commitments in areas in relation to which the Community enjoys an implied concurrent competence in the sense of Opinion 1/76. However, if the Community concludes an international convention which is necessary for the attainment of a Community objective on the basis of an implied concurrent competence in the sense of Opinion 1/76, Member States will lose, by virtue of the ERTA doctrine, the right to adopt internal measures or to enter into international commitments which might affect or alter the scope of the provisions contained in the above mentioned international convention concluded by the Community.

In Opinion 1/03, it seemed to be common ground that the conclusion of an agreement with third countries, such as the new Lugano Convention, was not necessary for the establishment of a system governing jurisdiction and recognition and enforcement of judgments in civil and commercial matters between the Member States. This objective could be attained through the enactment of a Community internal measure, i.e. Regulation No 44/2001, the territorial scope of which is limited to the Community territory. Consequently, jurisdiction for concluding the new Lugano Convention was not to be determined on the basis of an *effet utile* approach developed in Opinion 1/76, but rather on the basis of the ERTA doctrine, since at the time the new Lugano Convention was to be concluded, Regulation No 44/2001 would already be in force.

If Opinion 1/03 constitutes a rather straightforward application of the ERTA doctrine, this case is of some interest concerning the notion of pre-emption and the issue of effect on Community law. In that regard, it should be stressed that it is not sufficient for the Community to be exclusively competent for the conclusion of an agreement with third countries in a specific area, that that area be covered by internal Community measures. Member States only lose competence to adopt national measures or to enter into international commitments when such national measures or international commitments are liable to affect or alter the scope of Community rules. It can therefore not be ruled out that a Member State would be allowed to adopt measures – either at a purely national level or through an international agreement – in an area which is regulated at Community level, provided that those national measures do not interfere with Community rules. The conclusion that Community rules covering a given area are affected or that their scope is altered by an international agreement entered into by a Member State will be highly dependent upon the regulatory intensity and the content of those Community measures. As the Court made clear in Opinion 1/03, where the international agreement concerns an area which is already covered to a large extent by Community rules, the assessment must be based not only on the scope of the rules in question but also on their nature and content. Moreover, as emphasised above, the issue is not so much whether a national measure or an envisaged

agreement will conflict directly with Community rules, but rather whether they are liable to interfere in any way with the attainment of the objectives pursued by the Community when it adopted its measures[18].

In Opinion 1/03, the analysis of Regulation No 44/2001 showed that this measure had instituted a unified and coherent system of rules on jurisdiction and on recognition and enforcement of judgments. The Court consequently held that any international agreement which also establishes a unified system of rules on conflict of jurisdiction is capable of affecting those rules. It is striking that, having made such a finding, the Court did not need to enter further into the analysis of the new Lugano Convention in order to uphold the Community exclusive competence in relation to the conclusion of the latter. It seems that the Court nevertheless felt the need to do so in order to pinpoint the specific ways in which the envisaged agreement could affect some of the rules contained in Regulation No 44/2001. It is remarkable, however, that in response to the argument of the Irish government, which proposed that the Community could also negotiate alone the envisaged convention's provisions affecting Community rules, the Court stood firm behind its initial finding that the new Lugano Convention was capable of affecting the unified system established by Regulation No 44/2001.

[18] In that regard, a parallel could be drawn with the prohibition for Member States to further implement Community regulations that do not foresee such national implementation. If the national additional implementation runs counter the direct applicability, which Article 249 EC confers on this legislative instrument, it is also liable to affect the working of the rules contained in the regulation and the attainment of the objective pursued. See Case 93/71, *Leonesio*, 1972 E.C.R. 287.