Opinion of the Court of 26 April 1977. - Opinion given purs[u]ant to [Article 218(1) to (8)] of the [FEU] Treaty. - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels'. - Opinion 1/76.

Keywords

1. International agreements - Conclusion thereof by the [Union] - Authority

([EU] Treaty, [Article 47])

2. International agreements - Agreement on navigation on the Rhine - Conclusion thereof by the [Union] - Participation of Member States in the conclusion thereof - Justification for and limits thereof

([FEU] Treaty, second paragraph of [Article 351]; 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 [Union]

([FEU] Treaty, [Article 216(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 [Union] - Grant of powers of decision - Legality

([FEU] Treaty, [Articles 90 and 91])

5. European laying-up fund for inland waterway vessels - Structure of the organs thereof - Role of the institutions of the [Union] and the Member States vis-a-vis one another - Decision-making procedure - Alteration of the structure of the [Union] and of the [Union] decision-making procedure - Adverse affect on the requirements of unity and solidarity - Incompatibility with the Treaty

([FEU] Treaty, Preamble, paragraph 2; [EU Treaty,] Articles 3 and [13])

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

([FEU] Treaty, [Article 267])

Summary

1. Whenever [Union] law has created for the institutions of the [Union] powers within its internal system for the purpose of attaining a specific objective, the [Union] 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 [Union] measures are only adopted when the international agreement is concluded and made enforceable, the power to bind the [Union] vis-a-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 [Union] in the international agreement is necessary for the attainment of one of the objectives of the [Union].

2. The participation of specific Member States, together with the [Union], 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 [now FEU 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 351] of the [FEU] Treaty and cannot therefore be regarded as encroaching on the external power of the [Union].

3. The legal effect with regard to the Member States of an agreement concluded by the [Union] within its sphere of jurisdiction results, in accordance with [Article 216(2)] of the [FEU] Treaty, exclusively from the conclusion thereof by the [Union].

4. In order to attain a common policy, such as the common transport policy governed by [Articles 90 and 91 TFEU], the [Union] 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 [Union] cannot have the effect of surrendering the independence of action of the [Union] in its external relations and changing its internal constitution by the alteration of essential elements of the [Union] structure as regards the prerogatives of the institutions,

the decision-making procedure within the latter and the position of the Member States vis-a-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 [Union] 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 [Union] and more especially with the concepts which may be deduced from the recitals of the Preamble to and from [Articles 3 and 13 TEU]. An international agreement the effect of which is also to contribute to the weakening of the institutions of the [Union] and to the surrender of the bases of a common policy and to the undoing of the work of the [Union] is incompatible with the provisions of the Treaty.

6. The question whether the grant to a public international organ separate from the [Union] 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 [Union] 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 267] of the [FEU] 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.

Grounds

On 15 September 1976 the Court of Justice received a request for an opinion submitted by the Commission of the European [Union] pursuant to the second paragraph of [ex-]Article 228 (1) of the Treaty establishing the European Economic Community [now Article 218(11) TFEU], 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 [ex-] Article 236."

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 [Union] laid down in [Article 3 TEU]. In order to implement this policy, [Article 91 TFEU] 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 [Union], 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 91 TFEU], 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 [Union] 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 [Union] law has created for the institutions of the [Union] powers within its internal system for the purpose of attaining a specific objective, the [Union] 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 [Union] 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 [Union] *vis-a-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 [Union] in the in the international agreement is, as here, necessary for the attainment of one of the objectives of the [Union].

5 In order to attain the common transport policy; the contents of which are defined in [Articles 90 and 91 TFEU], the Council is empowered to lay down 'any other appropriate provisions', as expressly provided in [Article 91(1)(d) TFEU]. The [Union] 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 [Union] 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 [Union] 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 [Article 351 TFEU], explains and justifies the participation in the Agreement, together with the [Union], 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 216 (2) TFEU], exclusively from the conclusion of the latter by the [Union]. 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 [Union]. 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 [Union] 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 [Union] 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 [Union] 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 com position of the Supervisory Board), sometimes the [Union] 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 [Union] 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 [Union] and, moreover, alter in a manner inconsistent with the Treaty the relationships between Member States within the context of the [Union] as it was in the beginning and when the [Union] 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 [Union] and its institutions in a field which comes within a common policy which [Article 3 TEU] has expressly reserved to 'the activities of the [Union]';

(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 [Union] must be attained by 'common action', given that under [Article 13 TEU] that action must be carried out by the institutions of the [Union] 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 [Union], 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 [Union], constitutes both a surrender of the independence of action of the [Union] in its external relations and a change in the internal constitution of the [Union] by the alteration of essential elements of the [Union] structure as regards both the prerogatives of the institutions and the position of the Member States *vis-a-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 [Union] 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 [Union]? 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 [Union] 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 [Union] 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 [Union] and in Switzerland. The question has been raised whether the grant of such powers extending to all the territory of the [Union] to a public international organ separate from the [Union] comes within the powers of the institutions. More particularly, there arises the problem whether the institutions may freely transfer to non-[Union] 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 [Union] 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 [Union] 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 [Union] with a third State is, as far as concerns the [Union], an act of one of the institutions within the meaning of subparagraph (b) of the first paragraph of [Article 267 of TFEU]. It follows that the Court, within the context of the [Union] 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 [Article 218 (11) TFEU] 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 [Union] 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 Treaty [on the Functioning of the European Union].

Kutscher	Donner	Pescatore
President	President of Chamber	President of Chamber
Mertens de Wilmars	Sorensen	Mackenzie Stuart
Judge	Judge	Judge
O'Keeffe	Bosco	Touffait
Judge	Judge	Judge

Luxembourg, 26 April 1977.

A. Van Houtte

Registrar