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# Legal Aspects of European Space Activities

## ESA Convention, EEC Internal Market and Common Commercial Policy

A study commissioned by EUROSPACE, Paris

Nomos Verlagsgesellschaft
Baden-Baden

CIP-Titelaufnahme der Deutschen Bibliothek

**Micklitz, Hans W.:**
Legal Aspects of European Space Activities: ESA Convention, EEC Internal Market and Common Commercial Policy / Hans W. Micklitz; Norbert Reich. – 1. Aufl. – Baden-Baden: Nomos Verl.-Ges., 1989
(Schriftenreihe des Zentrums für Europäische Rechtspolitik an der Universität Bremen (ZERP); Bd. 9)
ISBN 3-7890-1875-9
NE: Reich, Norbert:; Zentrum für Europäische Rechtspolitik <Bremen>: Schriftenreihe des Zentrums . . .

1. Auflage 1989

## Preface

The present study, commissioned by EUROSPACE, Paris, analyses the legal position under Community law of European space activities under the ESA Convention, and, to a lesser extent, of national space agencies. It has been primarily concerned with the industrial policy provisions which - in combination with R & D, competition, regional, and employment objectives - form part the ESA scheme of financing and procurement, most notably of optional programmes.

The concentrated efforts by the EEC institutions to complete the Internal Market before the end of 1992, their demand for open competitive bidding in public procurement of goods, and more recently, services, the strict enforcement of state aid rules, and the growing Community competence in the Common Commercial Policy raise serious doubts whether and for how long the ESA industrial policy scheme can be maintained.

The paper tries to give first answers to this complicated set of questions. It reviews EEC law requirements for procurement concerning space activities from two different angles: from the Internal Market perspective (Chapter I), and from the Common Commercial Policy point of view (Chapter II). Since EFTA-countries participate in the ESA-scheme, it is not surprising that the rules on the Common Commercial Policy are somewhat more open to the ESA industrial policy objectives than the EEC Internal Market rules. During the transitional period until the completion of the Internal Market, therefore, certain derogations from the strict enforcement of the EEC rules on open competitive bidding can be maintained. On the other hand, the study emphasises the necessity for renegotiating the ESA industrial policy with the participation of the Community, before the 1st of January of 1993.

Chapter I was prepared by Norbert Reich, Chapter II by Hans Micklitz. The authors collaborated very closely and discussed their results for which each one of them bears the final responsibility. They were assisted in the editing phase by Ms. Deirdre Leahy, BA., LL.B., Galway, IRL.

They hope to have found rational legal solutions to the outstanding problems, which allow both for a continuation of European space programmes serving peaceful purposes as outlined by the ESA-Convention, and emphasise the need for an increased Community presence in European R&D and industrial policy. It should however be mentioned that problems of the ESA Convention in relation to GATT, legal problems in the

marketing phase of space systems, and legal protection of undertakings could not be explored.

At several occasions, earlier versions of the paper were discussed with representatives of EUROSPACE, its member enterprises, their consultants, and with collaborators of ESA. These discussions were characterized by frankness and expertise. They have helped a great deal in understanding the issues which were critically presented by the authors.

The authors finally wish to thank M. Demerliac, Secretary General, EUROSPACE, for the help and support in preparing the study and its discussion, and, most of all, for allowing scientific freedom without which the research would not have been possible.

Hans W. Micklitz / Norbert Reich ZERP-Bremen, Summer 1989

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(Summary)

### Chapter I:
### ESA Procurement Rules, National Procurement Rules, and EEC Law

1. ESA procurement rules, based on the ESA Convention and its implementation by the ESA Council of Ministers resp. the Industrial Policy Committee (IPC), seek to guarantee countries who participate — especially in ESA's optional programmes — a "fair return" for their contributions. The "fair return" policy aims at encouraging State participation in optional programmes by giving them the greatest part of their money "back". This principle helps, therefore, to develop State industries in the space sector, to promote national R & D activities in the high-tech area of space systems, to safeguard employment, and to support an equitable regional distribution of income. ESA carefully monitors these rules in order to guarantee an 0.95, and at minimum an 0.90 return coefficient. It should, however, not be forgotten that the "fair return" policy is clearly characterised by its anti-competitive effects, by restricting entry to ESA procurement to undertakings based in those Member States not participating in the programme or who have used up their quota, even if these undertakings can offer the goods or services at better prices. These anti-competitive effects of the "fair return" princple have to be carefully balanced against its consequences for R & D, industry, employment, and regional objectives (Nos. 1-11).

2. The EEC Internal Market provisions introduced by the Single Act, though not enjoying direct effect, are nevertheless adverse to procurement policies with objectives like those of the ESA industrial policy. The (justified) purpose of the ESA Convention to stimulate peaceful R & D activities in the space sector does not exempt its procurement rules from the applicability of the Internal Market provisions. The EEC itself, in implementing the new provisions of the Single Act on "Research and Technological development", wants to ensure their conformity with the Internal Market objectives, as demonstrated by Art. 130 F (12-14).

3. The EEC rules on the free movement of goods (15-17), namely Art. 30 et seq., prohibit every discriminatory treatment of goods imported by undertakings of EEC-countries, even if the state measures in question have a mere indirect or potential effect on intra-Community trade. This discrimination must be considered within the operation of the "fair return" principle in the ESA Convention, because the award of contracts for the supply of goods is not exclusively determined by objective criteria like price, quality etc., but also takes the origin of the supplier into account. A similar interpretation can be presented for the rules on the freedom to provide services, namely Art. 59 et seq. (24-26). According to the new case law of the Court of Justice of the European Communities (CJEC), these provisions seek to guarantee undertakings from every EEC country a right of entry into public supply or service markets, as well as safeguarding consumer's and customer's freedom of choice. They may be directly invoked by undertakings established in EEC countries which are not treated fairly in public procurement.

4. ESA itself, being an agency established under international law, is not directly subjected to the EEC prohibition on discriminatory procurement policies. EEC Member States, however, must obey their obligations under Community law and therefore not violate its "effet utile". This principle is laid down in Art. 5 and has found an ever growing importance in the case law of the CJEC, and by which any Member States autonomous policy which contradicts EEC rules may be restricted e.g. in finance and participation in international conventions, in allowing restraints to competition, and in granting state aids. Member States should not continue to participate in the financing of international organisations whose procurement policy is in clear contradiction with the objectives of the EEC Internal Market, unless they can justify their actions under specific provisions of Community Law (18-20).

5. Protectionist and discriminatory procurement policies, whether implemented by ESA or national agencies, cannot be justified under primary Community law. Arts. 36/66, according to the case law of the CJEC, allow only "non-economic" reasons as a justification for discriminatory procurement policies. They seem to exclude justifications based on R & D, industrial or regional policies. The "rule-of-reason" approach developed in the "Cassis-de-Dijon"-case for remaining restrictions in the free movement of goods and in similar cases for restrictions on the freedom to provide services do not justify

a discriminatory procurement policy based on the "fair return" principle, even if it serves to stimulate the R & D activities of undertakings in Member States (21-23, 27). Therefore, EEC Member States who participate in the ESA Convention have an obligation under primary Community law to align their commitments in ESA with the principles of the EEC Treaty.

6. The EEC directives on public procurement, especially Directive 88/295/EEC, exempt service contracts (with the exception of public works according to Directive 71/305/EEC), energy supply, transportation, and telecommunication from the requirement of Community wide procurement. New Commission proposals (Doc Com. (88) 377 & 378 final) seek to abolish these exemptions before 1 January 1993 (36a). The proposals are in line with the development of primary Community law.

7. International organisations like ESA are not required to observe the Community procurement regime, even if EEC Member States finance their R & D and commercial programmes. This exemption must, according to the new case law of the CJEC, be construed narrowly. It only relates to the transparency requirements which the directives establish. The directives cannot liberate Member States from their obligations under primary Community law, nor do they apply to the procurement of service contracts alone (34-36). Derogations from the requirements of primary Community law in public procurement may be permitted only under the Common Commercial Policy, not under the Internal Market rules.

8. The free trade agreements between the EEC and EFTA countries, who also participate in ESA, prohibit discriminatory procurement rules such as those in the ESA industrial policy, as far as goods are concerned. The "direct effect" of the agreements is, however, subject to doubt. Therefore, the principles of EEC law cannot be simply transferred to the interpretation of the free trade agreements. Deviations from the principle of non-discrimination for economic reasons may — under exceptional circumstances — be justified by invoking the safeguard clause of the free trade agreements (28-33).

9. The GATT rules on public procurement for goods which have been transferred into EEC law confirm the principle of non-discrimination in public procurement for the supply of goods, even though they are not directly applicable to ESA (37-39). The Uruguay round of GATT will probably extend these principles to the supply of services, even though no specific rules have been enacted so far.

10. The EEC state aid provisions are applicable only if space systems are commercially exploited. Neither ESA itself nor its contracting parties are subjected to these rules, unlike undertakings which market space systems (Ariane Space, Spot Image etc.). State aids illegally paid out by Member States or out of Member state funds, e.g. by their contributions to ESA, have to be repaid if they have not undergone the Community review procedure of Art. 93. The case law of the CJEC is very strict on enforcing the repayment obligation. Undertakings confronted with a recovery action by a Member State usually cannot argue that they have received the aid in good faith or have used up the funds. Member States must do everything to fulfil their obligations under Art. 5 to recover the illegally paid out aid. The Community review procedure will be applicable only to those aids whose purpose or effect is distort competition in the Internal Market. One might argue that this would only remain the case until a competitive European space industry has been built up. More details of the financing of European space activities must be known before a reasoned comment is possible (40-45).

## Chapter II:
## ESA Convention and EEC Law on External Relations

11. Infringements of EEC law, the EFTA agreements and the GATT agreement by ESA procurement rules concern the inner European Market, composed of EEC Member States and EFTA countries. These are legally obliged to provide for open non-discriminatory competitive bidding procedures on the inner European Market. But the non-compliance of the ESA procurement rules with primary EEC law, and, as far as goods are concerned, with EEC/EFTA and GATT agreements does not make them invalid in relation to ESA (47). ESA is an international organisation constituted under international public law. The second chapter examines the right of states to establish rules on public procurement under international public law while acting within their capacity as members of ESA, these rules however deviating from the requirements of primary Community law. This essentially concerns the discrepany between (1) the Member States'

autonomous right to shape an industrial policy within ESA (as a member of that organisation) which is also based on the fair return principle and falls under the scope of international law and (2) the diametrically opposite EEC policy and law requiring open competitive bidding.

12. The EEC Member States are not completely free in shaping their external relations. The Treaty provides for a Common Commercial Policy which will be imposed on all Member States in order to coordinate their external relations and to harmonize the rules governing the Internal Market. The existence of a Common Commercial Policy requires an analysis of the relationship between the EEC Internal Market rules and their repercussions on the shaping of a Common Commercial Policy. Are the Member States under an obligation to impose the economic freedoms of the EEC law, namely, the right of entry for every EEC undertaking, on ESA procurement rules? In legal terms : does the Common Commercial Policy determine and restrict the Member States' ability to engage themselves in international organisations which establish procurement rules deviating from that policy? And even if Member States are bound under Community law to shape a Common Commercial Policy which excludes the possibility of providing for differing procurement rules in the ESA Convention it might well be that the Member States are free to do so under the rules of international public law.

13. In the search for a possible solution to the conflicting procurement rules of the ESA Convention on the one hand and the EEC on the other, there are two different approaches possible for deciding on the Member States' freedom in the ESA Convention to deviate from the Treaty of Rome:

    (1) on examining the rules regarding the conflict between international treaties having different contents and analysing whether the ESA procurement rules benefit from priority over the EEC procurement rules or vice versa;

    (2) by forming a prospective solution for the conflict by elaborating the Member States' obligation to renegotiate the ESA Convention in order to reconcile the divergent rules of the different treaties and achieve a long term solution.

To our mind the dynamic extension of the EEC policy on external relations since the adoption of the Treaty of Rome requires us to analyze the possibilities of a prospective solution to the divergent procurement rules (55a-g).

14. The issues which must be considered with a view to renegotiating the ESA Convention may be grouped into three legal options:

    (1) A legal obligation to renegotiate the ESA Convention presupposes that the ESA procurement rules interfere with the Common Commercial Policy or the R&D policy of the Community. If the ESA procurement rules do not affect Community law there is no reason to renegotiate the ESA Convention; if however the ESA procurement rules interfere with Community law, than the Member States are under an obligation to align the ESA Convention to the EEC law.

    (2) Shared or exclusive competence for the Community to enter into the process of renegotiating the ESA procurement rules in external relations: The option makes sense only if we assume that the EEC law on external relations affects the ESA procurement rules. Therefore, the institution which governs EEC procurement rules in external relations and which leads the negotiations with ESA must be identified. It may be the Community through the Commission and the Council, i.e. the operation of exclusive power, or the Member States themselves (also an operation of exclusive yet separate power), or the parallel/ concurrent power of the Community and Member States operating jointly. Therefore, are the Member States allowed to uphold their exclusive competence as recognized within ESA, or are they obliged to share their power with the Community, or, again, have they even lost their power to the Community organs which will then be the only appropriate organ to enter into negotiations with ESA?

(3) The third option concerns jurisdiction of Member States to justify derogations from primary Community law in external relations (49-55): The analysis of the capacity, within the inner European market, of the EEC Member States as well as the EFTA countries to derogate from primary Community law or from the EEC/EFTA agreements respectively, has clearly shown that exemptions from the basic economic freedoms can be justified for non-economic reasons only. If it is possible to transfer the very same solution to the law in external relations, Member States would have no opportunity to reject the Community's request to enter into negotiations with ESA. We hesitate, however, whether such a rigid principle can be upheld within the objective of building up a European space industry which is able to compete on the world market.

15. Competence of the Community depends on whether the R & D activities or the commercial activities of ESA are concerned: the Community has no competence as far as ESA activities can be associated with R & D (56-63). Commercial activities of ESA, however, fall within the ambit of Art. 113 which requires a uniform Common Commercial Policy (64-74). The solution of this legal question depends on where to draw a line between ESA's R & D and ESA's commercial activities. It is not possible to associate the concept of space activities entirely with the R & D sector. This concept is inseparably linked to an industrial policy favouring the specific sectoral and regional priorities of Member States which justify their financial contributions. It is at the same time related to trade policy in broad terms, as far as the "fair-return principle" affects the free circulation of goods and services within the territories of the Member States to the Convention. The consequences of the double character of ESA activities are evident: The Member States cannot evade the scope of Art. 113 simply by referring to the R & D purpose of the agreement. The Community's competence cannot be presumed to have existed already in 1975 when the ESA Convention was concluded. At that time the Community was not yet engaged in the regulation of public procurement in external relations. But in 1980, when the

Community adopted the Council Decision 80/271 concerning the Multilateral Agreement and after publishing the Council Resolution of 22 July 1980, the Community has made clear that it is definitely determined to integrate the regulation of public procurement in the shaping of a Common Commercial Policy (72).

16. Because of the EEC's competence in the Common Commercial Policy, the ESA procurement rules for optional programmes must correspondingly be aligned with the EEC Internal Market requirements. Alignment means that the Member States have to use their influence on the ESA in order to begin a process of renegotiation, with the overall objective of adapting the ESA procurement rules to the EEC procurement rules. According to Art. 5 para. 2 of the EEC-Treaty, they are under a "stand-still" obligation to avoid a tightening of the "fair-return" principle. They have violated this obligation in 1987 during the Hague Conference of ESA when they increased the return coefficient. The EFTA Countries are bound by the EEC/EFTA agreements to accept the extension of the Community's competence in external relations. They profit from the concept of an inner European market which guarantees access to all undertakings irrespective of whether they are located in an EEC Member State or an EFTA Country. They have to bear the burdens which result from the growth of the Community's powers in public procurement (74).

17. The Community has no exclusive power to enter into negotiations with ESA (76-77). Member States and the Community are required to follow a joint approach (78-80). The Member States' power is based on their competence in R & D and their legitimate interests in financing ESA directly and not through the Community (80). The joint competence of the Community and the Member States exists only for a transitional period. The power to regulate public procurement will shift to the Community, yet not before 1993 due to the evolutive character of Community law (80).

18. The derogation from primary Community law provided for in directive 88/295/EEC for international organisations, like ESA, might be justified under Art 115, because the Member States and the EFTA countries are entitled to protect their newly built-up space industries, to promote R & D, and to guarantee security of investments and highly specialized jobs (83-91). The Member States position in the process of renegotiating the ESA Convention would then be strengthened. This conclusion, however, cannot be directly deduced

from the wording of Art. 115. As there is no case-law which discusses the precise meaning of "economic difficulties" in Art. 115 and which simultaneously determines the role of R & D and regional policies, we have based our conclusion on the general framework into which must be integrated the Common Commercial Policy and its exemptions. It lies within the logic of our argument that the notion of "economic difficulties" should be given a broader scope of application by including indirect effects on trade resulting from the working of ESA procurement rules, thus going beyond the classical field of "deflections of trade" which Art. 115 explicitly mentions.

19. The "block exemption" of Directive 88/295/EEC is valid, however, for a limited time only. This is due to the reasons which justify the "block exemption". "Block exemptions" can be considered for long as the measures protecting the home industry are necessary for setting up a competitive European space industry. The time to reconsider this will come once the directive on public procurement is renegotiated. The process has already started, as the publication of a proposed directive (Com.(88) 377, 378 final) indicates (36a). Although the draft does not provide for an amendment of the "block exemption", it might well be that the opening-up of telecommunication, energy and transportation markets for competetive bidding will influence the procurement rules in external relations already before 1992 (92).

20. The "block exemption" of Directive 88/295/EEC does not, however, embrace services alone. Here the Member States have to choose whether they provide for open competitive bidding by ESA or whether they request the Commission to grant them an authorization which can be given in the form a "block exemption". Member States would then have to call upon the ESA Council and its IPC which monitors the "fair return" principle. If the Member States have equipped the Commission with the necessary arguments and if they have requested an authorization for exempting service contracts in Phase A and B from Directive 88/295, the ESA procurement rules might be regarded as respecting Community law for a transitional period of time. Since they have not done so they have an obligation under primary Community law to insist on open competitive bidding for service contracts by ESA in the industrial committee, thereby initiating the process of renegotiating the ESA procurement rules with a view to the completion of the Internal Market by 1992 (93-96).

**Table of Abbreviations**

| | |
|---|---|
| Am.J.Int.L | American Journal of International Law |
| Art. | Article |
| Arts | Articles |
| Bd. | Band |
| CDE | Cahiers du droit europeén |
| cf. | confer |
| CMLR | Common Market Law Review |
| CMLRep | Common Market Law Reporter |
| Com. | Commission |
| DARA | Deutsche Agentur für Raumfahrtangelegenheiten |
| DFVLR | Deutsche Forschungs- und Versuchsanstalt für Luft- und Raumfahrt |
| DVBl. | Deutsches Verwaltungsblatt |
| DÖV | Die öffentliche Verwaltung |
| e.g. | exempli gratia (for example) |
| ECR | European Court Reports |
| ECSC | European Coal and Steel Community |
| ECU | European Currency Unit |
| Ed. | Edition |
| ed. | Editor |
| eds | Editors |
| EEC | European Economic Community |
| EEIG | European Economic Interest Group |
| EER | European Economic Review |
| EFTA | European Free Trade Association |
| EG | Europäische Gemeinschaften |
| ELDO | European Launchers Development Organisation |
| ELR | European Law Review |
| ESA | European Space Agency |
| ESRO | European Space Research Organisation |
| et seq. | et sequens (and the following) |
| et al. | et alii (and other persons) |
| etc. | et cetera |

| | |
|---|---|
| EuGH | Gerichtshof der Europäischen Gemeinschaften |
| EuR | Europarecht |
| EWG | Europäische Wirtschaftsgemeinschaft |
| EWGV | Vertrag der Europäischen Wirtschaftsgemeinschaft |
| F.I.D.E. | Féderation internationale de droit europeén |
| Fn | Footnote |
| FS | Festschrift |
| GATT | General Agreement on Tariffs and Trade |
| GYIL | German Yearbook for International Law |
| i.e. | id est (that is) |
| I.C.L.Q. | International and Comparative Law Quarterly |
| infra | see below |
| IPC | Industrial Policy Committee |
| JbIntR | Jahrbuch für internationales Recht (German Yearbook of International Law) |
| JCP | Journal of consumer policy |
| loc. cit. | loco citato |
| NJW | Neue Juristische Wochenschrift |
| No. | Number (references to the paper) |
| Nos | Numbers (references to the paper) |
| OJ C | Official Journal of the European Communities Part C. |
| OJ L | Official Journal of the European Communities Part L. |
| p. | Page |
| para | Paragraph |
| pp. | Pages |
| RFDA | Revue française du droit administratif |
| RTDE | Revue trimestrielle du droit europeén |
| PTT | Poste, téléphone, télégraphe |
| R & D | Research & development |
| Rdnr. | Randnummer |
| RIW | Recht der Internationalen Wirtschaft |
| RMC | Revue du marché commun |

S.E.W. ..... Sociaal-econoomische wetgeving
supra ..... see above
UK ..... United Kingdom
UN ..... United Nations
WuR ..... Wirtschaft und Recht
ZaÖRV ..... Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZHR ..... Zeitschrift für das gesamte Handels- und Wirtschaftsrecht.
ZLR ..... Zeitschrift für Luftrecht und Weltraumrechtsfragen

## Chapter I

## ESA PROCUREMENT RULES, NATIONAL PROCUREMENT RULES, AND EEC INTERNAL MARKET LAW

### 1. The Legal Basis of ESA Procurement Policy under the "Fair Return" Principle

*a) ESA and European space activities*

The European Space Agency (ESA), which was established as an organisation under public international law by the ESA Convention of 30 May 1975[1], is responsible for the coordination and execution of peaceful European space activites. It continues the former R & D activities of ESRO (European Space Research Organisation) and ELDO (European Launcher Development Organisation), two separate agencies founded in 1964. ESA has been successful in developing the launcher *Ariane 1-4*, the latter being designed to carry heavier payloads. Its manufacture and commercial marketing is, however, left to *Arianespace*, a commercial company under French law whose shareholders are the French space agency, CNES (Centre national d'études spatiales), and 36 European aerospace and electronics firms as well as European banks. Arianespace has lately been very successful in marketing launching systems for commercial uses.- ESA also participated in the NASA space transportation system by developing *Spacelab* which was first put into orbit on board the US-American shuttle *Columbus* in 1983. In 1986, this programme came to a temporary end due to the *Challenger* catastrophe. - Finally, ESA's space activities became well known when *Giotto*, a research satellite launched by Ariane in July 1985, passed within 500 km of the nucleus of Halley's comet in March 1986. 1

The 1985 Rome meeting of the ESA Council approved ambitious programmes for a larger launcher, *Ariane* 5, and the European contribution for an international space station, *Columbus*. In 1986, the French government proposed the development of *Hermes*, a mini-shuttle spaceplane to be launched by Ariane 5. The Hague Council of November 1987 approved these projects as *optional* programmes (No. 4) and specified

1 Cf. the documentation by Courteix/Manin, La coopération spatiale européenne, La documentation française No. 583, 1988. The Convention formally came into force through ratification by the Member States on 30 October 1980. The members are, from EEC-Countries, Belgium, Denmark, France, Germany, Italy, the Netherlands, Spain, the United Kingdom, and Ireland (which did not number among the predecessors of ESA), from EFTA-countries Sweden, Switzerland and, as full members since 1987, Austria and Norway; Finland is associated since 1st January 1987. Canada has an agreement for close cooperation since January 1979. For further details, c.f. v. Preuschen, I.C.L.Q. 1978, 46; Bueckling, ZLR 1975, 106; Kaltenecker, ZLR 1974, 244.

the considerable Member State contributions for the financing of Ariane 5 (total estimated costs about 3356 M$, French contribution 44,7 %, Fed. Rep. of Germany 22 %, Italy 15 %, etc.; the UK is the only country not to participate), Columbus (3564 M$, France 13,8 %, Germany 38 %, Italy 25 %; UK 5,5 %; Spain 6 %; Belgium 5 %, Netherlands 1,3 %, Danmark 1 %, Norway 0,4 %; 5 states will not participate) and Hermes (4252 M$, France 43,5 %, Germany 27 %, Italy 12,1% etc; the UK and Ireland will not participate) in the next decade, to be approved in installments.

*b) Importance of ESA industrial policy*

2

In defining the purposes of ESA, the Convention puts great emphasis upon *industrial policy* in Article II (d). Article VII of the Convention further outlines the preferred method of implementing this industrial policy, which it says, shall be designed...

"in particular to

a) meet the requirements of the European Space Programme and the coordinated national space programmes in a cost effective manner;

b) improve the world-wide competitiveness of European industry by maintaining and developing space technology and by encouraging the rationalization and development of an industrial structure appropriate to market requirements, making use in the first place of the existing industrial potential of all Member States;

c) ensure that all Member States participate in an equitable manner, having regard to their financial contribution, in implementing the European Space Programme and in the associated development of space technology; in particular the Agency shall, for the execution of its programmes, grant preference to the fullest extent possible to industry in all Member States, which shall be given the maximum opportunity to participate in the world of technological interest undertaken for the Agency;

d) exploit the advantages of free competitive bidding in all cases, except where this would be incompatible with other defined objectives of industrial policy".

Annex V sets out procedures designed to realize the industrial policy — which is one of the basic purposes of the Convention. Article II of Annex V imposes a legal obligation on the Agency as regards the exercise of its' power to place contracts, namely the duty to give preference to the industry and organisations of the Member States.

> "However, within each optional programme... particular preference shall be given to industry and organisations in the participating states".

The Council of ESA is empowered to derogate from this preference clause. The Director General may only make proposals to that extent in accordance with Article III.

In order to determine geographical distribution, Article II (3) sets out the following criteria:

> "Location of the enterprise's registered office, decision-making centers and research centers, and territory on which the work is to be carried out. In doubtful cases the Council shall decide whether an enterprise shall be considered to belong to one of the Member States or not".

In the matter of the return rates to which each Member State generally, and the undertakings established on its territory (in particular) are entitled, Art. IV of Annex V sets out some specifically detailed criteria:

1. A Member States' overall return coefficient shall be the ratio between its percentage share of the total value of all contracts awarded among all Member States and its total percentage contributions...
2. For the purpose of calculating return coefficients, weighting factors shall be applied to the value of contracts on the basis of their technologial interest. These weighting factors shall be defined by the Council. Within a single contract having a significant value, more than one weighting factor shall be applied.
3. Ideally the distribution of contracts placed by the Agency should result in all countries having an overall return coefficient of 1

...

6. The distribution of contracts between formal reviews of the situation should be such that, at the time of each formal review, the cumulative overall return coefficient of each Member State does not substantially deviate from the ideal value...

The return coefficient shall never be lower than 0.8. The ideal distribution should be 1. The formal review procedure of industrial policy is to enable ESA to avoid distortions from the proposed return coefficient.

Article VI of Annex V finally gives Member States a veto right concerning the exclusion of a particular firm or organisation from competing for the Agency's contracts.

3 The Convention of 1975 is quite explicit in the establishment of an industrial policy. The Council of Ministers regularly reviews the industrial policy according to Art. I of Annex V. It may adopt rules for the attainment of the industrial policy objectives by a two-thirds majority according to Art. VII (1) last paragraph, of the Convention. In fulfilling its task, it is assisted by an Industrial Policy Committee (IPC) composed of Member States' representatives. It monitors the industrial policy of ESA, (e.g. by being consulted in the decision-making process on the award of larger contracts) and it makes recommendations for its implementation. Under international law it is a legal obligation of both the participating Member States and of ESA as a subject of international law itself, to ensure that the return coefficient of 1.0 for each Member State is established or will at least be within reach, unless the criteria for derogation are met. If the threshhold of 0.8 is not reached, the Council and the Director General have a specific obligation to review the procurement policy of ESA. Although the Convention does not expressly recognize the right of enterprises based in the Member States to be awarded contracts under the industrial policy rules, Member States are free, in order to fulfill the desired return coefficient, to take the necessary steps which will allow the particular enterprise to be awarded the contract sought.

4 The important position which the industrial policy rules have in the ESA Convention may be explained on the following grounds:

(1) When a formal European space policy was created, both US-American and Soviet space programmes were quite advanced. The Member States therefore had to attain the creation of an industrial structure which would meet the challenges of US-American and Soviet space programmes. The industrial policy therefore presupposed the foundation of a competitive

European space industry which needed some sort of safeguard for the investments to be taken in space research, technology, and development.

(2) In order to have the Member States participate in programmes of ESA, they had to be assured that participation would contribute something to their "home industry". The rules on industrial policy may therefore be regarded as a sort of quasi-contractual arrangement which guarantees that every mark, pound, franc or kronor spent would, after the necessary deductions for the general research and administrative overhead of ESA, flow back to home industry. In order to get Parliaments' support for the ESA Convention, it was probably necessary to show that, via ESA, money contributed would at the same time be money spent for and by home industry. The ESA Convention must therefore be regarded as a *quasi-exchange contract* which is quite common in international law but, as we shall show later, foreign to Community law.

(3) The importance of the "fair return" principle can be seen in the growing significance of so-called optional programmes as opposed to mandatory programmes. Mandatory programmes contribute to basic research in space activities. Optional programmes, on the other hand, according to Article V 1. (b) of the Convention include

> "the design, development, construction, launching, placing in orbit, and control of satellites and other space systems; the design, the development, the construction, and operation of launch facilities and space transport systems".

The research objective of these programmes is to some extent therefore supplemented and overlapped by the imperatives of practical application of modern space technology and their usefulness, based on cost/benefit criteria.

The financing of these cost-intensive programmes is different from that of mandatory programmes insofar as States unwilling to participate may opt out and will not be required to give the programme financial support. They will also be excluded from the decision-making process and from the privilege of having their enterprises participate in the placement of contracts.

*c) Practical experience with the placing of contracts under the industrial policy objectives of ESA*

5 The industrial policy rules of ESA mostly apply to optional programmes. Therefore, firms participating in tender offers must fill out geographical distribution forms. These forms are designed to enable the Agency determine the proportion of work which may be allotted to each of the Member States. These figures are collected and are used to compute the return coefficient and to initiate review procedures, as foreseen by Annex V of the Convention. More sophisticated forms have been proposed recently by the IPC of ESA (cf. sub d).

As far as the placing of different types of contracts is concerned, one must distinguish between separate phases, namely phases A, B, C and D in the realization of optional programmes. Tender offers of phase A, the "study-phase", contain so-called "prefeasibility studies" in order to enable the Agency establish whether and under what conditions a certain project or part of a project may be initiated. A contract arising from that phase must be regarded as a *service contract*, if we apply the terminology of EEC law (No. 24). Phase B, the definition phase, concerns feasibility studies specifying and defining the project to be developed. This phase again leads to the possible placing of service contracts, these however being far more specific and concrete with respect to the object to be developed (a launching system, a satellite, or parts thereof).

Phase C and D of the tender offer concerns the actual project planned. Under ESA rules, a specific object will be developed and eventually produced or elaborated. This must be regarded as a contract concerning goods, not just services as under the EEC rules. Depending on the project to be implemented, also separate service contracts may be placed, e.g. concerning software development. This phase is the most important in financial terms. For the enterprises involved, it is certainly the most attractive in terms of guaranteeing jobs for their employees and ensuring a profit for their shareholders. It is obvious that successful leadership or participation in phases C and D depends on positive results in phases A and B, concerning the elaboration of the project's prefeasibility or feasibility studies. In shaping cooperation agreements and in founding *consortia*, a participating enterprise or group of enterprises has a certain influence on the geographical distribution of the work to be contracted, which may be decisive (under the industrial policy rules of the ESA Convention) on whether and how the contract is awarded if competing offers exist. This effect will be increased when the contract is awarded to a leading enterprise (*Systemführer*) which cooperates with many subcontractors from different ESA-Member countries. It should be mentioned that, due to the complexity of space technology, ESA has been lately more willing to award larger contracts for optional programmes through negotiation rather than competitive tender offers; this negotiation procedure amounts to about 1/2 of the current placement of contracts. 6

A statistical evaluation demonstrates that ESA is increasingly concerned that the data it produces is in accordance with the "fair return" co-efficient — although some deviations can be shown. Member states carefully observe ESA performance as to industrial policy, especially through their representatives in the IPC. This is shown by the chart below[2]:

2 Chatham House Special Paper, Europe's Future in Space - A Joint Policy Report, 1988, p. 197

ESA:Industrial returns, from 1 January 1972 to 31 December 1984 (in thousands of EAU)

| Country | Unweighted amount | Weighted amount | Ideal amount | Surplus/ deficit | return coefficient |
|---|---|---|---|---|---|
| Austria | 14866 | 11597 | 12481 | - 884 | 0.93 |
| Belgium | 174609 | 1633451 | 175390 | - 11939 | 0.93 |
| Denmark | 76696 | 62237 | 60551 | + 1786 | 1.03 |
| France | 1665255 | 1384526 | 1353034 | + 31492 | 1.02 |
| W.Germ. | 1204736 | 1118191 | 1085754 | + 34437 | 1.03 |
| Ireland | 4772 | 3933 | 2716 | + 1217 | 1.45 |
| Italy | 532404 | 497197 | 519210 | - 22013 | 0.96 |
| Netherland | 201864 | 142776 | 145633 | - 2857 | 0.98 |
| Norway | 7130 | 7053 | 7741 | - 688 | 0.91 |
| Spain | 120608 | 101257 | 120572 | - 19315 | 0.84 |
| Sweden | 92219 | 82672 | 89215 | - 6543 | 0.93 |
| Switzerland | 87123 | 78684 | 84303 | - 5619 | 0.93 |
| UK | 658996 | 592787 | 574134 | + 18653 | 1.03 |
| Canada | 55435 | 55435 | 61712 | - 6277 | 0.90 |
| **Total** | **4896713** | **4301896** | | | |

Phase D concerns the utilization of a certain space project (launching systems, satellites and so on). They may be used for scientific or commercial purposes, or for both. This distinction is important for the application of the state aid rules of EEC-law (No. 42). The "marketing" of space systems developed by ESA under its procurement and industrial policy rules is not, however, done by ESA itself, but by commercial undertakings like Arianespace (No. 1) which concludes contracts on the launching of satellites with governmental or commercial users. The procurement of these contracts is not governed by the ESA Convention, with the exception of Article IX para 3 of the Convention, which provides that:

(a) Products developed under a programme of the Agency shall be supplied to any Member State that has taken part in the funding of the programme in question and ask for such products to be supplied for its own purposes.

The Council shall determine by a two thirds majority of all Member States the practical arrangements under which such products will be supplied and in particular the measures to be taken by the Agency in regard to its contractors to enable the requesting Member State to obtain those products.

(b) This Member State may ask the Agency to state whether it considers that the prices proposed by the contractors are fair and reasonable and whether, under similar circumstances, it will consider them acceptable for the purposes of its own requirements.

We cannot assess the importance of this clause concerning the preferential treatment of participating Member States in the utilization of products developed by ESA.

*d) Recent modifications of ESA industrial policy*

The growing importance of the optional programmes of ESA, their increased financial volume and the duration of contract completion has led to a modification in the industrial policy of ESA. The Council of Ministers, which met in The Hague in November 1987 and put under way the optional programmes Ariane 5, Hermes, and Columbus (No. 1), demanded a new calculation of return rates in order to achieve the following objectives: 8

- Each participating state should be guaranteed an 0.90 return coefficient, with a target value of 0.95.
- ESA should calculate more accurately than before the medium-term overall coefficients based on contract payments and outstanding commitments.
- Return estimates should be developed for the completion of programmes, even if no contracts have yet been placed due to the long duration of these programmes.

IPC developed proposals for attaining these goals. Though we cannot, within the framework of this paper treat with the discussion in detail, the following points[3] deserve consideration:

- As before, the return coefficient is calculated by comparing the value of contracts placed in a given country with the ideal value based on the contributions of a participating country, corrected by the weighting factors.

3 Based on IPC document (88) 94 of 29 July 1988.

- ESA will use its financial accounting system facilities (EFSY) to calculate as accurately as possible medium-term overall coefficients which include payments made and outstanding commitments, adjusted by price and currency changes.
- Estimates will be elaborated for the completion phase of a programme even when contracts have not yet been placed; this is particularly important if increased financial contributions become necessary because of the long duration of programmes (threshhold of 120 % of the agreed contribution of a participating state).
- Special consideration will be given to the purchase of components by industry: the purchase price will be reckoned as geographical return for the country in which the firm is established, while the value added is credited to the firm responsible for the centralised purchase.

A ESA Council Resolution on the Regulation concerning calculation of the return coefficients used for the geographical distribution of contracts[4], seeks to codify the new practice of calculating return coefficients. It does not, however, include a guarantee of a 0.90 coefficient to a contributing state nor the target value of 0.95.

In addition to the above mentioned reasons for these changes, we submit that they are due to the increased financial burdens and the different contributions of paticipating Member States (cf. No. 1) to optional programmes. In order to make them subscribe to the programmes, ESA must be sure that the overall return coefficients will not only be maintained, but will also be increased and guaranteed in the future. It is therefore not surprising that the imperatives of the EEC Internal Market seem to have been completely "forgotten" in the deliberations of the ESA Council of Ministers and its IPC, at least insofar as the policy of Member States of the EEC is concerned.

4 Of 15 November 1988.

*e) Procurement of national agencies*

Space products and objects are also developed by national agencies, most notably in France by CNES (Centre National d'Etudes Spatiales) and by the British Aerospace Agency. In Germany, the Ministry for Research and Development, through DFVLR (Deutsche Forschungs- und Versuchsanstalt für Luft- und Raumfahrt), a company established under private law, may award contracts and/or subsidies concerning space activities. The creation of a German space agency is under consideration and has recently been founded under the name DARA (Deutsche Agentur für Raumfahrtangelegenheiten). It is also possible for states to cooperate bilaterally in the support of space activities. ESA has no exclusive jurisdiction extending to all Member State space activities. These activities may concern both civil and military uses; the latter do not come under Article II of the ESA Convention: **9**

> "whereas the purpose of the Agency shall be to provide for and to promote, for exclusively peaceful purposes, cooperation among European states and space research and technology and their space applications, with a view to their being used for scientific purposes and for operational space application systems. . ."

We have little information about the practical handling of procurement by national space agencies. We submit, however, that they will prefer national contractors in the placement of their contracts and only under exceptional circumstances request foreign companies for tender offers, for example if the technology needed is not available to them through national suppliers. This may still be justified by the existing exemptions from Community wide procurement in the area of transport, energy, and telecommunication services, even though they will be certainly abandoned before 1993 (cf. Nos. 36, 36a).

*f) Economic effects of the "industrial policy" of the ESA Convention*

(1) It is not the purpose of our study to evaluate, from an economic standpoint, the effects, merits and possible distortions to competition resulting from the industrial policy of ESA. We refer for details to a thorough, yet critical, study by the well-known Royal Institue of International Affairs, London, and other research institutes[5]. This paper argues that an inherent contradiction exists within the ESA Convention itself, since it seeks to guarantee at the same time **10**

5 Chatham House special paper, loc. cit. at Fn 2.

— to use the advantages of competitive tender offers,

— an equitable share of the contracts to each Member State,

— and to increase return rates of smaller countries which have not yet developed their own space industry.

It is quite critical of the "fair return" policy insofar as it contradicts the principles of competition and leads to difficult and time-consuming negotiations on the "fair return" rates. In the long run, it prevents the establishment of a truly competitive European space industry which, until now, may not be subjected to demands for rationalization, cannot use the economies of scale, and will give preference to big companies from large countries[6]. It comes to the conclusion:

> "The general goal of a strong autonomous European presence and identity in space will not be attained without greater public support. Furthermore, a greater degree of democratic control and public awareness of the choices involved in European space policy is not merely desirable; it will become a necessity as that policy reaches a higher degree of importance and maturity"[7].

Another paper by CNES[8] is critical about "les effets pervers" of the "fair return" policy because it leads to a fractioning of markets and, consequently, a segregation of markets within the Member States of the ESA Convention.

Concerning the problem of competitive bidding a theory-based economic critique has been voiced by Finsinger[9]. If bidding is truly competitive, there is a good chance that, in the long run, the most efficent supplier will win. If the process is distorted either by *quasi*-cartel effects on the bidder's side or by government-imposed return rates on the demand side, negotiation procedures will take place instead of true competition. All participating enterprises will try to get "part of the cake", and the procurement agency will be under pressure to award "fair shares" to every participant. A "fair return" principle imposes a quasi-cartel effect on the bidders who have to organise themselves in order to meet the conditions of the tender offers. In the short run, this negotiation procedure may be quite profitable for the participating undertakings and their employees, in

6 Loc. cit. p. 159, 170, 181.

7 Loc. cit. p. 185/6.

8 Impacte de l'acte unique européen sur les activités spatiales, Juin 1988.

9 EER 1988, 69.

guaranteeing security for jobs and profitability of investments. In the long run, it may perpetuate inefficiencies and exclude these undertakings from world-wide competition for contracts in space activities.

(2) On the other hand, it should be emphasized that the participating ESA Member States could probably persuade their Parliaments to participate in European space research and development only by imposing the fair return principle. This is the more true after the adoption of the ambitious projects Ariane 5, Hermes, and Columbus by the 1987 ESA Council with widely differing contributions of Member States to these optional programmes. As an incentive to promote European space activities, therefore, the "fair return" principle was a prerequisite for an independent European space policy and for the creation of a European "high-tech industry". It cannot be stated unequivocally whether this argument still holds true for the next future (1992!), when a competitive European space industry will exist which does not need to be shielded from competition by the "fair return" principle[10]. This statement is quite in contrast to the demands of the ESA-Council and the IPC for the allowance of a more precise monitoring of medium range return rates for participating governments and to guarantee under all circumstances a 0.90, if possible a 0.95 return ratio. The conflict arising between the "fair return" principle of the ESA Convention on the one hand, and the insistence of the EEC Treaty and the free trade agreements of the EEC with EFTA countries on competition on the other, may well be a useful stimulus for creating a more open and competitive European space industry. The following sections will therefore confront the ESA Convention with the imperatives of the Internal Market which the Community wants to complete by the end of 1992. 11

10 Cf. in this direction the Chatham House Paper, loc. cit. p. 146-150.

## 2. The EEC Internal Market Policy as an Alternative to the ESA Principle of "Fair Return"?

12 The importance of Community law to industrial policies of Member States and international organisations like ESA has received increased political and legal attention after the ratification of the Single European Act. It came into force on 1 July 1987. The Single Act, in Article 8 A para 2 of the amended Treaty, imposes a definite policy objective on the Community, namely the creation of an

> "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty".

The Member States' government representatives

> "have declared their firm political will to take before 1 January 1993 the decisions necessary to complete the Internal Market defined in those provisions, and more particularly the decisions necessary to implement the Commissison's programme described in the White Paper on the Internal Market. Setting the date of 31 December 1992 does not create an automatic legal effect".

From its wording, the intention behind it, and its context in the Treaty, Article 8 A enumerates a political objective and not a specific legal obligation[11]. This can be seen quite clearly from the other provisions amending the EEC Treaty. The most important changes in the Treaty imposed by the Single Act have been the following:

- The establishment of a cooperation procedure with the European Parliament which allows for the adoption of directives and other measures necessary to establish and complete the Internal Market by qualified majority under Articles 100 A, 57, as amended.
- The inclusion of new policies like economic and social cohesion, research and technological development, and environment, which were gradually developed before, but have been reaffirmed by the Single Act and found their institutional and legal recognition.

11 This point has been developed in greater detail in Reich, Schutzpolitik in der Europäischen Gemeinschaft im Spannungsfeld von Rechtsschutznormen und institutioneller Integration, 1988.

Taken in context the provisions on the Internal Market do not have a *direct effect* in the sense used in the case law of the Court of Justice[12]. If the Community does not take the necessary measures, most notably directives, or if the Member States do not implement them in due time, the Internal Market will not arrive automatically. This is shown through Article 100 B of the Treaty and by the negotiations in the Commission and the Council before its insertion into the amended Treaty. Article 100 B creates a special procedure for establishing whether the provisions in force in a Member State may be regarded as being equivalent to those applied by another Member State or not. It is up to the Council through a political decision under the procedures of Article 100 A to decide whether or not these provisions are equivalent. If the Council has taken this decision, then the safeguard clause of Article 100 A (4) shall apply by analogy. This means that a Member State will be able to oppose Community measures concerning the free circulation of goods to its existing national provisions on

> "grounds of major needs referred to in Article 36 (most notably to the protection of health and safety, NR), or relating to the protection of the environment or the working environment. . ."

The completion of the Internal Market therefore is a gradual process which will not necessarily be completed by 31 December 1992.

Even if therefore the completion of the Internal Market is not "self-executive", the relevant provisions of primary and secondary Community law on the free movement of goods, persons, services and capital must be interpreted in this spirit. This is especially true insofar as the basic provisions of the Treaty on the free circulation of goods and services are concerned. Articles 30 and 59, as we will show later, will become ever more important in the Community objective to establish the Internal Market. The basic Community freedoms, as interpreted and extended by a growing and continuing Court of Justice case law, will have to be accomplished in order to attain the objectives of the Internal Market. There is no opposition, but a *common spirit* in the basic Community freedoms on the one hand and the political will and determination to create the Internal Market by 31 December 1992 on the other. The Single Act therefore has not changed, but

12 Cf. the judgment of 3 December 1974, 1974 ECR 1299 — van Binsbergen, concerning the direct effect of the provisions on the freedom to provide services; the same had been ruled for the free circulation of goods, but rejected for the free circulation of capital, 1981 ECR 2595 — Casati. We will not go into the details of the discussion.

propelled the economic freedoms of the Treaty. As Ehlermann[13], former head of the legal service of the Commission and one of the authors of the Single Act, has correctly stated,

> "far from watering down the EEC Treaty, the Single European Act enriched it by adding finer details".

13 In this context, Articles 30 and 59 must be interpreted together with the provisions on the Internal Market in a dual sense:

(1) The basic freedoms of the EEC Treaty, reinforced by the provisions on the Internal Market, have as one particular objective the guarantee to undertakings established in the EEC of access to the *entire common market* of goods, services and capital without discrimination and unreasonable restrictions. This *basic right of entry* into the common market which is *granted to every EEC-based enterprise*, as the Court of Justice has repeatedly stated, serves to create conditions of marketing similar, from 1993 on identical, to those of an internal market[14]. The economic objective of this right of "entry" has been clearly enunciated by Peter Sutherland[15], the former EEC Commissioner on competition, as follows:

> ". . . avec l'approche de l'échéance décisive de 1993, les efforts tenaces des autorités européennes n'ont cessé de converger vers un seul but: mettre en place un véritable marché intérieur et, simultanément restaurer et renforcer la competitivité des entreprises européennes sur le marché mondial. L'un ne va pas sans l'autre: la libre concurrence, dans les limites autorisées par la loi, reste la meilleure façon d'atteindre ce double objectif".

(2) The basic freedoms guaranteed by the EEC Treaty and the objective of the Internal Market not only protect the basic right of entry of persons and undertakings, but also the *freedom of choice of all consumers and customers within the entire common market*[16]. This relates both to private consumers, to professional customers, and to public entities requesting the supply of goods or services. All customers have a fundamental right to choose among the most advantageous and competitive

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13 CMLR 1987, 361 at 369; in the same sense cf. De Ruyt, L'Acte Unique européen, 1987, p. 160, against the former judge of the Court of Justice, Pescatore, EuR 1986, 153 at 161.

14 For an overview of the relevant case-law principles, cf. Steindorff, ZHR 1986 (150), 687 at 697.

15 Le 1 janvier 1993 — Ce qui va se changer en Europe, 1988, p 53. Even though we do not adhere to the exclusively market-oriented positions of Sutherland, they are characteristic of Community thinking.

16 We have developed this point of view in Reich, Schutz und Förderung diffuser Interessen durch die EG, 1987, Nos. 8, 11. This freedom of choice is, of course, not absolute, but any restriction must be justified under Community law principles.

offers of goods and services within the entire Internal Market without regard to the nationality of suppliers or the geographical distribution of offers.

It should be remembered that the objectives of the Internal Market have also been written into the so-called new policies which have been either recognized or established by the Single Act. This is especially true with regard to the provisions on research and technological development. Article 130 F (3) says:

> "In the achievement of these aims, particular account shall be taken of the connection between the common research and technological development effort, the establishment of the Internal Market and the implementation of common policies, particularly as regards competition and trade"

The objectives of the EEC concerning the Internal Market as laid down in the Single Act have been criticized for different reasons. This paper cannot go into a detailed discussion of this criticism, especially insofar as social policy is concerned. The following points however should be mentioned in passing: 14

(1) From the very objectives of the Internal Market it can easily be seen that the Single Act is opposed to an industrial policy of the type formulated in the ESA Convention. The requirements of the Single Act on competition, entry and free choice are difficult to reconcile with the opposite principle of safeguarding industrial policy, as expounded by the ESA Convention. We will discuss the legal issues of this conflict more thoroughly in the later parts of this paper. One may wonder whether insistence on the Internal Market may lead Member States of the ESA Convention to withdraw from the funding of space activities if they cannot get a fair return for their home industry. We do not know whether this danger exists. Such a withdrawal might be quite contrary to the objectives of the Single Act itself, namely its provisions on economic and social cohesion and on research and technological development. On the other hand, it should be pointed out that strengthening the European competitiveness and the safeguarding of an industrial policy (with emphasis on employment) should be accomplished through means which conform with basic EEC principles. We will therefore develop procedures which aim at bringing ESA industrial policy into conformity with basic requirements of EEC law and free trade agreements between EEC and EFTA countries. This may result in time-consuming adaptation processes whose goal is to give an

increased role to the EEC in European space policy[17] without abolishing government commitments taken, and without interfering with the employment and industrial infrastructure already created. Therefore, not only the Internal Market considerations, but also the international law provisions of the EEC, in relationship with ESA procurement policy will be analysed in greater detail (Chapter II).

(2) Industrial policy concerns not only industry as such but also employment policy in general and regional distribution of employment in particular. EEC law in these respects is only developing. It is still the basic obligation of Member States to ensure employment and equitable regional distribution of incomes according to their constitutions and social policies. Even under the imperatives of the Single Market, the Community does not have an overall mandate to determine the employment and regional policies of Member States. This can be clearly demonstrated by the rather hesitant transfer of powers to the Community in this area, which the Single Act has affectuated through Articles 118 A, 130 A et seq. Community law therefore recognizes the primary responsibility of Member States for employment and regional development. This is indirectly corroborated by the provisions on state aids, most notably Article 92, (3) (c) (No. 45), and on safeguard measures relating to the Common Commercial Policy, namely Article 115 (Nos. 83 ss). In any case, the Member States should take all steps necessary to ensure that their social policies conform with the requirements of the Treaty as amended by the Single Act. Different social policies are no pretext for avoiding application of the rules on free circulation of goods and services, and on the completion of the Internal Market. Social policies on the one hand, and the Internal Market objective on the other, have to be awarded an equal status in the shaping of Community policy and in interpreting Community law. This is demonstrated by Article 8 C of the amended Treaty:

> "When drawing up its proposals with a view to achieving its objectives set out in Article 8 A, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain during the period of establishment of the Internal Market and it may propose appropriate provisions. If these provisions take the form of derogation, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the Common Market".

17 Cf. the Document Com. 88 (417) final of 26 July 1988.

(3) Community law does not exempt certain policies, e.g. in the R & D sector, from an application of the basic freedoms and the competition rules, even if the Member States still maintain their sovereignty especially on the financing of research programmes. The Court of Justice has never recognized that certain areas are beyond the reach of Community jurisdiction, e.g. education, culture, research, but insisted that Member States pursue their policies in conformity with EEC law.

Therefore, the purpose of this paper will be to present the legal instruments designed to coordinate the different objectives of the projected Internal Market and the industrial policy of Member States.

## 3. EEC Law Requirements on Public (ESA and National) Procurement (1): Article 30 as Guarantee of Free Entry to Undertakings and Free Choice to Consumers/Customers

*a) The importance of Article 30 for establishing the Internal Market*

15 Article 30 as a basic rule of the EEC Treaty[18] forbids "all measures having an effect equivalent to quantitative restrictions on imports". Article 30 does not specifically mention procurement rules as being measures of equivalent effect. We must therefore look at the interpretation of the notion "measures having equivalent effect" by the Court of Justice. If we analyse the case law correctly, the interpretation has increasingly been extended to measures which do not directly effect intra-community trade with goods, but which create conditions which *indirectly* disfavour goods coming from, or undertakings established, in another Member Country or which are, in general, unduly restrictive to trade within the Community.

The scope and content of *state measures* coming under Article 30 has been subject to a long and contentious legal debate. We need not repeat the arguments because there now exists established case law and legislation which makes clear the broad application of Article 30 to measures of Member States having an impact on intra-community trade. The process of a broad construction of Article 30 was begun with Directive 70/32/EEC of 17 December 1969[19] which concerned the establishment of the free movement of goods between Member States until the end of the transition period. It follows from Articles 3(1) and 3(2), as well as from the Preamble, that measures having an effect equivalent to quantitative restrictions include

- statutory and other practices or other provisions which stipulate that a given government or public authority requirement must be wholly or partially met by domestic products, thereby excluding or limiting the procurement of imported goods, or
- those measures which stipulate advantages or preferences for domestic products when public contracts are put out to tender or placed for supply, where imported as opposed to domestic products are put at a disadvantage, by means other than taxation.

18 Its importance for the internal market policy of the Community was spelled out in the White Paper on the completion of the internal market, Com. (85) 310 final, No. 82.

19 OJ L 13/1 of 19 January 1970.

This approach has been continued by Directive 70/50 of 22 December 1969[20].

The case law of the Court went even further because it applied Article 30 not only to discriminatory measures, but also to measures which are indistinctly applicable to home and foreign products or which have a mere potential effect on intra-Community trade: **16**

> "All trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions"[21].

This so-called Dassonville-formula which, after some discussion, has now been accepted by Member State courts of law, does not only cover product-related regulations but all rules restricting entry of undertakings to product markets. Further in our discussion, we will use this so-called Dassonville formula in order to discover whether and how state procurement rules come under Article 30 and, if that is the case, whether they may be justified.

The following legal discussion will have to answer three questions:

- How far will Art. 30 apply to Member State practices which do not overtly discriminate against foreign goods or undertakings, but establish rules on the geographical distribution in placement of government supply contracts?
- Under what circumstances must procurement rules, being used either by Member State agencies or by ESA in space activity, be regarded as "state measures"?
- What possible justifications exist for discriminatory procurement rules under primary and secondary Community law?

20 OJ L 13/29 of 19 January 1970.

21 1974 ECR 837 at 852 No. 5 — Dassonville.

*b) Applicability of Article 30 to rules on entry*

17 The case law of the Court of Justice in the eighties can be divided into two parts. One part concerns product-oriented regulations which were indistinctly applicable to home and foreign products. This discussion is centred around the so-called "Cassis-de-Dijon-doctrine"[22]. It does not concern procurement policies because these are not product-related. We will therefore not go into the details of this case law[23].

The other part of the case law concerns an ever-growing extension in the sphere of application of Article 30, to measures which have a mere indirect or potential effect on intra-community trade. Most of them have some sort of overt or hidden discriminatory character. They are not so much related to products themselves, as to entry of foreign untertakings into product *markets*. For the purpose of our study, this case law is more interesting since certain conclusions can be drawn as regards Member States' procurement policy and their importance for procurement policies of international organisations to which Member States adhere.

The case law of the eighties provides many examples where primary Community law was extended to state measures concerning the marketing of products and therefore the entry of undertakings. In the following are some examples of Court practice in striking down quasi-protectionist measures of Member States:

(1) Health-related advertising regulations on alcoholic beverages which are more stringent for foreign than for home products[24] or rules on fair competition that discriminate against imported products or undertakings from other EEC countries[25] do not directly exclude these undertakings from the market. Rather, they make market penetration more difficult, force foreign undertakings to create subsidiaries in the receiving country, or make them adapt their marketing strategies to the legislation of the importing countries. These rules, even if they have a mere potential or indirect effect on intra-Community trade, fall under the prohibition of Art. 30 and can only be justified by meeting some sort of public interest test which we will consider at a later point (Nos. 21-23).

22 1979 ECR 649.

23 Cf. Reich, loc. cit. Nos. 13, 24

24 1980 ECR 2299 at 2316 No. 18 — Advertising of alcoholic beverages.

25 1981 ECR 181 at 195 No. 16 — Dansk Supermarked; 1982 ECR 4575 at 4587 No. 15 — Osthoeck; 1984 ECR 3651 at 3663 No. 17 — Kohl.

(2) Similar principles apply where rules oblige the undertaking to purchase a certain proportion of its demand, e.g. of petroleum, from a national supplier organisation[26]. These rules limit the entry of undertakings who wish to import, as in the case at hand, to Ireland, at competitive prices. Such a regulation will fall under Article 30, even though it has only a potential effect on intra-Community trade (it may under exceptional circumstances however be justified on grounds of public policy in Article 36).

(3) The Duphar-case concerned the conformity of exclusionary lists of medicinal products reimbursed by the Dutch social security fund. The Court insisted that the list "must be drawn up in accordance with objective criteria, without reference to the origin of the products, and must be verifiable by any importer"[27]. The establishment of these lists may not be used to promote R & D of home based pharmaceutical enterprises.

(4) Another area of application of Article 30 has been government support programmes of home industries through the funding of a sales promotion campaign or by disfavouring foreign enterprises in the purchase of goods. This broad application of Article 30 to indirect, yet discriminatory measures of Member States is clearly demonstrated by the judgment of 24 November 1982 condemning the "Buy Irish Campaign"[28]: Even though the Irish government had not directly launched this campaign but set up an Irish Goods Council and a label "Guaranteed Irish" in order to induce customers to buy Irish products, its participation was condemned as a "measure of equivalent effect". The government indirectly participated in the campaign through funding, organisation, and monitoring. The campaign was part of its economic policy in order to secure employment and restore business efficiency in Ireland. In order to be successfull (which it was not!), entry for foreign undertakings into the Irish market was made more difficult, though not impossible:

> "... those two activities form part of a government programme which is designed to achieve the substitution of domestic products for imported products and is liable to affect the volume of trade between Member States"[29].

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26 1984 ECR 2727 at 2747 No. 20 — Campus Oil.

27 1984 ECR 523 at 542 No. 21.

28 1982 ECR 4005.

29 At 4022 No. 25; this must be distinguished from an information campaign based on objective criteria, even if indirectly promoting the marketing of local products, 1983 ECR 4083 at 4128 — Apple Council.

Ireland had consequently violated its obligations under primary Community law and could not invoke any justification like the public interest test of Article 36, or of a specific safeguard clause.

(5) The judgment of 9 May 1985 criticized French PTT's practice of disfavouring foreign goods and undertakings in the order of postal machines through means of certification delay. This practice was not written into law. The Court of Justice insisted that a "state measure" having equivalent effect according to Article 30 need not to be written into formal rules of procurement, but may derive from simple administrative practices with a certain degree of consistency and generality. If a Member State adopts a systematically unfavourable attitude towards imported machines, it has violated Article 30[30].

(6) The judgment of 14 March 1985 condemned the French preferential postal tariffs reserved for French newspapers and periodicals or to newspapers and periodicals printed in France. The Court did not even allow a *de minimis* defense:

> "A national measure cannot evade the prohibition under Article 30 merely because the hindrance to importation is slight or because it is possible for the imported product to be marketed in another way. . ."[31].

*c) Criteria for applying Article 30 to the procurement policies of Member States or ESA procurement in which Member States participate*

**18** This extremely broad interpretation of Article 30 by the Court means that Member States' procurement policies must be regarded as measures having an effect equivalent to quantitative restrictions. The Member State cannot defend itself by arguing that procurement rules do not guarantee the award of contracts to participating undertakings, but only give a choice to public authorities. Procurement rules concern the entry of undertakings into the Common Market and must therefore meet the criteria of Article 30. They may not openly or covertly discriminate against undertakings having their established business seat in one of the 12 member countries. The only exception are defense contracts under Article 223 of the EEC Treaty.

30 1985 ECR 1355 at 1364 No. 11 — French postal machines.

31 1985 ECR 837 at 846 No. 10.

In its recent judgment against Ireland on 22 September 1988, the Court has affirmed on the application of Art. 30 to public procurement, even if the services demanded were exempted by the relevant Community directives (cf. No. 36):

> "L'art. 30 du traité a pour but d'éliminer toutes les mesures des Etats membres qui font obstacle aux courants d'importation dans le commerce intracommunautaire, que ces mesures portent directement sur la circulation des marchandies importés ou qu'elles aient indirectement pour effet d'entraver la commercialisation des produits provenant d'autres Etats membres. . ."[32].

These principles first apply to those Member State space agencies who are responsible for the implementation of national space policies. In their procurement policies, they are under the obligation of primary Community law to *allow tender offers by undertakings from all EEC countries*, which must be taken into consideration in the award of the contract by *applying objective criteria*. If they adopt rules on the geographical or regional distribution of contracts, they are applying protectionist objectives and therefore discriminating against undertakings which do not come from these areas. *These practices are therefore forbidden under Article 30*[33]. There may be cases where these regional policies may be regarded as subsidies or state aids according to Article 92 (cf below Nos. 40-44). But the Court has repeatedly said that the applicability of the state aid rules must not be used as an argument to circumvent the strict enforcement of Article 30[34]. In cases where a procurement policy based on geographical criteria is paralleled by state subsidies to undertakings or regions, both Article 30 and Article 92 will be applicable. As the Court of Justice has said:

> "(Both Art. 30 and 92 have a common objective) to ensure the free movement of goods between Member States under normal conditions of competition"[35].

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32 Case 45/87, 1988 ECR not yet published — Commission/Ireland.

33 Müller-Graff, ZHR 1988 (152), 403 at 420; Weiss, ELR 1988, 318 at 319, 330; Vandamme, dans: Dutheil de la Rochere & Vandamme (eds.), Interventions publiques et droit communautaire, 1988, p. 106.

34 1977 ECR 550 at 574 — Meroni; 1985 ECR 1339 at 1347 No. 13 - Tax advantages for newspaper publishers.

35 Cf. 1986 ECR 1759 at 1774 No. 19 — Italian cars.

19 The problems are however much more complicated where the procurement policy of international organisations is concerned. International organisations do not come under the jurisdiction of the EEC Treaty. In these cases, the specific rules concerning the interrelationship between international law and Community law must be observed. We will elaborate on these rules in greater detail in the following chapter and then refer to the results drawn within this context.

On the other hand, Member States who participate in international organisations must observe their obligations under primary Community law. They cannot act counter to their obligations under Community law by simply becoming a member of an international organisation which has different objectives and policies from that of the Community. This principle must be derived from Article 30. In connection with Art. 5, 116, 234, it can be shaped into an *overall rule of good faith by Member States concerning their participation in international organisations*[36].

The importance of this principle can be seen specifically in ESA: Member States participate in ESA in order to promote a European space policy. This objective, as we have mentioned above, is certainly not contrary to primary or secondary Community law. It is also true that there is a trade-off relation between the Member States' contribution to optional programmes on the one hand and to the R & D as well as industrial policy of ESA on the other. Community law, however, is critical of such trade-offs, which by their nature hinder an equal development of *all areas of the Community,* as can be shown by Article 2 and by the new provisions of the Single Act on economic and social cohesion, Art. 130 A, and on R & D, Art. 130 F. It is therefore up to the Community and not the Member States to decide on the regional and geographical distribution of public supply and service (No. 26) contracts, even if this concerns R & D objectives. If Member States wish to encourage research and development in specific areas and thereby promote certain regions or industries, they may do so, but in the process must observe the Internal Market and Common Commercial Policy rules; they may not unilaterally use their procurement policies for the purpose of developing R & D in certain regions or industries. Community law, under the broad interpretation of Article 30, is strictly opposed to protectionist R & D and industrial policies based on discriminatory procurement. The Member States may not escape these rules by becoming or continuing to be members of international

36 1976 ECR 1279 at 1311, Nos. 44/45 — Kramer; 1986 ECR 1425 at 1472, No. 77 — Asjes; for a comprehensive treatment cf. Söllner, Art. 5 EWGV in der Rechtsprechung des EuGH, 1985.

organisations, unless they have been exempted from their obligations by a specific Community procedure under its state aid or commercial policy rules, namely Arts. 92, 115 (Nos. 40 ss., 83 ss.).

This seemingly strict verdict is corroborated by another fact. Under **20**
the principles of the Internal Market, as shown above, undertakings should be free to decide on the place where they will establish their principal business seat and how they will co-operate in terms of respecting competition rules. A geographical relocation of these entreprenurial decisions by rules on the geographical distribution of public supply contracts is contrary to the very spirit of the Internal Market, as an area where boundaries will not impede the free movement of goods.

In this context it should also be mentioned that EEC law provides for new forms of Community-wide cooperation, like the European Economic Interest Grouping (EEIG) created by Council Regulation No. 2137/85 of 25 July 1985, in effect from 1 July 1989[37]. If a future EEIG, given its legal capacity under Article 2 of the Regulation, participates in a tender offer, it will be impossible to apply geographical criteria in order to determine from what country or region the offer came from: from the business seat as registered according to Article 6, from the establishment of a subsidiary according to Article 10, or from the business seat of one of the participants of the grouping? The EEIG serves as a legal famework for undertakings to "cooperate effectively across frontiers" according to Recital 1 of the Regulation. This cooperation purpose within the EEC would be frustrated if public bodies were allowed to impose geographical or regional criteria for the participation in and award of public supply contracts to undertakings.

The same is true for the position of the potential client in a public tender offer. The public body which calls for tenders in order to fulfill its statutory purposes must be free, in respecting merely *objective criteria* for the award of contracts, to choose among offers coming from *all countries* of the EEC. It should not be under an obligation to grant preferential treatment to one geographical area in the Community. It should not be prevented, by applying restrictive procurement rules to its own purchases, to get the most favourable offers, as far as quality and price is concerned, from undertakings from all over the EEC. The problem of financing public supplies has to be strictly separated from the origins of the tenders. This is even the more true if the contracts attempt to stimulate R & D activities. By its very nature, the award of a contract should be determined here merely by objective criteria relating to the project to be developed, and not by

37 OJ L 199/1 of 31 July 1985.

taking into consideration the nationality of the contractor which has nothing to do with the quality and outcome of the research and development to be undertaken.

For the purposes of Article 30, there is no difference where state or international tender offers are concerned, provided that Member States participate in the financing of the supplied products like launching facilities or space systems. This is especially true for ESA optional programmes. These are financed by the participating states. The Member States would violate primary Community law if they insisted on a fair return for their financing to the home industries. They would violate Article 30 (or Article 59, respectively, if services are concerned, see No. 27), unless there is a specific justification under Community law.

*d) Possible justifications for the procurement policies of Member State agencies or of ESA*

21 A procurement policy which is based upon the fair return principle and not upon competitive principles is opposed, as we have shown, to Article 30 of the Treaty. It may be justified under specific exceptions of Community law. It should be made clear that Community law will interpret these exceptions very narrowly. The Member State will therefore be under an obligation to prove how its discriminatory procurement policy might be specifically justified under the Treaty. As far as primary Community law is concerned, we would like to make the following comments with respect to possible justifications:

(1) The most important justification is Article 36 which states that Community law is not opposed to state measures restricting free trade between the Member Countries if this is required by public policy or for public security reasons, or by the need to protect the health and life of human beings. As far as this exception is concerned, the Court of Justice has made it quite clear that only reasons of a *non-economic nature* justify the application of Aricle 36 which is in effect an exception to a basic principle of the Treaty[38]. The desire of Member States to promote the development of certain regions, to sponsor R & D activities of business, or to create and keep up employment have not been regarded as justification of discriminatory practices. This can be demonstrated very easily by the wording of the Buy Irish judgment above.

38 1984 ECR 523 at 542 No. 23 — Duphar; 1986 ECR 1759 at 1775 No. 22 — Italian cars.

The only exception allowed so far by the Court of Justice has been the safeguarding of a minimum supply of petroleum in the Irish Campus Oil Case "... transcending purely economic considerations ..."[39]. This judgment does not justify a specific Irish industrial policy, but is based upon the safeguard of the supply of basic energy in times of need. Due to the geographical location of Ireland, the government could not be forced to rely solely on importers but could shape a policy enabling it to overcome a crisis situation. This specific "crisis management" exception cannot be equalled to an overall industrial policy concept by using procurement rules to promote employment and business activities in certain regions. There is no principle of EEC law stating that the tax-payer should get the money sent back in the form of investment or employment. The internal market principle, quite in opposition to the "tax payers return rule", wants to spread income within the Community as far as possible.

(2) Another exception to the basic rule on the free circulation of goods of Article 30 has been developed by the so-called Cassis-doctrine of the Court. This rule-of-reason approach has been applied in justifying exceptions to the principle of free circulation of goods, especially to satisfy

> "... mandatory requirements relating to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumers[40]."

22

There is agreement among legal writers that this so-called Cassis-doctrine is not limited to the exceptions mentioned there, but can be extended to other mandatory requirements, e.g. relating to protection of the environment, or to safeguarding cultural interests.

On the other hand, the Cassis-rule cannot be used to justify a Member State R & D or industrial policy. This doctrine would mean that the restrictive interpretation of Article 36 could be circumvented by a broad construction of the rule of reason-principle under the Cassis-doctrine. The Court of Justice certainly had conceived such a broad reading of "mandatory requirements". The principle of fair return as established by the ESA Convention and/or by national space procurement policies can therefore not be said to protect a "fair trade or competition" within the meaning understood by the Court of Justice. This type of fairness implies a clear discrimination against undertakings from states which e.g. do not participate in optional programmes. It is hostile to competitive tender offers from undertakings spread out all over the Community. It determines the

39 Loc. cit. at 2752 No. 35.

40 1979 ECR 649 at 662 No. 8.

participation in government tender offers and the award of public contracts (by ESA or by national agencies) by criteria based on nationality, which is in opposition to the fundamental principles of the Treaty. The mere fact that a member country of ESA contributes to an optional project is *no justification for the fair return principle* under primary Community law. These are considerations of a purely economic nature which have nothing to do with the idea of an Internal Market where the free flow of goods is assured without being hampered by boundaries.

**23** (3) A final justification for measures of equivalent effect will come from other provisions of the Treaty or from secondary Community law. As far as other provisions of the Treaty are concerned, the Common Commercial Policy, under certain circumstances, allows for derogations from Internal Market principles or at least enables Community procedures to exist under which Member States may be exempted from the strict application of these rules, Art. 115. This problem will be analysed in depth in chapter II of our study.

As far as secondary Community law, especially directives are concerned, one could speculate that Article 30 does not apply if the directives allow for certain exemptions. We will discuss the sphere of application of the relevant EEC directives on public supply contracts to space activities later on (No. 36). We will show that their scope is not as wide as Article 30. This does not mean that the areas of procurement policy, which are not covered by the directives, fall automatically beyond the applicability of Article 30 or Article 59. The Court of Justice has resisted such a reading of the directives. In another context it has said that certain EEC Directives which attempt to improve the free circulation of goods must be

> "read in the light of Article 30 of the Treaty and. . . may not be relied upon as a means of defeating the objective set out in that Article, an objective which it itself is also intended to achieve"[41].

A similar view has been taken by the Court in the above (No. 18) mentioned judgement against Ireland of 22 Sept. 1988:

> "Le fait qu'un marché public de travaux concerne la prestation de services ne peut donc avoir pour conséquence de soustraire aux interdictions de l'art. 30 une limitation des matériaux à utiliser inscrite dans un avis d'appel d'offres".

41 1986 ECR 1759 at 1774 No. 20 — Italian cars.

The Community itself, in its Internal Market policy, is bound by the principles of Article 30. It is therefore hard to imagine that secondary Community law could be used to frustrate the full effect of Article 30. The judgment of 29 February 1984 is quite explicit in that respect:

> "Although it is true, as the Commission emphasized in its observations, that Articles 30 to 36 of the Treaty applied primarily to unilateral measures adopted by the Member States, the Community institutions themselves must also have due regard to freedom of trade within the Community, which is a fundamental principle of the Common Market"[42].

As a resumé of the arguments set out above we should affirm that the ESA principle of "fair return", written into the industrial policy rules, violates primary Community law, as far as access for undertakings from the whole common market to public supplies is concerned. There is no justification for such a discriminatory policy under primary or secondary Community law, as far as the Internal Market rules are concerned. How far and under what procedures Member States may escape from this obligation under primary Community law — by participating in international agreements — will be subject to a more thorough discussion in the next chapter.

On the other hand, it should be clearly stated that Article 30 only covers the free movement of goods. As far as service contracts are concerned, which do not relate to the provision of goods, Article 59, not Article 30 will apply. Therefore we will now turn to the relevant Community law provisions on the supply of services, namely Articles 59 et seq.

42 1984 ECR 1229 at 1248 No. 18 — Rewe.

## 4. EEC Procurement Policy (2): Rules on the Freedom to Provide Services (Articles 59 to 66)

*a) Scope of application*

24 Both ESA and national space agencies may award not only contracts relating to the supply of goods in a broad sense, especially launching systems, satellites and component parts, but also to services. This will be particularly true in phases A and B of ESA procurement where prefeasibility and feasibility studies are contracted, but it may also occur in later phases of the development of space technology. These studies will be engineering, software development, patent and know-how licencing, consulting, and other contracts which do not relate to goods but must be regarded as services under the provisions of the Treaty. If these service contracts are to be supplied across borders, Article 59 is applicable because this will normally be done for remuneration.

The rules on free establishment will only cover the cases where an engineering, soft-ware, or consulting firm wishes to establish its business seat in a member country in order to conform to the principles of geographical distribution as set out in the "fair return" principle. It lies beyond argument that a Member State may not prevent the establishment of a business seat by an engineering or consulting firm, in order to exclude it from participating in public procurement. Such a policy would amount to clear discrimination and would come directly under the rules on free establishment.

The exception of Art. 61, whereby "freedom to provide services in the field of transport shall be governed by the provisions... relating to transport", is not applicable here. In the present stage of technological development in space activities, launching systems have not yet reached the state of belonging to transportation because no regular routes can be maintained. This may change when Europe has put a regular space station into orbit.

*b) Applicability of Art. 59 to public procurement of service contracts*

There are as yet no precedents available concerning the applicability of Community law on the freedom to supply services (Article 59) to procurement policies. Legal doctrine is certainly inclined to apply the same principles as in the area of the free circulation of goods[43]. There is reason to believe that the Court's new case law will subject the service markets to the same principles as those for goods[44], unless some very specific reasons allow for a different construction. **25**

This more or less *parallel application of the rules on the freedom to supply goods and to supply services* is corroborated by Article 8 A of the Treaty as amended under the Single Act. The achievement of the Internal Market by 31 December 1992 will allow not only for the free movement of goods but also of services. Even if Article 8 A does not have a direct effect from 1 January 1993 on, it assists in interpreting and implementing primary Community law on the provision of services.

According to legal doctrine, Article 59 covers three possible means of intra-community supply of services: **26**

- The supplier moves to the customer in order to offer his services in the receiving country.
- The customer or client moves to the supplier of services in order to receive the service in the foreign country.
- The supplier offers his services across frontiers to possible customers in other EEC countries without having an established business seat or subsidiary.

As far as procurement rules on services are concerned, we need not inquire further on the first two alternatives to rules on the freedom to provide services. Only the third alternative is important for the purpose of our study. The freedom to provide services in the entire Community includes, as we have developed above relating to the free circulation of goods, a right of *entry* for all undertakings into the different service markets, and a right to freedom of choice for all customers[45]: The free entry of service enterprises should not be impeded by discriminatory rules or by unreasonable restrictions. The potential customer has the basic right to

43 Cf. Steindorff, RIW 1983, 831 at 832; Bleckmann, EuR 1987, 28 at 32.

44 For a more detailed discussion, cf. Reich, Die Freiheit des Dienstleistungsverkehrs als Grundfreiheit, paper presented to the meeting of the Arbeitskreis Europäische Integration from 11 to 13 January 1989 and to be published in ZHR 1989 forthcoming.

45 Cf. Reich, loc. cit. Fn 16, Nos. 30, 33.

"shop for services" which he needs all around the Community, without being restricted by the mere fact that there are still borders or different legal regimes among the Member State countries. Therefore, procurement rules which reserve participation in public tender offers and award of service contracts to undertakings established in one Member Country, and which impose a rule of fair return according to geographical and not to competition criteria, limit at least indirectly the entry of those enterprises which are not established in the state privileged by the return principle. This restriction in the freedom to provide services cannot be justified by arguing that the undertaking might make use of its freedom of establishment by shifting its business seat or subsidiary to the receiving state and by these means participate in public procurement on the "fair return" principle. It is an established rule of EEC law that the guarantee of one basic freedom of the EEC Treaty — provision of services — cannot be made dependent upon another freedom, namely that of establishment[46].

This broad construction of the rules on freedom to provide services also covers discriminations having a mere indirect or potential effect on intra-Community trade. Even if no undertaking has a *legal right* to be awarded a specific contract, it cannot be excluded from participation by arguing that it does not have its business seat in one Member State or that a certain quota provided for one region has already been used up. Participation in procurement and award of contracts should be based on *objective criteria*. This is even more true if procurement seeks to encourage R & D activities of undertakings established in the Member States: The most competitive offer and the best technology should be awarded the contract and not merely the offer from a certain privileged region. If the Member States want to encourage research and industrial policy in one region they should use the state aid-rules (cf. Nos. 40 et seq.), and not abuse the provisions on public tender offers for that purpose. Exclusion from participation and award for geographical or national factors of an undertaking therefore amounts to a "discrimination du fait " which, as the Court has said in its recent "kabelregeling"-judgment, is forbidden under EEC law[47].

46 1986 ECR 3577 at 3809 No. 52 — German insurance regulation.

47 Cf. 1988 ECR unreported, Case 352/85, Judgment of 26 April 1988, No. 26 — Bond van adverterdeers, concerning entry of advertising and cable companies into the (closed) Dutch market of TV-advertising.

*c) Justifications for restrictions on the freedom to provide services*

Such a discrimination cannot be justified on grounds of public security or public policy according to Articles 66, 56. In the "kabelregeling" judgment, the Court of Justice has clearly stated that the requirements of Articles 56, 66 are not met by "objectifs de nature économique"[48]. The industrial policy of Member States is, according to the established case law of the Court in the area of products, a mere economic objective, i.e. to develop R & D in space activities, to create employment, to provide for higher tax return, and to improve regional distribution of income. **27**

The Court of Justice, in its new case law concerning justified restrictions on the freedom to provide services, has also developed a *general or public interest test* similar to that concerning the free circulation of goods[49]. The same restrictive interpretation of these exceptions must be applied. Therefore, the "fair return" principle is not justified under the general interest test. The freedom of every undertaking to provide services within the EEC and the free choice of clients to purchase these services from undertakings of all EEC countries should not be impeded directly or indirectly. Therefore, ESA and Member State rules on the "fair return" principle violate the freedom to supply services, leading to consequences similar to the above mentioned violations in the free circulation of goods.

As far as the relationship between primary and secondary Community law on government procurement is concerned, the Court applies the same principles to services as in the area of the free movement of goods. Community directives should be construed in accordance with primary Community law in order to make effective the freedom to provide services[50]. They should not impose additional restrictions on enterprises:

> "To make the provision of services in one Member State by a contractor established in another Member State conditional upon the possession of an establishment permit in the first State would be to deprive Article 59 of the treaty of all effectiveness, the purpose of that article being precisely to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided"[51].

48 Loc. cit. No. 34.

49 1980 ECR 833 at 856 — Debauve, concerning advertising restrictions.

50 1986 ECR at 3812 No. 62 — German insurance regulation.

51 1982 ECR 417 at 427 No. 14 — Transportroute.

## 5. EEC Procurement Policy (3): Free Trade Agreements with EFTA Countries

*a) The problem*

28 The ESA Convention is comprised not only of EEC Member States, but also includes countries belonging to EFTA. It is a form of cooperation going beyond the sphere of influence of the EEC. Therefore, member countries of EFTA cannot be bound by principles of EEC law, most notably those concerning the direct effect of the provisions on the free circulation of goods and services in order to establish the internal market.

On the other hand, the EEC has concluded free trade agreements with EFTA countries in 1972, i.e. with Switzerland, Austria, Norway, Sweden, who are also members of ESA, and Finland, which is associated with ESA. Therefore, the principles which have been established in these agreements must also be coordinated with the provisions of the ESA convention. One could say that EFTA countries, when concluding treaties under international law in which EEC Member States participate, should not violate basic principles of the free trade agreements between the EEC and EFTA countries.

The provision which is important in this context is Article 13 of the agreement between the Community and Switzerland, which has been repeated in other free trade agreements. Article 13 says:

> "No quantitative restrictions on imports or measures having equivalent effect shall be introduced in trade between the parties".

It should be said that these provisions relate only to the free circulation of goods. The free trade agreements do not contain a provision on the freedom to provide services similar to Article 59 of the EEC Treaty. This may change when the free trade agreements will be renegotiated between the EEC and the EFTA countries.

The free trade agreements create obligations only between the EEC or respectively its Member States, which are subjected to the supremacy of Community law, plus the specific contracting parties, and not obligations among the EFTA countries as such. The latter, however, are bound by the EFTA Convention of 1960, namely Article 10 (2), and by the GATT rules, especially Art. XXIV. These provisions seek to prevent the introduction of *measures having an effect equivalent as quantitative restrictions* on the import of goods. They introduce a rule of non-discrimination as far as the supply of goods from other EFTA countries is concerned.

*b) Measures having an effect equivalent to quantitative restrictions of imports under the free trade agreements*

One could argue that the contracting parties are under obligations 29
imposed by the free trade agreements and the EFTA Convention, which are analogous to the obligations which the EEC member countries have among themselves. This would mean that their procurement policies, whether conducted by national or international agencies, must obey the principle of non-discrimination, at least insofar as the trade in goods is concerned. Such an interpretation would have the advantage of a parallel application of EEC law and free trade agreement rules. It would avoid EEC Member States being subject to stricter obligations than EFTA countries. All parties participating in the ESA Convention would therefore be under an obligation to change procurement rules in order to meet the principle of non-discrimination. The "fair return" principle should, under this interpretation, not only be disregarded by EEC-Member State policies, but also by EFTA countries. This interpretation would prevent a drifting apart among the contracting parties of the ESA Convention resulting from the imposition of different legal obligations upon them.

Such a broad interpretation of the free trade agreements may be opposed by the simple fact that these trade agreements do not propose the creation of an Internal Market between the Community and EFTA countries. Therefore, the obligations between the Community and its Member States, respectively, on the one hand and EFTA countries on the other should not be as strictly interpreted as among the EEC countries themselves. This somewhat more cautious approach to the construction of the free trade agreements is confirmed insofar as we have no case law or state practice which interprets Article 13 in the same broad sense as the Court of Justice with Art. 30 of the Treaty of Rome has done. The above mentioned Dassonville doctrine certainly cannot be directly applied to the relationship between the Community and EFTA countries.

When the ESA Convention was ratified in 1980, the participating EFTA countries were probably of the opinion that they could include an explicit industrial policy in the document which was the prerequisite for their financing and cooperation. At this time, however, the GATT Tokyo round was under way, which opened up procurement of public supply contracts by imposing a non-discrimination rule for participation in tender offers (No. 37). EEC law itself had, on the other hand, not yet reached the state of development by which entry of undertakings and freedom of choice for customers and consumers were to be regarded as the essential objective of Article 30. The relevant judgments of the Court of Justice relating to

discriminatory Member State industrial policies, e.g. the Buy Irish case and the case of the French postal machines, have been handed down later. Since there is no judicial review in the interpretation of the free trade agreements, general principles of international law will apply.

*c) Possible approaches to interpreting the notion of "measures having an effect equivalent to quantitative restrictions of imports" in the free trade agreements*

30 A simple way out of this dilemma could be through the application of the classical rule of international law *"lex posterior derogat legi priori"*. This would mean that the ESA Convention, being concluded in 1975 and ratified in 1980, with its provisions on industrial policy, simply sets aside the obligations under the free trade agreements, which in most cases were concluded in 1972. Such an approach, however, is far too formalistic and does not satisfy the basic objective of the free trade agreements, namely to open up the markets of the contracting parties to undertakings in their respective territories.

31 As far as the EEC itself is concerned, we have cases concerning the importance of the free trade agreements under the doctrines of supremacy and direct effect. The case law of the Court of Justice seems to be quite settled now insofar as the legal effects of the rules on non-discrimination in tax matters are concerned. In our opinion, they should be extended to the problems of discrimination in trade in general.

The Court has frequently stated that the Community is bound by the GATT-rules which have a spirit similar to the free trade agreements, even though it is not a member of GATT[52]. The EEC, in its relationship with third countries, should respect the supremacy of international law which can be invoked against Member State action by the Community.

Alternatively, the principle of direct effect concerning undertakings must be differentiated depending on whether the relationship is one between an undertaking and the Member State (or the Community respectively) or whether the given problems which arise are rooted in the legal relationship among different undertakings themselves[53]. Only the first alternative concerns us here. It was dealt with by the Kupferberg case. The

52 1972 ECR 1219 at 1227, Nos. 10-18 — United Fruits; cf. the explaining remarks by Pescatore, CMLR 1979, 615 at 636.

53 This problem was decided to the negative by the Polydor-case, 1982 ECR 392; we will not go into details, but must distinguish very clearly the intellectual property cases on the one hand from those arising out of discriminatory practices of states against undertakings, on the other.

case concerned the direct effect of the non-discrimination rules in tax matters between an undertaking and a member country, which are written into the free trade agreements. There, the Court accepted the direct effect principle because the obligations are "unconditional and sufficiently precise". The Court elucidated further on the purpose of the free trade agreements (between the EEC and Portugal):

> "The purpose of the Agreement is to create a system of free trade in which rules restricting commerce are eliminated in respect of virtually all trade in products originating in the territories of the parties"[54].

The free trade agreements contain unconditional rules forbidding not only tax-discrimination, but also all measures having an effect equivalent to quantitative restrictions on imports. As far as the Community (and its Member States) in relation to the contracting EFTA-countries is concerned, the non-discrimination principle is directly applicable. It forbids any discrimination which hinders the free flow of goods and the entry of undertakings from EFTA-countries to the common market, where such obstacles cannot be specifically justified (No. 33). Procurement rules between EEC- and EFTA-countries must therefore follow the same principles as among EEC-countries themselves, if we interpret the tendencies in the Kupferberg decision correctly. They should not be based on principles of "fair return" and "geographical distribution" in the placing of contracts, but on objective criteria, without discriminating as regards the origin of the undertaking participating in a public tender offer within the territory of the EEC[55].

54 1982 ECR 3641 at 3665 No. 24; cf. also the comment by Bebr, CMLR 1983, 35.

55 In this sense cf. Winkel, NJW 1977, 1993 at 1996, referring to 1976 ECR 811 at 906 No. 19 — EMI ("The binding effects of commitments undertaken by the Community with regard to certain countries cannot be extended to others"); this view is indirectly approved by 1980 ECR 1345 at 1386 No. 24 — Chatain.

32 This differentiation in the case law cannot be automatically applied to EFTA countries. Important studies by Bernitz[56] and Bohrer[57] have shown, however, that Swiss and Swedish law essentially follows rules similar to those of the Court of Justice. Therefore, the non-discrimination principle is directly applicable, as far as the legal relationship of an undertaking with an EFTA-country[58] is concerned. On the other hand, the legal relationships between undertakings themselves, especially in industrial property matters, are not touched by the free trade agreements[59].

If we take the above mentioned principles as being uniformly applicable to the EEC Member States and to countries adhering to the EFTA — EEC free trade agreements, we might argue that the *principle of non-discrimination is directly applicable in favour* of undertakings in their relationship to governments which participate in the agreement. We can therefore apply similar principles governing entry of undertakings and free choice of customers. Therefore, procurement rules should be applied without discrimination and allow participation of *all* undertakings from the member countries. A tender offer from an undertaking cannot be rejected simply because it does not come from the geographical area which is protected by the industrial policy of the ESA Convention or of a national body. This interpretation allows the application of EEC law and free trade agreements to be paralleled — yet without creating a risk whereby the Member States' obligations would begin to drift apart.

56 CMLR 1986, 567 at 574, 577, 580.

57 Maßnahmen gleicher Wirkung Schweiz-EWG, 1988, p. 157; cf. also Baldi, WuR 1987, 73 at 95.

58 Cf. arrêt du Tribunal Fédérale Suisse du 13 octobre 1972, Recueil Officiel 98 Ib 385 at 388, concerning the direct effect of the EFTA agreement of 1960, as far as Switzerland is concerned. We have, however, no case law concerning the EEC-EFTA-free trading agreements.

59 Cf. the famous Swiss OMO-case, 1980 CMLRep 664; the Austrian Austro-Mechana-case, 1984 CMLRep 626.

*d) Justifications for discriminatory procurement policies under the free trade agreements*

**33** The free trade agreements which the EEC has concluded with EFTA countries contain a safeguard clause which allows it to

> "prohibit or restrict imports, exports or goods in transit on grounds of public morality, public policy or public security" (Article 20 of the free trade agreement between the EEC and Switzerland and similar provisions in other free trade agreements).

The application of the safeguard clause is not controlled by jurisprudential means but governed instead by political principles of international law. We have therefore no established case law on its application. As far as EEC-law is concerned, the existence of a safeguard clause does not prevent the direct application of the non-discrimination principle, at least as far as tax-matters are concerned[60].

One might argue that principles analogous to EEC law would apply. This would mean that only *non-economic reasons* would allow restrictions on imports or the imposition of discriminatoy rules on procurement, respectively. Opting for such a parallel construction of the safeguard clause stands to reason, since it would have the effect of bringing the obligations of the Member States, EEC and the parties adhering to the free trade agreements, into alignment. But again, there is no settled case law which we could rely on.

Usually, EFTA countries will simply apply their own procurement policies which may or may not discriminate against EEC undertakings. If there is a conflict, the special arbitration procedures under the free trade agreements must be invoked. There is no judicial remedy, unless a court of law of an EFTA country will guarantee legal protection (which has not yet been the case, if we are correctly informed).

EFTA countries could also argue that the principles of the ESA Convention on industrial policy are a justification for restrictions on imports on the grounds of public policy, including restrictions on the participation of foreign undertakings in public procurement. Article 20 of the free trade agreements could then be invoked by ESA, that is, with regard to the role which it places on industrial policy, which is a prerequisite for the participation of EFTA-countries in European space activites. Such an interpretation cannot be completely ruled out. On the other hand, EFTA

60 1982 ECR at 3664 No. 21 — Kupferberg.

member countries have not explicitly insisted on such an interpretation by invoking the specific committee-proceedings of the free trade agreements. We should therefore rely on the general principles already mentioned above:

- Trade between member countries should be based on overall respect for the principles of free entry and freedom of choice.
- Exceptions should be construed narrowly and normally be allowed only for non-economic reasons. Undertakings should be protected against discriminatory measures, including the procurement policies of Member States, without necessarily awaiting reciprocal treatment.

This point of view is corroborated by the GATT rules on procurement (see sub 7) which impose principles of non-discrimination and equal treatment among with the contracting parties (including EEC-countries, Austria, Norway, Sweden, and Switzerland; Finland as an associated member of ESA). This is true, as we have said above, only in relationship to goods and services attached thereto, not to services as such which do not (yet!) come under the free trade agreement rules.

## 6. Directive 71/305/EEC on Procurement of Public Works, Directives 77/62 and 88/295/EEC on Public Supply Contracts, Proposed Amendments, and Their Importance for ESA and National Agency Procurement Practices

*a) Basic objectives of the EEC Directives on procurement*

The EEC has adopted several directives on Member State procurement policy. The first directive of 26 July 1971 (71/305/EEC)[61] concerned the coordination of procedures for the award of public work contracts. On 21 December 1976, Directive 77/62/EEC[62] governing the coordination of procedures for the award of public supply contracts was adopted. This directive was amended in 1980 and, even more substantially in 1988 by Directive 88/295/EEC of 22 March 1988[63]. **34**

In the following analysis, we will emphasize the importance of the directive on public supplies[64]. The directive on public work contracts is not important in this context because ESA and national space agencies are only to a very limited extent engaged in the award of public work contracts. Their procurement activity in the supply area is much more important.

The directives on the procurement of public supply contracts attempts to enforce and implement Article 30. Therefore, Recitals 1 and 2 of Directive 77/62 read as follows:

> "Whereas restrictions on the free movement of goods in respect of public supplies are prohibited by the terms of Article 30 et sequitur of the Treaty; whereas that prohibition should be supplemented by the coordination of the procedures relating to public supply contracts in order, by introducing equal conditions of competition for such contracts in all the Member States, to ensure a degree of transparency allowing the observance of this prohibition to be better supervised . . ."

61 OJ L 185/5 of 25 August 1971 — Special English edition 1971 p. 682, modified by Directive 89/440/EEC of 18 July 1989, OJ L 210/1 of 21 July 1989.

62 OJ L 13/1 of 15 January 1977.

63 OJ L 127/1 of 20 May 1988.

64 Cf. for a thorough and critical evaluation of these Directives Weiss, ELR 1988, 318; Bréchon-Moulènes, RFDA 1988, 753; their importance in completing the Internal Market is underlined by Mattera, Le marché unique européen - Ses règles, son fonctionennement, 1988, p. 311-339..

Recital 5 of Directive 88/295 reads as follows:

> "Whereas it is necessary to improve and extend the scope of the directives by increasing the transparency of procedures and practices for the award of public supply contracts, and to make possible stricter enforcement of the prohibition of restrictions on the free movement of goods, which constitutes the basis of these directives . . ."

The directive should therefore be read in the spirit of Article 30 as outlined above, namely to open up public supply markets, to guarantee entry of enterprises and to allow for a freedom of choice for customers. The amended directive has been adopted in order to complete the Internal Market as defined by the Single Act. It is now based upon Article 100 A of the amended Treaty. The directive seeks to install a regime of EEC-wide competition, transparency, and standardisation in tender offers for public supply contracts[65].

*b) Scope of application*

**35** Article 2 defines the sphere of application. Only the following contracts come under the rules of the Directives concerning community-wide procurement:

> "Public supply contracts shall be contracts for pecuniary interests concluded in writing involving the purchase, lease, rental or hire purchase, with or without option to buy, of products. . . The delivery of such products may in addition include siting and installation operations".

This definition is wider than that of Directive 77/62 because the latter only mentioned supplies, not leasing or hire-purchase agreements which may be more frequent now than in 1977. The definition also makes clear that *services alone* are not included, unless they fall under Directive 71/305. If the service is related to the delivery of products, especially installation, then again the Directive will apply. The feasibility studies undertaken in phase A and B by ESA or national space Agency contractors would therefore not be covered, but fall under the general rules of the freedom to supply services. The same would be true for pure software contracts unattached to goods.

65 Cf. for details of the purposes of the Directives Bréchon-Moulènes, loc. cit. at 755.

Article 3 of Directive 77/62 which was left unchanged by Directive 88/295 excludes from its application public supply contracts, which are awarded in accordance with the particular procedure of an *international organisation*. It is not clear from the documents leading to the adoption of the Directive, whether the procurement procedures of ESA are thereby expressly excluded. On the other hand, ESA was *de facto* established before the adoption of the directive. Therefore the Council having adopted the directive in 1976 must have known of the specific procurement procedures of ESA under the industrial policy as written into the Convention. There is reason to believe that ESA procurement is implicitly excluded from the application of Directive 77/62. When adopting the new directive in 1988 under the cooperation procedure in Article 100 A of the amended Treaty, the Community legislator did not want to change this scope of application even though the different procurement policies of the EEC on the one hand and of ESA on the other were known or must have been known. It seems clear that ESA procurement policy must therefore be regarded as excluded from the scope of application of Directive 88/295. As we have argued above, this exemption for ESA only concerns the specific transparency obligations of the Directive, not the *application of primary Community law*, unless the rules on the Common Commercial Policy apply.

*c) Applicability of the directive to national procurement polices*

Procurement by national space agencies is not, however, exempted **36**
from the directive, unless certain conditions are met:

(1) Article 3 (e) exempts contracts awarded pursuant to an international agreement concluded between a Member State and one or more non-Member States which cover supplies intended for the joint implementation/exploitation of a project by the signatory states; every agreement shall be communicated to the Commission. This would arise, for example in the cooperation between a national space Agency and the Agency of a non-member country like NASA, if this agreement has been communicated to the Commission.

(2) If the national space agencies award defense contracts within the meaning of the new Article 2 (a), inserted by Directive 88/295.

(3) If the threshold mentioned in the amended Article 5 is not met (200.000 respectively 130.000 ECU).

(4) Transport contracts according to Article 3 of the Directive 88/295, namely

"public supply contracts awarded by carriers by land, air, sea or inland waterway".

This wording must be narrowly construed. In our opinion, it does not concern the development and placing of launching facilities or space activities (No. 24).

(5) Production and distribution of energy.

(6) Public supply contracts of authorities

"whose principle activity is to offer telecommunication services".

Satellite procurement is therefore excluded as far as the marketing phase by the national PTTs or telecom is concerned. The Commission however is determined to abolish these exemptions when the Internal Market will be completed by 31 December 1992[66].

(7) Article 7, replacing Article 6(4) (e) of Directive 77/62, excludes the requirement for open procedures and allows for a negotiated procedure which concerns

"articles... manufactured purely for the purpose of research, experiment, study or development".

Procurement related to development and marketing activities of space systems by national agencies therefore does not come under the exception. Consequently, open procedures should be the rule.

Even if the directive is not applicable or applicable only to a limited extent to national procurement policies in the area of the supply of space systems, the basic principles of primary Community law must also be observed, as a minimum standard by national agencies, especially the rules on free movement of goods and services. Therefore, national agencies shall not discriminate against foreign undertakings by excluding them from tender offers or simply by rejecting the award of contracts for the supply of goods or services by reason of nationality or geographical distribution.

66 Some authors argue that Art. 90 will prohibit the PTTs from discriminating in procurement, cf. J. Müller, Dienstleistungsmonopole im System des EWGV, 1988, p. 228.

*d) Proposed changes to Directives 71/305 and 88/295 in view of completing the Internal Market*

The Commission, in documents submitted to the Council on 11 October 1988[67] and published afterwards[68], is aiming at abolishing the still existing exemptions from Community procurement rules, namely in the area of water, energy, transport services, and telecommunication. Art. 1 of the proposal on telecommunication provides for Community wide procurement to the "award of supply, works and software service contracts by contracting entities which: **36a**

(a) are public or granted special or exclusive rights by Member States, and

(b) operate public telekommunications networks or offer one or more telecommunications services to the public".

The Annex makes clear that the national postal services fall under the provisions of the proposed directive. Similar provisions shall be adopted on the other areas.

It should be mentioned that, as in the previous directives, excluded from its application are those "public supply and software service contracts, which are awarded in accordance with the particular procedure of an international organisation". The preparatory documents do not make clear whether *all* international organisations are exempted from the EEC rules even if Member States participate in them and contribute substantially to their financing for their own benefit, which is the case of ESA, or only those which have attained a specific status of independence under international law, like the UN and its auxiliary organisations.

It is also not clear whether this derogation could be used by ESA as a justification for continuing its "fair return" policy and whether Member States may be exempted from the Internal Market rules under Art. 115 of the EEC Treaty (cf. Nos. 83 et seq.). We do not consider this to be the intention of the proposed directive. Recital (1) of the proposal of 11 October 1988 refers to the aim of "progessively establishing the internal market during the period up to 31 December 1992 . . ."; recital (3) mentions the prohibition of restrictions on the free movement of goods and on the freedom to provide services in the telecommunications sectors under Art.

67 Com (88) 377 and 378 final.

68 OJ C 319/2 of 12 Dec. 1988 and C 40/5 of 17 Feb. 1989.

30 and 59, and recital (8) insists on the necessity of a Community-wide competition. The Community policy quite obviously intends to open up public supply and services markets in *all areas* of economic importance without omitting such a large market as that of space systems. Therefore, once the proposed Directives enter into force in the areas of energy, transportation, and telecommunication, the "fair return-principle" can no longer be enforced by the Member States against the procurement policy of an international organisation like ESA.

It is not yet clear whether the Council will adopt the proposals without changes. The case-law of the Court of Justice, corroborated by the judgment of 22 Sept. 1988[69] which insists on the parallel applicability of Art. 30/59 to the procurement policies of Member States even where exemptions exist, will certainly promote the legislative success of the proposals.

69 Case 45/87.

## 7. The Importance of the GATT Rules on Public Procurement

As we have seen, the EEC procurement rules on public supply contracts have a relatively limited importance for space activities. As far as ESA itself is concerned, they will not apply at all. For national agencies, they will only apply to a limited extent. In addition, the EEC has adopted the results of the GATT Tokyo round by decision 80/271[70] of the Council. This "Agreement on government procurement"[71] is part of EEC law and must be respected by the Community in its commercial transactions, in its Internal Market policy, as well as by the Member States. EFTA countries are bound by the agreement if they have adopted it in due form, like most Member States of ESA. Therefore, the agreement on government procurement links the procurement policies of both the EEC and the EFTA countries. 37

The scope and range of the agreement is enunciated in Article 1. The Article reads as follows, in its most important parts:

> "The agreement applies to
>
> (a) any law, regulation, procedure and practice regarding the procurement of products by the entities subject to this agreement. This includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products itself, but not service contracts per se;
>
> (b) any procurement contract of a value of SDR 150.000 . . .
>
> (c) procurement by the entities under the direct or substantial control of parties and other designated entities, with respect to their procurement procedures and practice".

The entities are listed in Annex A of the agreement. ESA procurement policy is not covered. On the other hand, the parties to the GATT agreement are under an obligation to

> "inform the entities not covered by this agreement. . . of the objectives, principles and rules of this agreement . . ."

70 The decision, published in OJ L 71/1 of 17 March 1980, was based on Art. 113; cf. the comment by Bourgeois, CMLR 1982, 5; Bréchon-Moulènes, loc. cit. at 755.

71 OJ L 71/44 of 17 March 1980.

We do not think that ESA must be regarded as an entity belonging to the EEC, the Member States or to EFTA countries. It is, as an international organisation, an autonomous subject of international law and is therefore not covered by the GATT agreement on government procurement.

38 On the other hand, the EEC-Member States and the EFTA- countries which adhere to GATT and at the same time to ESA are bound by the obligations of the agreement. These obligations are included in Article II on national treatment and non-discrimination. Paragraph 1 reads:

> "With respect to all laws, regulations, procedures and practices regarding government procurement covered by this agreement, the parties shall provide immediately and unconditionally to the products and suppliers of other parties offering products originating in the customs territories... of the parties, treatment no less favourable than (a) that accorded to domestic products and suppliers; and (b) that accorded to products and suppliers of any other party...

Paragraph 3 reads as follows:

> "The parties shall not apply rules of origin to products imported for purposes of government procurement covered by this agreement from other parties, which are different from the rules of origin applied in the normal cause of trade and at the time of importation to imports of the same products from the same parties".

39 Article VIII contains the exceptions to the agreement, namely para 2:

> "Subject to the requirement that such measures are applied in a manner which constitutes a means of arbitrary or unjustified discrimination in countries where the same conditions prevail or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent any party from imposing or enforcing measures necessary to protect public morals, order or safety, human, animal or plant life or health, intellectual property, or relating to the products of handicapped persons, of philantropic institutions or of prison labour".

This exception from the rules on non-discrimination and national treatment is similar to that of Article 36 in the EEC Treaty and Article 20 of the free trade agreements of the EEC with EFTA countries. There is, however, no judicial review on the application of the safeguard clause. We

have no established state practice as to the importance of the safeguard clause. An in-depth investigation would require an anlysis of the position of EEC and EFTA in relation to GATT, with special regard to US-trade and space policy.

The Uruguay-round of the GATT negotiations sought to include services, e.g. software contracts, licencing etc., in the public procurement provisions[72]. A final decision has not yet been taken.

72 Cf. Sindelar, Das GATT — Handelsordnung für den Dienstleistungsverkehr, 1987, p. 149.

## 8. Applicability of State Aid Rules in the EEC-Treaty (Articles 92 — 94) to Public Procurement by ESA and National Entities.

*a) Basic principles*

40 We have demonstrated that ESA procurement policy contains certain discriminatory and protectionist elements which are based upon the industrial policy concept of the ESA Convention. We shall now examine whether the funding of ESA by the Member States, the procurement policy of ESA itself, and/or the commercial utilization of space systems which have been developed by ESA and which are exploited by private enterprise might amount to a violation of the state aid rules under Article 92[73]. These provisions, of course, apply only to Member States of the EEC, not to EFTA countries. They are also not applicable to ESA itself.

A thorough analysis of this highly complex legal question would require an evaluation of research, development, and utilization of space systems developed under the ESA scheme. It is quite obvious that the European space industry and space activities could only be established by common effort and not by one Member State of ESA alone. This is even more true for the ambitious European space programmes put forward in 1987 (No. 1). At the time of the foundation of ESA (or, respectively its predecessors ESRO and ELDO), the EEC had not yet defined a space policy; only in 1988 did it formulate its position in space, notably in R & D activities[74], without, however, considering appreciable financial contributions[75]. But, even if this basic policy objective will be accepted by the EEC, this does not mean that the rules on state aids are not applicable to space activities under the ESA Convention or under national schemes.

The state aid rules of the EEC Treaty impose a review scheme, which enables the Commission to avoid distortions of competition within the Common Market. Member States may grant aids to undertakings under certain qualified conditions, but they must observe a Community review procedure and they must not "put their proposed measures into effect until this procedure has resulted in a final decision", Article 93 para 3, (3).

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73 Art. 77, relating to state aids in the transportation area, is not applicable here, cf. No. 24.

74 Com. 88 (417) final of 26 July 1988 which, at p. 21, is quite critical to the fair return principle without going into details of the legal analysis.

75 Cf. the Chatham House Special Paper, loc. cit. at Fn 2, p. 83 discussing EEC R & D programmes in space.

*b) Different hypotheses on the application of the state aid rules to space activities*

As far as the applicability of state rules is concerned, different alternatives must be distinguished. **41**

(1) One might think that the discriminatory procurement policy under the "fair return" principle not only violates Article 30 and Article 59 (as far as Member States are concerned), but also amounts to an aid to an undertaking which is privileged by the industrial policy scheme. Such a hypothesis can be ruled out, because the award of contracts by ESA is sufficient financial return for being regarded eligible in the tender offer procedure. The somewhat discriminatory award of a contract is not accompanied by a gratuitious transfer of state funds, the latter always being the legal prerequisite for making Art. 92 applicable to such a situation[76]. Therefore the state aid rules will only apply to the procurement policy as such, if financial return for the contract placed would be excessive. We have no information that this is the case in the contract policy of ESA or national agencies.

(2) The funding of ESA itself might be regarded as a state aid under Article 92 which covers not only state aids, but also aids granted "through state resources in any form whatsoever". Payments to ESA for optional programmes might in this way be regarded as aids. It could also be said that these aids favour "certain undertakings" under the industrial policy scheme or that they favour "the production of certain goods", namely space systems. In our opinion, such an interpretation of the state aid rules would be too far-reaching. It would mean that any government purchase would come under the state aid rules and that a mere cooperation of governments in the form of an international Agency, as in the case with optional programmes of ESA, would induce the applicability of Article 92. Such a reading would go far beyond the "effet utile" of Article 92 which seeks to prevent distortions in competition by state transfer payments without or with insufficient financial return.

76 We therefore need not discuss in detail the relationship between Art. 30 on the one hand to Arts. 92 s. on the other, cf. Mattera, loc. cit. Fn 64, p. 42

(3) A final hypothesis would apply should the government contributions to ESA-financed and monitored programmes be regarded as state aids to undertakings which later market the space systems, like Arianespace or Spot Image. ESA would then be regarded as a type of joint venture to relieve undertakings from the costs and risks of research and development in space systems which will later be exploited commercially. This would especially be true if the development costs would not be recovered by the pricing of the space systems in the utilization phase.

*c) State aids to promote commercial activities of undertakings offering launching or orbital space systems*

42 There is some possibility that the rules on state aid may be applicable under the third hypothesis. We cannot definitely answer whether such a case could be brought by the Commission against a Member State for not having notified its contribution to ESA under the optional programmes. We should mention the following settled aspects of Community law which may be relevant in this context:

(a) A state aid, as Article 92 expressly sets out, is also an "... aid granted through state resources in any form whatsoever". The mere fact that Member States pay contributions to ESA under the optional programmes, that ESA awards contracts for research and development, that ESA buys space systems which are utilized by other undertakings on the basis of "no loss, no profit"[77], will not *per se* rule out the applicability of Article 92. The Court of Justice has said that Article 92 will also be applicable to government established funds[78]. It will, on the other hand, not be applicable to subsidies paid exclusively out of EEC funds[79].

(b) The state aid must favour certain undertakings or the production of certain goods. This problem amounts to the specificity of the support granted to undertakings or the production of goods. An early court definition on subsidies and aid may be helpful in settling this problem:

> "A subsidy is normally defined as a payment in cash or in kind, made in support of an undertaking other than the payment by the purchaser or the consumer for the goods and services which it produces. An aid is a very

77 Chatham House Special Paper, loc. cit., p. 75.

78 1977 ECR 595 — Steinicke.

79 1982 ECR 3583 — Norddeutsches Viehkontor.

similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions, which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect"[80].

In later decisions, the European Court of Justice has made it clear that it does not look so much at the purpose, but rather at the *effects* of a particular measure[81]. If the effect of a measure is to grant benefits to an undertaking or to the production of certain goods, then it should normally be regarded as a state aid, even if such a benefit was not the primary intention of the measure. Such a benefit in the case of space activities might arise for those undertakings which commercially exploit space systems. This form of exploitation is only possible because Member States contribute to the optional programmes of ESA, and because ESA develops these expensive systems for space activities. A commercial development of these systems through the use of normal means of capital subscription by private shareholders would be impossible[82].

(c) One might argue that the state aid rules are not applicable because they are not meant to cover R & D activities. Such a sweeping statement would not be true under the present state of EEC law. Two different hypotheses must be distinguished. State aids for *basic research*, whether done in universities, state laboratories or undertakings, will usually not constitute an aid because they do not have a commercial purpose or effect (c. f. also No. 58). They cannot therefore distort competition. This is the case for research programmes like Giotto. If the effect of the aid, however, is to serve the development of highly complex technological systems which later on may be exploited commercially, the state aid rules will remain applicable[83]. **43**

80 1961 ECR 1 at 19 — Steenkolenmijnen under the ECSC-Treaty.

81 1987 ECR 901 at 921 No. 8 — Deufil.

82 1986 ECR 2321 at 2345 No. 16 — Boch; cf. for a more detailed discussion Quigley, ELR 1988, 242 at 247; Müller-Graff, loc. cit. at 421.

83 1988 ECR unreported, Cases 62 & 72/87, Judgment of 8 March 1988 — Belgian glass industry.

In its communication of 11 April 1986[84] on a "Community framework for state aids for research and development", the Commission has developed some guidelines which can be applied here. It insists on the applicability of the state aid rules for R & D activities. It also insists on the due observance of the transparency rules and on a Community review procedure according to Article 93.

The following criteria have been drawn up to ensure that R & D activities, which benefit from State aids, are acceptable under Community law:

> The level of aid for basic industrial research should not be more than 50% of the gross costs of the project or programme.
>
> As the activity being aided gets nearer to the market place, i.e. covers the area of applied research and development, the Commission in its examination and evaluation of national proposals will look in principle for progressively lower levels of aid.
>
> The Commission will consider higher aid levels in cases where particular projects are recognized to be of special economic importance, linked to relevant Community projects or programmes, located in the least favoured areas of the Community, related to specific welfare services or implying very high and specific risks.

We believe that projects on space activities would certainly qualify for the last condition and would therefore allow for higher aid levels than those which the Community would normally be willing to accept. This would require, however, the observance of the review procedures under Article 93. The new rules on the Internal Market have not changed these basic objectives of Community law, but have rendered their enforcement more important: "It will be particularly important that the Community discipline on state aid be rigorously enforced", as the Commission has spelled out in its White Paper of 1985 and repeated in its paper on space activities of 1988[85].

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84 OJ C 83/2 of 11 April 1986; a detailed analysis of the Community practice can be found in Klodt et al., Forschungspolitik unter EG-Kontrolle, Tübingen 1988, showing that the EEC Commission usually had no objections if the aid was notified in due time and form.

85 White paper on the completion of the internal market, loc. cit. No. 158, repeated by Com. (88) 417 final, p. 22 as far as space activities are concerned.

The applicability of the state aid rules is not excluded by the mere fact that the procurement policy of ESA is based on an arms' length principle. Even if this is the case, the space systems developed by ESA will not be exploited by itself under commercial principles, but by undertakings in the utilization phase based on rates which may not allow a return of the invested capital into research and development of space systems. If state payments to ESA or Member State agencies under the optional programmmes are to be regarded as aids to undertakings like Arianespace, they have to be notified to the Commission and should not be paid out before the review process has started. Every payment to the contrary would be illegal and void. The Commission might order its *repayment*[86]. As of yet there is no settled case law on whether and under what circumstances cases an undertaking, having received state aid in violation of the Treaty, can invoke a protection of its legitimate expectations (Vertrauenschutz) against repayment, but recent case law shows a rather restrictive attitude of the Court of Justice[87]. Concerning ESA and state agency activities, one might argue that they had not yet been attacked or even examined under the state aid rules and that therefore undertakings could rely on the conformity of Member State contributions to the development of commercially usable space systems under the optional programmes.

(d) State aids will only be subject to Article 92 if they "distort or threaten to distort competition". This was certainly not the case when ESA started its first optional programmes because there was no Community market for space systems and hence no (potential) competition which could have been distorted at this time. One might argue that, once space systems are developed and commercially exploited, some (potential) competition will probably exist; it may than be distorted by state aids. This is especially true in areas where ESA and national agencies develop competing space systems which will be used for commercial purposes[88]. **44**

86 1973 ECR 813 at 829 No. 13 — Mining aids.

87 1987 ECR at 927 – Deufil.

88 Cf. Commission, 17th report on competition policy, 1988, No. 219; Matthies, ZHR 1988 (152), 442 at 443.

(e) In judging the conformity of state aids with the objectives spelled out in Art. 92 para 3 (c), namely the development of certain economic activities, the compatability with the Treaty must be "determined in the context of the Community and not of a single Member State"[89]. The Commission enjoys a certain discretion which will be respected by the Court of Justice. The Commission seems to be willing to specify its discretion, by making use of its powers under the R & D policy of the Single Act, in position papers and guidelines which we have already mentioned[90]. The mere fact that an international agency like ESA is still responsible for a European space policy will not prevent the Community from being active in this field, if it can prove a non-observance of the state aid rules by EEC Member States. 45

It is a matter of fact, however, as to the time and conditions under which these requirements of Article 92 are met. The crucial date may again be 31 December 1992[91].

89 1980 ECR 2671 at 2692 No. 26 — Philip Morris.

90 We again refer to Com. 88 (417) final of 26 July 1988 at 23, 34.

91 Cf. Mattera, loc. cit. Fn. 64, p. 83.

## Chapter II
## ESA CONVENTION AND EEC LAW ON EXTERNAL RELATIONS

### 1. The Framework for Analysing the Relationship Between the ESA Procurement Rules and the EEC Law on External Relations

46 The analysis of the ESA procurement rules in the context of EEC rules on completion of the Internal Market, the EEC/EFTA agreements and the GATT agreement on public procurement, has brought a clear and distinct result to light: the ESA procurement rules and the "fair-return" principle do not respect the basic rights of every EEC and EFTA undertaking to participate in public tender offers. It makes no difference whether state or international tender offers are concerned, provided that Member States contribute to the financing of the supplied products or services. A solution has been found under the auspices of the Internal Market philosophy, by which the EFTA countries could be integrated, despite remaining differences between the Treaty of Rome and the EFTA Convention. The GATT agreement on public procurement confirms the principle of non-discriminatory public procurement.

47 Infringements of EEC law, the EFTA agreement and the GATT agreement by ESA procurement rules, concern the Internal EEC as well as the inner European market, composed of EEC Member States and EFTA countries. Altogether, these are legally obliged to provide for open competitive bidding procedures on the inner European market. *But the non-compliance of the ESA procurement rules with EEC law, the EEC/EFTA and GATT agreements, do not make them invalid in relation to ESA.* ESA is an international organisation constituted under international public law. In the second chapter, a fundamental issue must be examined, namely, the right of the EEC Member States[1] to establish rules on public procurement under international law while acting within their capacity as members of ESA, these rules however deviating from the requirements of primary Community law. This essentially concerns the discrepancy between firstly, a Member States' autonomous right to shape an industrial policy within ESA (as a member of that organisation) which is based on a "fair-return" principle and falls under the scope of international public law and secondly, the diametrically opposite EEC policy of open competitive bidding.

1 Here, we are setting aside the problem of the extent to which the EFTA countries might be bound under the EFTA convention to shape a Common Commercial Policy which respects the market entry aspects.

Since the conclusion of the Treaty of Rome the EEC Member States are no longer completely free to shape their external relation policies. The Treaty provides for a Common Commercial Policy which will be developed by all Member States in order to coordinate their external relations and to harmonize the rules governing the Internal Market. The existence of a Common Commercial Policy requires an analysis of the relationship between the EEC Internal Market rules and their repercussions on the shaping of a Common Commercial Policy. Are the Member States under an obligation to apply the basic economic freedoms, and the right of entry for every EEC undertaking, to the ESA procurement rules? In legal terms: does the Common Commercial Policy determine and restrict the Member States' ability to engage themselves in international organisations which establish procurement rules deviating from that policy? And even if Member States are bound under Community law to shape a Common Commercial Policy which excludes the possiblity of providing for deviant procurement rules in the ESA Convention, it might well be that the Member States are free to do so under the rules of international public law[2]. The question then arises whether Community law can restrict the Member States' capacity to conclude binding international treaties under international public law[3].

The second chapter will therefore analyze a possible conflict arising in the procurement rules which may contradict the shaping of a Common Commercial Policy but nevertheless be permitted under international public law. The scenario of external relations in Community law differs somewhat from the clear and distinct picture provided by the rules governing the Internal Market. Member States traditionally benefit from a greater autonomy in external relations than in internal market affairs. The challenge will be to make the stringent rules on the internal market compatible with the looser principles regulating the EEC law on external relations and its interdependence on international public law, without jeopardizing the basic political objectives of the Single Act.

2 The relationship between Community and international law in case of contradicting obligations of Member States has been and still is the subject of a controversial debate in legal doctrine; see e.g. Kovar, RMC 1974, 356; Meesen, CMLR 1976, 485; Zuleeg, GYIL 20 (1977), 259 et seq.; Bleckmann, DÖV 1978, 392; Zuleeg, 1981, Gedächtnisschrift Ch. Sasse, 59 et seq.; Dowrick, ICLQ 1982, 66; we are looking for a solution in developing specific Community rules in order to determine the extension of treaties with the Community legal order; see in that sense Leenen, LIEI 1984, 93 et seq.; Zuleeg, GYIL 27 (1984), 367 et seq.

3 Cf. Zuleeg, GYIL 20 (1977), 250; Bernhardt, EuR 1983, 199 et seq.

In the search for a possible solution to the conflicting procurement rules of the ESA Convention on the one hand and the EEC Treaty on the other, there are two different approaches open in order to decide on the Member States' freedom in the ESA Convention to deviate from the Treaty of Rome: 48

- (1) on examining the rules regarding the conflict of international treaties and analysing whether the ESA procurement rules benefit from *priority* over the EEC procurement rules or vice versa; priority presupposes that it is possible to decide whether the Member States are free to involve themselves in the ESA Convention or not;
- (2) by forming a prospective solution for the conflict by elaborating the Member States' *obligation to re-negotiate* the ESA Convention in order to reconcile the divergent rules of the different treaties and achieve a long-term solution;

Relying on the priority rules mainly concerns discovering whether the subject matter of the ESA Convention and the EEC Treaty overlap[4] and if so, whether the conclusion of the ESA Convention in 1975 overrules the Treaty of Rome, concluded in 1957. This approach may be described as having a retrospective nature. Searching for the existence of *post negotiation duties* might be associated with a prospective approach. It would be short sighted to analyze the relationship between the ESA Convention and the EEC policy on external relations only with a view to the situation which existed in the seventies when the ESA Convention was concluded. It is all the more important to look at the state of development of the European Community as it stands after the adoption of the Single Act.

The dynamic extension of the EEC policy on external relations since the adoption of the Treaty of Rome requires us to analyze the possibilities of a prospective solution to the diverging procurement rules. It might well be that the Member States benefitted up to the late seventies from the inactivity of the Community in external relations, in order to formulate their policy in the ESA Convention. In other words: the Member States might have had the competence in the seventies to regulate public procurement in the ESA Convention contrary to the EEC rules, but they would not be permitted to establish the very same rules in the eighties because the Community has extended its power in external relations in the interim. 49

4 And this is not an easy question to answer, see under 4. and 5.

**50** The issues which must be considered with a view to renegotiating the ESA Convention may be grouped into three distinct legal options:

- (1) Renegotiating the ESA Convention presupposes that the ESA procurement rules interfere with the Common Commercial Policy. A tendency to answer this in the affirmative thus emphasises the Member States post-negotiation duties.
- (2) Secondly the question of shared or exclusive powers of the Community to enter into the process of renegotiating the ESA procurement rules in external relations — with the perspective of opting for a so-called "mixed" procedure of joint competence,
- (3) The potentiality of the Member States to justify the deviating ESA procurement rules under Community law by renegotiating the ESA Convention — with a view to accepting derogations from Community law until the completion of the Internal Market by 1992 at the latest.

The three options shall be explained with the overall perspective of renegotiating the ESA Convention against a socio-political background in order to explain them, before we begin on a more thoroughgoing legal analysis. This will be done with special emphasis on possible or even indirect effects of the Single Act in EEC law on external relations and on the position of the Member States as subjects under international public law.

*a) Interference of the ESA procurement rules with the EEC law on external relations*

Entering into the different perspectives and conditions for re-negotiating the ESA Convention, makes sense only if the ESA procurement rules affect EEC law on external relations as shaped and confirmed under the Single Act. Only if such an overlapping of policies exists, will the interrelationship between conflict rules on treaties and the post-negotiatiation duties of Member States have to be clarified.

(1) The Single Act has confirmed the overall mandate of the Treaty of Rome, for the Community, to elaborate a *Common* Commercial Policy on external relations. There are no provisions providing for amendments or alterations to the EEC law on external relations. Art. 30 of the Single Act concerns itself with closer cooperation in the sphere of foreign policy, but it does not affect the basic principles of a Common Commercial Policy as formulated in Art. 110 et seq. To solve the problem of establishing whether the Community has competence to regulate public procurement in the international sphere, one must look to the case-law of the European Court of Justice and the legal doctrine relevant to interpreting a system like the Common Commercial Policy. **51**

There are however some amendments made by the Single Act which have some relevance to the shaping of an EEC law on external relations. They deal with explicit powers given to the Community in newly-established policies, like R & D, (Art. 130 N) and environmental protection (Art. 130 R). Art. 130 N reads as follows:

> "In implementing the multiannual framework programme, the Community may make provision for cooperation in Community research, technological development and demonstration with third countries or international organisations.
>
> The detailed arrangements for such cooperation may be the subject of international agreements between the Community and the third parties concerned which shall be negotiated and concluded according to Art. 228".

Art. 130 R (5) reads as follows:

> "Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the relevant international organizations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which

> shall be negotiated and concluded in accordance with Art. 228. The previous paragraph shall be without prejudice to the Member States' competence to negotiate in international bodies and to conclude international agreements".

The declaration by the representatives of the Member States provides an interpretation, (in the international context) of the purpose of the newly established article:

> "The conference considers that the provisions of Article 130 R(5), second subparagraph do not affect the principles resulting from the judgment handed down by the Court of Justice in the ERTA case"[5].

In the light of the ERTA judgment Art. 130 N needs to be analyzed as to its possible effects and links with public procurement rules which are part of the ESA R & D policy. Art. 130 N might be interpreted so as to empower the Community to regulate the procurement rules internationally.

52 (2) More important than explicit changes resulting from the Single Act are the indirect effects of the Internal Market philosophy on the further development of the EEC law on external relations. Art. 113, in laying down the Common Commercial Policy, might be understood as the counterpart of Arts. 30 and 59. In terms of policy one might assume that the Internal Market will strengthen the Community's powers in developing a Common Commercial Policy. The stronger the Member States grow together in the Internal Market, the more necessary it is to act at the international level on a common basis. The Internal Market not only restricts the Member States' sovereignty with regard to all matters which affect the relation between the Member States themselves, but also the Internal Market will at the same time transform EEC policy and law in external relations. The Member States' importance will decrease in the long run and the Community's role will be upgraded as a consequence. This shift in competence will not be achieved by 1992 automatically[6], it must be understood as a constant process. The ESA Convention and the rules on public procurement must be seen and analyzed in that broader political context.

5 1971 ECR 263 at 270, concerns the exclusive powers of the Community in Common Commercial Policy, cf. No. 75.

6 The Internal Market is not self-executing, cf. No. 12.

*b) Shared or exclusive powers of the Community in renegotiating public procurement in the ESA Convention*

The option makes sense only if we assume that the ESA procurement rules affect the EEC law on external relations. Therefore, the organ which governs EEC procurement rules in external relations and which might be entitled to lead the negotiations with ESA, must be identified. It may be: 53

- the Community through the Commission and the Council i.e. the operation of exclusive power, or
- the Member States themselves (also an operation of exclusive power), or
- the parallel/concurrent power of the Community and Member States operating together.

Therefore, the question is whether the Member States are allowed to uphold their exclusive competence as recognised within ESA or are they obliged to share their power with the Community or again, have they even lost their power to the Community organs?

The Single Act provides no new incentives to the distribution of power in external relations. That is why the rules in the Treaty of Rome apply with due regard to the overall objective of completing the Internal Market by 1992. Competence is regulated in the context of the subject concerned. Our attention is directed to Art. 130 N on R & D and Art. 113 on the Common Commercial Policy and even here the text needs interpretation. Once more the Court of Justice has taken the lead and formulated the basic principles for the distribution of power in the EEC law on external relations. The Court's fundamental standpoint is that a Common Commercial Policy can only be realized under the exclusive competence of the Community[7]. However, in attaining this competence it recognises the notion of "mixed procedure" especially for the transitional period. The leadership of the Court of Justice explains the declaration by the Member States in the Single Act not to amend the principles defined by the Court in the ERTA judgment. These principles will be transferred to the procurement rules and will be integrated in a thoroughgoing legal analysis of the interrelationship between the procurement rules and R & D under Art. 130 N, and the Common Commercial Policy under Art. 113.

The stated Member State policy of respecting the legal critera which define competence in public procurement is not easily reconciled with the numerous interventions made in external relations by the Council of

7 1971 ECR 263.

Ministers at different Summit meetings. There is no precedent to be found in public procurement matters but intervention can be reported from the International Agreements on Raw Material (No. 78). The rules to be applied balance out the conflicting interests of the Community and the Member States apart from the question of distribution of power in the Treaty. Any analysis of competence in public procurement must consider the fact that questions of competence are very sensitive and must be understood outside of their pure legal context. This is all the more true with regard to the political process of renegotiating the ESA Convention.

*c) Possible justifications for derogation from primary Community law in the ESA procurement rules*

When entering into negotiations with ESA, the Member States might be tempted to justify the deviating ESA procurement rules under existing EEC law. The question is whether the Member States are entitled under EEC law to reconcile the conflicting procurement rules by exempting international tender offers from the market entry rules governing the Internal Market. If so, there would be no need to renegotiate the ESA Convention. But the question remains what kind of arguments could be brought forward to justify derogations from primary Community law.

54 The analysis of the EEC Member States and EFTA countries capacity to derogate from primary Community law or from the EEC/EFTA agreement respectively, has clearly shown that exemptions from the basic economic freedoms can be justified for non-economic reasons only. We wonder however whether such a rigid solution can be upheld within the objective of building up a European space industry which is able to compete on the world market. The question arises whether the ESA procurement rules can be justified for the sake of making the European space industry competitive. Such an approach should encompass the examination of employment policies and the regional distribution of employment as possible economic justifications for the maintenance of the "fair return" principle.

The Single Act does not consider the problem of possible economic barriers to trade as a result of justification for building up competitive European industries. Nor does it look to the long-term effects of the Internal Market on global economy. The ever growing influence of the EEC might even result in a review of EEC status within the GATT. The Single Act, outside Art. 130 A, also neglects the role of employment policy and regional distribution of employment in particular (No. 14). There are no

mechanisms available under the Single Act for coordinating regional policies of the Member States with regard to the external relations of the Community.

As in any other area of the Common Commercial Policy possible legal justifications for the Member States' efforts to use the "fair return" principle in order to protect their home industries and to guarantee job security, must be found in the Treaty of Rome. There are no explicit rules in the Treaty nor in the Single Act for reconciling the difficulties resulting from regional policies. Essentially, the Member States trust in the regulating forces of the market. This is made clear in Art. 8 C which accepts only temporary derogations from the free circulation of goods and services. Art. 8 C is certainly not applicable to the EEC law on external relations. The Treaty provides for exemptions in cases of deflection of trade, and thereby indirectly allows the protection of home industries (Art. 115), if the Commission grants the respective authorization. One could interpret Art. 115 as an attempt to uphold the primary responsibility of the Member States for employment and regional development in external relations. The similarities with the rules on state aids, Art. 92 (3) are striking (No. 41). Subsidies where allowed are bound, however, to a specific procedure.

We will examine the possibility of deducing a generally applicable principle from Art. 115, i.e. that derogations from primary Community law in the ESA procurement rules might be justified for economic reasons in order to build up a European space industry. Art. 115 would then become the counterpart of Art. 113. Its fundamentally transitional character would not undermine, but rather confirm the Community's overall mandate to shape a Common Commercial Policy within the framework of the GATT. Art. 115 would allow the Member States to uphold the ESA procurement rules till the end of 1992, but urge them to renegotiate the ESA Convention for the time after the completion of the Internal Market. **55**

## 2. Renegotiating the ESA Convention and the Importance of the Priority Decision

**55a** Our hypothesis runs as follows: Whatever the result of the application of priority rules might be, the conflict between the divergent procurement rules can only be overcome by way of negotiation procedures between the different contracting partners, the ESA and the EEC as subjects under international public law, who respect the specific obligations of EEC Member States under Art. 5 (No.19).

This must be explained more clearly. Two alternatives should be considered: firstly the ESA Convention might supersede the EEC law on external relations. Such an understanding would refute any attempt by the Community's organs to interfere with ESA activities. The completion of the Internal Market, however, and even more the overall perspective of transforming the EEC into a political union, requires the Member States to look for possibilities to reconcile the ESA Convention and the EEC Treaty, at least in the long run. The second alternative could be the converse, i.e. that EEC law on external relations supersedes the ESA Convention and requires the Member States to apply the basic rules on the economic freedoms to the ESA Convention i.e. to harmonize the ESA rules on public procurement with the respective EEC rules.

There are strong legal arguments for promoting the predominant role of renegotiating the ESA Convention as the only possible and feasible solution: the fact remains that Member States when acting as subjects of international public law are still bound to EEC law. It is well accepted that the priority rules do not lead to the nullity of the superseded treaty[8]. Member States remain bound to both treaties, the ESA Convention and the EEC Treaty. Priority, however, obliges the Member States when dealing with third parties not to refer to the agreement to which priority has been denied. Third parties, mainly the EFTA countries under the ESA Convention[9], are then entitled to claim performance of the ESA Convention even if EEC law supersedes the ESA Convention, provided that the EFTA countries are acting in good faith (No. 55g). As priority does not make the superseded agreement void, the conflict prevails and a solution must be found only by bringing all the contracting parties together. They are under a *legal obligation* to find a solution which reconciles the divergent procurement rules. It is exactly here, where the dynamics of the EEC law come into play (49).

8 See Zuleeg, loc. cit. Fn. 3, p. 248 et seq.

9 And perhaps even the ESA itself, thereto Zuleeg, GYIL 27 (1984), 369.

*a) Post negotiation duties of the Member States under EEC law*

The Single Act does not provide help for defining the scope and content of the post negotiation duties of Member States. Reference can be made, however, to general Community law, namely to Art. 5, 116[10] and 234. Art. 234 of the Treaty of Rome offers a solution to our question as far as those agreements are concerned which have been concluded by the Member States *before* the enactment of the Treaty of Rome. It begins from a "*do ut des*" philosophy: the Community is obliged to respect those agreements and not to impede their performance[11], the Member States correspondingly must use their influence to align such agreements with the basic requirements of Community law, Art. 234 para 2. **55b**

The ESA Convention was concluded *after* the enactment of the Treaty of Rome. Legal doctrine interpretes Art. 234 as being applicable to agreements concluded after 1958 by analogy[12]. The Community, however, would be bound to respect the ESA-Convention only if it (the Community) had not yet received the power to regulate public procurement in international organisations at the time the Convention was concluded. Under these circumstances the situation would be similar and comparable to the purpose for which Art. 234 has been shaped. If, however, the Community already held the competence to regulate public procurement in international organisations in 1975, the ESA Convention could not be binding on the Community, at least not under Art. 234[13]. Whatever the solution might be, the Member States would be in any case under an obligation to align the ESA Convention to the basic rules of the EEC Treaty.

10 Art. 116 concerns mostly the duty of the Member States to take at least a common position especially when the Community has not yet been transferred the power to conclude international agreements. But Art. 116 will gain more and more importance as a general rule instituting cooperation duties of the Member States under the auspices of the Community, Vedder in: Grabitz, Art. 116 Rdnr. 1, 10.

11 Cf. Vedder in: Grabitz, Art. 234 Rdnr. 4, 5.

12 Cf. Vedder in: Grabitz, Art 234 Rdnr. 20 et seq. and Petersmann in: Grabitz, Art 234 Rdnr. 18.

13 We will not go into the details of what is meant by the binding and direct effects of international agreements, cf. Zuleeg, ZaÖRV 1975, 341; Petersmann, ZaÖRV 1975, 213; Pescatore, ELR 1983, 137; Everling, in: FS H. Mosler, 1983, 173; and Pescatore, in: FS H. Mosler, 1983, 661; Everling, in: FS K. Carstens, 1984, 95 et seq.; Schilling, ZaÖRV 41 (1988), 637 et seq. The issue might be discussed at a later stage in the project for the analysis of the possibilities for undertakings to invoke the ESA procurement rules against the EEC rules on external relations.

**55c** The existence of post negotiation duties might be backed by Art. 5 (No. 19)[14]. Art.5 imposes on the Member States a general duty to contribute to the achievement of the common, or respectively the Internal Market[15]. However there is no case law available which has instituted such a post negotiation duty. There is still some uncertainty as to the scope of the duties, mainly on the question of whether the objective i.e. to develop a Common Commercial Policy suffices to implement the cooperation duties or whether the objectives of the Treaty first need to be concretized by EEC regulations[16]. Legal doctrine derives a general consultation duty for the Member States from Art. 5, which must be observed before they enter into negotiations on the conclusion of an international agreement[17]. The Court has not gone so far, but it has made clear that the Member States should refrain from entering into international obligations which might impede the Community in achieving its policy in the respective field[18]. The case-law allows us to conclude that the Member States are under an obligation not to endanger the development of a Common Commercial Policy. Therefore Member States have to avoid all activities which might aggravate the conflict between the ESA-Convention and the EEC Treaty. They are at least under a *stand-still obligation* not to increase the return coefficient as they have done in 1987 (No. 8). Such a broad notion of cooperation duties would institute post negotiation duties independent of the priority decision.

14 Although the importance of Art. 5 is recognized, there are few studies available, most of them written by German lawyers, cf. Söllner, Art. 5 EWG-Vertrag in der Rechtsprechung des Europäischen Gerichtshofs, p. 2

15 Söllner, loc. cit. p. 3

16 See the overview in Bleckmann, RIW 1981, 653.

17 Cf. Bleckmann, DVBl 1976, 483 at 487; Söllner, loc. cit. p. 59 et seq.; in the same direction Vedder in: Grabitz, Art. 234 Rdnr. 6.

18 1976 ECR 1279 at 1312, 1313 — Kramer.

*b) Importance of the violation of EEC law in 1975*

The position of the Community in renegotiating the ESA Convention might be strong, if the Member States violated Community law whilst concluding the ESA Convention in 1975. The applicability of Art. 234 on international agreements concluded after 1958 makes clear that a possible violation of EEC law depends entirely on the scope of the Community's competence to regulate public procurement in external relations at the time the Convention was concluded: **55d**

- if the Community's competence arose after 1975, the Member States would not have violated the EEC law in external relations, or, conversely;
- if the competence already existed in the early seventies then the Member States would have violated EEC law on external relations.

Possible future competence in external relations, which was *objectively foreseeable* at the time when the Member States adhered to the ESA Convention is the yardstick taken by legal doctrine[19]. Criteria have to be developed in order to determine whether foreseeabilty concerns the development of secondary Community law only or whether foreseeablity covers the development of the case-law of the Court of Justice as well. Legal doctrine takes a rather narrow view, only those actions are not objectively foreseeable which are based on Art. 235[20]. A possible development of the case-law in external relations would not exclude foreseeability. If the question of foreseeablity has to be answered in the affirmative, the Commission would even be entitled to initiate infringement procedures under Art. 169[21].

19 Cf. Petersmann, in: Grabitz, Art. 234 Rdnr. 18; Vedder in: Grabitz, Art. 234 Rdnr. 20-22.

20 Cf. Vedder, loc. cit. Art. 234 Rdnr. 21; Petersmann, loc. cit. Art 234 Rdnr. 18.

21 Vedder in: Grabitz, Art. 234 Rdnr.6.

*c) Importance of the priority rules in the process of renegotiating the ESA Convention*

**55e** The decision on who supersedes whom, the ESA Convention the EEC rules in external relations or vice versa, determines the starting position of both the Member States and the Community when it comes to renegotiating the ESA Convention.

The question of priority has to be decided according the rules on the conflict of treaties concerning different contracting parties. It has first to be checked whether the conflicting agreements provide for a clear answer on the priority question. Art. 234 of the Treaty of Rome might be understood as such a rule which reiterates the public international law principle of *pacta sunt servanda*[22]. If one accepts the application of Art. 234 to agreements concluded after 1958, priority would go together with the decision on a possible violation of Community law. If the Member States have not violated Community law, because the extension of the Community's competence in external relations was not objectively foreseeable, the ESA Convention would supersede the EEC law and vice versa. The decision on priority would be coupled with the rather sophisticated analysis of what the Member States should and could have known in 1975 on the extension of the EEC law in external relations.

One might also seek the solution of the priority question in the general rules governing the conflict of treaties in public international law[23]. The decisive question will then be whether the *lex posterior* rule is applicable to the relationship between the ESA Convention and the Treaty of Rome. As the contracting parties are not identical, the *lex posterior* rule might only apply between those EEC Member States who are at the same time member of the ESA Convention and of the Community[24]. Such an understanding, however, sets aside possible effects of the ESA procurement rules on those EEC Member States who have not joined the ESA and the Community itself. These side effects of the double engagement of ESA/EEC Member States on Non-ESA/EEC Member States explain why legal doctrine tends to deny the applicabilty of the *lex posterior* rule in conflicts with different contracting parties[25].

22 Vedder in: Grabitz, Art. 234 Rdnr. 1.

23 Which presupposes that Art. 234 cannot give an appropriate answer to the arising conflict between the ESA Convention and the Treaty of Rome; different conflict rules apply dependant on the existence or the lack of a stipulation governing the conflict, Zuleeg, loc. cit. Fn 3.

24 Zuleeg, loc. cit. Fn. 3, p. 264/265.

25 Seidl-Hohenveldern, in: FS Luther, 1978, 178 at 183; und Zuleeg, loc. cit. Fn. 3, pp. 264/265.

The solution might then be found with reference to the "political decision" the States have taken in entering into two contradictory international agreements[26]. This is not an easy category to apply. The EEC Member States by joining ESA, have made clear that they intended to maintain their power to use public procurement as a means of industrial policy, at least in the field of space activities. They have aligned the EEC law to the ESA procurement rules by providing for the necessary exemption rules in the different directives on public work and public supply (No. 35). This might be understood as the political decision to give priority to the ESA rules. The Member States, however, might run into a conflict with Community law. The Court seems unwilling to accept the Member States attempts to circumvent primary Community law by providing for derogations in secondary Community law (No. 23). It is true that the extension of the EEC law on external relations was executed by the Court of Justice against the opposition of the Member States[27] and the same kind of conflict is foreseeable on the admissability of exemption rules in the directives on public work and public supply. Consistency with EEC law can only be achieved, if the Member States accept that they are no longer politically free to set aside Community law in international agreements. They cannot escape primary Community law by providing for exemptions in secondary Community law. The Member States have adopted the Single Act, thereby confirming the rules governing the Internal Market, including the role and function of the European Court of Justice. Therefore, Member States remain bound to the EEC law, but have they really taken a "political decision" on the priority of the EEC law on the ESA procurement rules?

26 As to the role and importance of the "political decision" as an appropriate means to solve the conflict between contradictory rules in international treaties, Zuleeg, loc. cit. Fn. 3, p. 267 et seq.

27 See the analysis of Stein, Am.J.Int.L. 1981, 1 et seq. at 22 et seq.

*d) Is the EEC bound by the ESA Convention?*

**55f** Whilst the foregoing analysis of a possible violation of the EEC law on external relations and the application of priority rules seem to strengthen the Community's position in the process of renegotiation, we have to consider the possibility that the Community itself is bound by the ESA Convention. Art. 234 might be interpreted so as to oblige the Community to respect the ESA Convention and not to impede its performance. Art. 234 however, does not hinder the Community from extending its policy in the very same field and to bring the Member States post negotiation duties up-to-date[28]. That is why Art. 234 does not bind the Community to the rights and duties of the ESA Convention. Such a consequence might be possible under the case law of the Court of Justice even if the Community is not a member of an international organisation, as the Court has said of GATT[29]. The obvious contradictions between the ESA procurement rules and the EEC rules exclude such a transfer of arguments from the GATT to the ESA Convention.

*e) The role of the EFTA countries in the process of renegotiating the ESA Convention*

**55g** Our analysis has focussed so far on the role of the Member States of the EEC and the Community itself in the possible process of renegotiating the ESA Convention, without respecting the position of the EFTA countries. The arguments which the EFTA Countries can bring forward against a possible amendment of the ESA Convention will largely depend on whether they acted in good faith when they concluded the ESA Convention — although they might have already realized that there is a contradiction between the ESA and the EEC procurement rules as early as in 1975.

Art. 234 protects the EFTA countries as third states who can rely on the binding effects of international agreements which have been concluded before 1958. The application of Art. 234 to the relationship between the ESA Convention and the EFTA countries makes it necessary to analyze the EFTA countries capacities to refer to the ESA procurement rules, in the light of the state of the development of the EEC law in external relations at

28 Vedder in: Grabitz, Art. 234 Rdnr. 5

29 Vedder in: Grabitz, Art. 234 Rdnr. 17, 18; Petersmann, loc. cit. Art. 234 Rdnr. 10 et seq.

the time when the ESA Convention was concluded. Legal doctrine refers to the applicability of Art. 46 of the Vienna Convention[30]. The question then arises whether the EFTA countries operated in "good faith", a legal category which has to be weighed against "objectively foreseeable". Can both categories be put on an equal footing or should the EFTA countries be given more "freedom" than the Member States (No. 74)?

30 Vedder in: Grabitz, Art. 234 Rdnr. 20-22; Petersmann, loc. cit. Art. 234 Rdnr. 18.

### 3. Competence of the EEC to Regulate the ESA Public Procurement Rules under R & D, Art. 130 N

The Member States' post negotiation duties are dependant upon the Community's competence of regulating the ESA procurement rules under the scope of Art. 130 N (No. 50). We are looking at a possible link between R & D activities, the rules on public procurement and the "fair return" principle. Such an approach presupposes familiarity with the main principles determining the ESA R & D policy. Only if such a link exists, does the question have to be raised as regards time when the Community's competence arose, namely before or after 1975.

*a) Preliminary definition of the ESA activities — R & D only?*

The European Space Agency figures under the heading of an international research and development organisation. We wonder whether that presumption is correct and do not hesitate to strike a critical note on the pretended non-commercial character of ESA's R & D policy. The conclusion can be drawn from the Convention itself.

**56** (1) First criterion for the shaping of ESA activities: the *purpose* of the Convention as defined in Art. II:

> "The purpose of the agency shall be to provide for and to promote for exclusively peaceful purposes co-operation among European States in *space research* and *technology* and *space application*, with a view to their being used for scientific purposes and for operational space applications systems,
>
> a) by elaborating and implementing a long-term European space policy, by recommending space objectives to the Member States and by concerting policies of the Member States with respect to other national and international organisations and institutions;
>
> b) by elaborating and implementing activities and programmes in the space field;
>
> c) by coordinating the European space programme and national programmes, and by integrating the latter progressively and as completely as possible into the European space programme, in particular as regards the development of applications satellites;

d) by elaborating and implementing the industrial policy appropriate to its programme and by recommending a coherent industrial policy".

Art. V distinguishes, as already noted (No. 4), between two kinds of activities: mandatory and optional ones. Mandatory activities may be summed up under the heading of *non-commercial* activities with a mere scientific character to the forefront of any future commercialisation. Optional activities are all those research activities which are directed to the further *commercial* use of the findings (No. 2-7).

(2) The second criterion which shapes ESA activities is the attention it devotes to *industrial policy*[31]. The spirit of the industrial policy is ambiguous: it pretends to cover both fields of activities: basic research *and* commercial application, but indeed puts emphasis on the *optional* programmes; it underlines the necessity of competitive bidding as an essential tool for achieving international competitiveness, but it develops at the same time specific rules on "fair return" for the Member States' financial contributions. The "fair return" principle should be understood as a sort of hinge which connects basic research with application of the space technology. **57**

(3) Conclusion: In terms of policies it seems difficult to associate the given concept of space activities entirely with the R & D sector. It is inseparably linked to an industrial policy concept favouring specific regional needs of the Member States and justified by financial contributions. It is at the same time related to trade policy in broad terms, as the "fair return" principle affects the free circulation of goods and services within the territories of the Member States to the Convention. Although the Convention undoubtedly aims at coordinating R & D policy, it cannot be regarded as a body which restricts its activities to this particular sector of policy. This diversity of policies needs to be analysed when it comes to considering the Community's competence in the field of R & D. **58**

31 See for a distinct description of the industrial policy Nos. 2-11.

*b) Explict and implied powers of the Community in the R & D sector*

What lies behind the distinction between explicit and implied competence of the Community in external relations ? Explict powers mean those provisions of the Treaty which literally enable the Community to take action in the external relations. Implied powers are those which may not be derived directly from the Treaty but which result from the context laid down by the provisions of the Treaty.

**59** (1) Until its insertion in the Single Act, the Community was not vested with *explicit* powers in the R & D policy, Art. 130 N. One might be tempted to conclude that R & D remained in the hands of the Member States until the adoption of the Single Act. The only — *explicit*, if we may say so — possibility for regulating R & D before the insertion of Art. 130 N came from Art. 100/235. Art. 100/235 serve as a general basis for all those fields of activities which are not directly covered by the Treaty, but which the Member States agree to have regulated in a common way. As the Community has not made use of its competence in Art. 100/235 the question remains whether the ESA activites are covered by Art. 130 N.

The importance as well as the scope of application of Art. 130 N are not yet clear. In its communication of 11 April 1986 the Commission has developed for the first time some guidelines on the R & D policy in the context of state aids (No. 43). The multiannual framework programme as mentioned in Art. 130 I has not yet been elaborated on. The different provisions, namely Art. 130 F and G are very broad and one might assume that the ESA activities could come under the EEC R & D policy one day. At the moment it is far too early to give more than a preliminary statement of the EEC's possible role in the R & D field on space activities[32].

32 In a broader context, A.Fuchs, Kartellrechtliche Grenzen der Forschungskooperation, 1988.

(2) In the meanwhile our attention should focus on the question of whether the EEC's competence to regulate R & D could result *implicitly* from the Treaty[33]. All provisions of the Treaty relating to R & D and public procurement could serve as a possible basis. The question is not an academic one, on the contrary, it is highly political. It became practical in the early seventies. The Member States and the Council, as their representative organ, defended the idea that the Community should have power only as far as the Treaty *explicitly* provided for that contingency. The intention was clear: the Member States — through the Council — wanted to restrict the Community's competence in external relations and at the same time to safeguard their sovereignty. The Commission's view on the insertion of *implied* powers in external relations beyond the rather narrow reading of the Treaty, started from the idea that the Community was the competent organ to represent the Member States in external relations and to shape a Common, in the direct sense of the word, Commercial Policy whenever the Treaty requires even implictly for such a coordinated approach, in order to realize the idea of a common market. 60

The Commission's view was confirmed by the ERTA-judgment already in 1971: "Such authority (to enter into international agreements H.-W.M.) arises not only from an express conferment by the Treaty — as in the case with Art. 113 and 114 for tariff and trade agreements and with Article 228 for association agreements — but may equally flow from other provisions of the Treaty and measures adopted, within the framework of those provisions, by the Community institutions"[34]. A possible Community power for regulating R & D public procurement in the ESA Convention, besides the explicit powers given under the Single Act, Art. 130 N, could theoretically be deduced from quite a number of the Treaty's provisions. In other words: the ERTA judgment allows the shaping of R & D in external relations outside the explicit powers in the Treaty of Rome.

33 Stein, loc. cit.

34 Case 22/70, 1971 ECR 263 at 274, No. 16 — ERTA.

*c) Implied Community powers for regulating R & D under Art. 30/59*

A suggested operational basis could be the Community's jurisdiction under *primary Community law: Art. 30 and 59.* These provisions establish the common, or respectively, Internal Market. In relation to R & D, the question following questions have to be raised:

- (1) whether the powers given to the Community under Art. 30 and 59 may cover or may have covered activities in the R & D sector because such measures are *inherently bound to the free trade of goods or services* and, if so,
- (2) whether or not the implicit competence deduced from Art. 30/59 comprises the regulation of *R & D in external relations.*

**61** (1) It has been shown that the scope of application of Art. 30 and 59 in the case-law of the Court of Justice cannot be limited to measures *directly* restricting the free circulation of goods and services (Nos. 15-20). For this reason, all those R & D measures could fall within the ambit of Art. 30 and 59 which only *indirectly* effect the free trade of goods and services. The ESA procurement rules as embodied in its industrial policy, form the basis of the whole ESA Convention. The completion of the optional as well as the mandatory programme is bound by these rules (Nos. 3-4). We might therefore understand the ESA procurement rules as being part of the R & D policy. In this capacity they affect the free trade of goods and services and come under the scope of application of Art. 30 and 59 (Nos. 15 ss.). Such a verdict does not cover the ESA R & D policy as a whole. It concerns only the procurement rules and the "fair return" principle as an integral part of ESA's R & D policy.

**62** (2) It remains to be seen whether Art. 30 and 59 are the appropriate provisions to apply to the EEC rules on public procurement in external relations. As we have stated earlier, Art. 30 and 59 have Art. 113 as their counterpart in the EEC law on external relations (52). We are reluctant to deduce a Community power to regulate public procurement as part of the R & D policy, based on Art. 30 and 59 in connection with Art. 100 A. Such an understanding would lead to an overlapping of the scope of application of Art. 30 and 59 on the one hand and Art. 113 on the other. Although the ESA procurement rules form an integral part of the R & D policy, we assume that the emphasis must be put on the commercial effects of these rules. That is why the solution must be found in the interpretation of Art. 113 and not in a further extension of Art. 30 and 59.

(3) Conclusion: The analysis has made clear that the powers given to the Community under Art. 30 and 59 cover activities in the R & D sector, but they do not comprise the implicit competence of regulating R & D in external relations. This might be different once the Internal Market has been completed. The overall importance of Art. 30 and 59 could then be used to align the notion of a "Common Commercial Policy" with the meaning given to "measures having an equivalent effect". Such a perspective might have far-reaching effects on the concept of R & D beyond the attention devoted here to the procurement rules as part of the ESA's R & D policy. As the Community does not have the implict competence deduced from Art. 30/59 to regulate R & D in external relations there is no need to discuss the consequences of an application of Art. 234, and mainly the question of what the Member States should have known when concluding the ESA Convention in 1975. 63

## 4. Competence of the EEC to Regulate the ESA Procurement Rules under the Common Commercial Policy?

The Member States' post negotiation duties are dependant upon the Community's competence to regulate the ESA procurement rules under the Common Commercial Policy. The ESA rules on public procurement could come today (or could have already come in 1975) under the Community's competence in regulating the Common Commercial Policy, Art. 113. In the latter case priority for the ESA procurement rules would be denied and the Community would be in a strong starting postion in the process of renegotiating the ESA Convention. If the ESA procurement rules, however, supersede the Common Commercial Policy, the Member States would be at least under an obligation to align the ESA Convention to the Treaty of Rome provided that the Community has been transferred the competence after 1975. Our analysis is limited to the ESA procurement rules and sets aside all those commercial activities of ESA which might also fall into the ambit of Art. 113[35].

Art. 113 is the key provision on external relations. The Common Commercial Policy does not distinguish between goods and services. Seen as a counterpart to Art. 30 and 59 the Common Commercial Policy should cover the rules on entry under Art. 30 as well as the rules on the freedom to provide services. Only such an understanding could encompass all phases of contracts concluded in the realization of the optional programme (Nos. 5-7). We will have to examine whether the Common Commercial Policy can be understood and interpreted so as to comprise services (No. 70).

The real problem in the interpretation of the Common Commercial Policy concerns the lack of case-law similar to Art. 30/59 — which helps to shape its meaning. There are only some ten judgments dealing with the Common Commercial Policy. It is true that most of them are quite outspoken and require acceptance of the rulings laid down as "acquis communautaire" — basic principles valid far beyond the subject at stake. This handful of judgments cannot yet be regarded as a well developed concept on external relations. The trends, however, are evident in the case-law of the Court of Justice, and they permit a definite response to the question of who holds the competence.

The analysis will be done in three steps: first, to examine whether the ESA procurement rules interfere with the Community's competence in Common Commercial Policy. Here we have to consider the importance of ESA's R & D activites in relation to Common Commercial Policy. Put

35 Namely those mentioned under Nos. 5-7.

simply: are the Member States allowed to escape the Community's jurisdiction in the Common Commercial Policy by referring to the R & D character of the ESA activites? The second step concerns the role and importance of the exemptions provided in the different directives on public work and public supply. These exemptions might provoke the argument that the Community's competence in regulating the Common Commercial Policy under primary Community law can be shaped and restricted by exemption rules of secondary Community law. The third step evaluates the option for the Member States to reject the application of Art. 113 by pointing out that the ability of the Community to assume competence on international agreements in the space sector depends on the preceding enforcement of internal rules relating to the matter contemplated. Last but not least and provided that the Community holds the competence, the date of the transfer from the Member States to the Community has been determined in the light of the meaning given to the application of Art. 234 for international agreements concluded after 1958.

*a) Scope of the Community powers — Common Commercial Policy and the ESA procurement rules*

Art. 113 gives a very broad interpretation of the Common Commercial Policy, mainly referring to the EEC's role in reducing customs tariffs and barriers to trade in order to enable the free circulation of goods and services world-wide. The Court and legal doctrine facilitates the integration of procurement rules within the Common Commercial Policy by maintaining a broad concept of the latter. Member States, however, have made and are still making efforts to narrow down the notion of the Common Commercial Policy, in order to protect their own competences. The conflict which arises, and which we must consider, concerns the scenario of a proper understanding of the Common Commercial Policy.

65 (1) The Council and individual Member States wished to restrict the Common Commercial Policy to measures reducing customs tariffs[36]. Such an understanding of the Treaty would exempt the procurement rules in the ESA Convention from the scope of Art. 113. The Court of Justice has rejected attempts to reduce the scope of application of Art. 113 in opinion 1/75[37]. The Court gives a broad notion to the concept of the Common Commercial Policy which must have "in the Community sphere a meaning which cannot be construed more narrowly than in the context of the international action of a State and which no doubt covers export policy, including the matters of export credits which were at stake here"[38].

66 (2) Opinion 1/75 has triggered off a far reaching conflict between the Commission and the Council on the scope of the Community power in the Common Commercial Policy[39]. The Commission began with the idea that Art. 113 covers all measures being a specific *instrument* to regulate international trade[40]. The Council on the contrary concentrated on the *purpose* and aim of the measure. It falls therefore within the ambit of Art. 113, if it affects the volume and the patterns of trade. Transferring this to the ESA Convention: following the Commission's interpretation the commercial rules on procurement and "fair return" would probably be considered as *instruments* for regulating international trade; whereas according to that of the Council, one might argue that the very same rules are not covered by the Common Commercial Policy because their *purpose* has never been to impede international trade.

36 Cf. Gilsdorf, Die Grenzen der Gemeinsamen Außenhandelspolitik, 1988, p. 8 with references in Fn. 10.

37 1975 ECR 1355 at 1356 — Understanding on Local Costs Standards.

38 Part B, 1 of the opinion, Pescatore, CMLR 1979, 615 at 621.

39 Cf. Gilsdorf, loc. cit. Fn. 36, p. 5 et seq.; Timmermanns, La Libre Circulation des Marchandises, 1986 p. 94.

40 Cf. Ehlermann, EuR 1982, 285.

The political implications of the diverging attitudes held by the Commission and Council are reflected in opinion 1/78[41]. The Commission had requested to be informed "whether the international agreement on rubber comes as a whole or at least in essentials within the sphere of the "Common Commercial Policy" referred to in Article 113 of the Treaty "[42]. The Council argued that Art. 113 should not be interpreted so as to render meaningless other provisions of the Treaty, in particular those dealing with *general economic policy*, including the supply of raw materials within the power of the Member States and for which the Council has only, under Article 145, a power of "co-ordination"[43] and more specifically..." the agreements contain elements of "non-reciprocity" which are typical for *development aid* (policy)"[44]. The Court clearly rejected any attempt by the Council to narrow down the scope of Art. 113 by construing links between *commercial policy* and *development problems*: 67

> "It is not possible to lay down, for Art. 113 of the EEC treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms such as appear in the agreement envisaged. A common commercial policy understood in that sense would be destinated to become nugatory in the course of time. Although it may be thought that at the time when the Treaty was drafted liberalization of trade was the dominant idea, the Treaty nevertheless does not form a barrier to the possibility of the Community's developing a commercial policy aiming at a regulation of the world market for certain products rather than at a mere liberalization of trade[45]. Art. 113 empowers the Community to formulate a commercial policy based on uniform principles thus showing that the question of external trade must be governed from a wide point of view and not having regard to the administration of precise systems such as customs and quantitative restrictions. The same conclusion may be deduced from the fact that the enumeration in Art. 113 of the

41 1979 ECR 2871 — International Agreement on Natural Rubber.
42 Loc. cit. No. 37.
43 Loc. cit. No. 39.
44 Loc. cit. No. 40.
45 Loc. cit. No. 44.

subjects covered by commercial policy... is conceived as a non-exhaustive enumeration..."[46].

Then the Court refuted the Council's attempts to withdraw the Community's competence by referring to the exclusive competence of the Member States in the *general economic policy*:

"... the considerations set out above[47] form to some extent an answer relating to the distinction to be drawn between the spheres of general economic policy and those of the common commercial policy since international co-operation would be confused with the domain of general economic policy. If it appears that it comes, at least in part, under the common commercial policy, as has been indicated..., it follows clearly that it could not, under the name of general economic policy, be withdrawn from the competence of the Community"[48].

The opinion lends the impression that the Court is willing to follow the Commission in a wide-embracing understanding of the Commercial Policy per Art. 113. The Court rejects the Council's intention of focussing entirely on the purpose of the respective measure, but on the other hand does not consider this approach to the purpose of a measure, to be meaningless[49]. The Court of Justice, however, does not go as far as the Commission. The Commission's interpretation would lead to an extremely broad notion of the Common Commercial Policy covering all measures which only indirectly affect the international trade like regulations on health, safety and the environment[50].

**68** What does the Opinion on the International Agreement on Natural Rubber contribute to the question if the commercial rules of the ESA Convention come under the scope of Art. 113? The extensive analysis of EJC case-law makes clear that:

— *The Member States, whilst negotiating the ESA Convention, cannot evade the scope of Art. 113 by simply referring to the R & D purpose of the agreement which is not yet covered by the Treaty.* The competence newly

46 Loc. cit. No. 45.

47 Loc. cit. Nos. 44/45.

48 Loc. cit. No. 48.

49 Cf. Timmermanns, loc. cit. p. 95.

50 Cf. Gilsdorf, loc. cit. p. 19. and Timmermanns, loc. cit. with reference to Ehlermann, EuR 1982, 285-287.

established in Art. 130 N underlines our understanding of the dynamic character of the Common Commercial Policy as a Community.

— *The "fair return" principle and the restrictions on the competitive bidding affect the Community's competence under Art. 113.* The case law of the Court of Justice allows us to draw such a conclusion even if the Member States have not explicitly aimed at influencing the international trade by laying down provisions on fair return of the funds invested and on the bidding procedure.

— It might well be that the Member States of the ESA Convention pursue the objective of establishing, at the same time, a common industrial policy to coordinate space activities, which as a whole[51] is still outside the Community's competence. *The cumulation of policies does not lead to a withdrawal of the Community's competence*[52]*, if only parts of the activities come under the jurisdiction of Community law.*

(3) Although the case-law leaves no doubt as to the Community's competence, the internal conflict between the Commission and the Council on the scope of Community power in external relations is far from being solved. It might come up again if the Commission asks the Council for a mandate to enter in negotiations with the ESA. The Council's intention is to escape the broad notion of Art. 113 as presented at the Court of Justice by basing measures concerning external relations on Art. 235[53]. The Council's approach is based on the understanding that only those measures whose explicit *purpose* is to regulate international trade actually concern the Common Commercial Policy. By referring to Art. 235, the Council seeks to withhold its power of defining the scope of the Common Commercial Policy. The Commission is not willing to accept the Council's policy of requiring unanimity, and has decided to refer the matter to the Court of Justice[54]. **69**

51 Including regional distribution of employment, No. 14.

52 Cf. Opinion 1/78 1979 ECR 2871.

53 Cf. Timmermanns, loc. cit. p. 95 with reference to Directive 83/129.

54 1987 ECR 1493; thereto Gilsdorf, loc. cit. p. 2.

70 (4) One problem remains to be solved: phase A and B under the industrial policy of ESA must be regarded as *service contracts* (Nos. 5-7). The issue then arises as to the extent to which trade and services and the trade in goods must be differentiated in the regulation of the Common Commercial Policy. Since the Court has not, until now, ruled on the issue, it might well be the case that a similar discussion commences, as with the meaning of the Common Commercial Policy with regard to international trade in *goods*. The integration of services in the Uruguay-round is, however, too strong an argument to assume that the Council would resuscitate its' old concept of the Commercial Policy as a mere tool for reducing customs. There seems to be a common preparedness in this doctrine, to ensure integration of *services* within the scope of Art. 113[55]. Services should fall into the ambit of Art. 113 as far as the Community has vested powers to regulate internal trade in services.

*b) Scope of the Community powers — the Common Commercial Policy and the exemptions in the directives on public work and public supply*

71 There is much to be said for the application of Art. 113 to the commercial activities of ESA because of its trade-related character, namely the procurement rules. This leads to the assumption that the EEC holds the competence to regulate public procurement under the Common Commercial Policy, at least today. Member States, however, could reject a possible application of Art. 113 by pointing out that the ability of the Community to assume authority for procurement rules in the space sector internationally, contradicts the exemption rules in the different directives on public work and public supply. The internal conflict between the notion of a Common Commercial Policy and the exemption rules in the directives has far reaching effects on the distribution of competences between the Member States and the Community. It predetermines the position of the Member States and the Community in the renegotiation of the ESA Convention.

Two alternatives should be distinguished: either the Member States are free under EEC law to define the scope of application of Art. 113 by way of exempting international public procurement from the Common Commercial Policy or Member States are bound to the primary Community law as defined by the Court. Their only opportunity of escaping the

55 Cf. Timmermanns, in: Liber Amicorum Pierre Pescatore, 1987, 675-689; in the same sense Gilsdorf, loc. cit. p. 28 et seq.; see also Lauwaars, in: J. Schwarze (ed.) Discretionary Powers in the Field of Economic Policies and their Limits under the EEC Treaty 1988, 73 at 80 et seq.; and Hilf, in: J. Schwarze, loc. cit. 1988, 91 et seq.

applicability of the EEC rules on the Common Commercial Policy would then be to submit the exemptions provided for in the directives to the justification procedure of Art. 115. In the first alternative Member States can use secondary Community law to maintain their competence in regulating the ESA procurement rules, in the second alternative Member States are bound to the primary Community law even if they try to escape its grasp by setting into motion the authorization procedure of Art. 115. Competence has then been transferred to the Community.

(1) The conflict has not yet been discussed in the law on external relations[56]. We should however remember the Court of Justice case-law on Art. 30, mainly the two famous judgments Dassonville and Cassis-de Dijon. Here the Court has given a very broad interpretation of "measures having equivalent effect", but has at the same time extended the opportunities for the Member States to justify possible derogations from Art. 30 beyond the rather narrow scope of Art. 36. In the light of the rulings laid down for the regulation of market entry rights to the Internal Market, we should consider a solution for the law on external relations.

(2) A long term perspective must reconsider the categories under which the scope of application has been discussed so far. The conflict between the Commission and the Council, on whether the purpose of a certain measure or rather its nature as an instrument should decide on the applicability of Art. 113 seems to have reached a deadlock. The Court is well advised when it avoids entering the conflict on the very same categories. The Court starts from the basic idea that only a *Common* Commercial Policy can implement the objectives of the Internal Market. It is exactly this relationship between the rules on the Internal Market and the rules on external relations which has been used in the legal doctrine as a starting point for defining the scope of application of Art. 113.

Gilsdorf[57] links the content of the Common Commercial Policy to the ongoing process of completing the Internal Market. The Common Commercial Policy should be seen in the overall framework of the Treaty. Timmermanns[58] defines the decisive question in the following way:

> "La question de savoir si la notion de la politique commerciale commune ne devrait pas être définie en tenant compte des particularités de la division des

56 With the exception of Vedder, in: Grabitz, who mentions the Member States' capacities to align contracting international agreements by making use of secondary Community law, Art.234 Rdnr. 5 et seq.

57 1988, loc. cit. p. 9/10.

58 Loc. cit. p. 96.

compétences entre la Communauté et ses Etats membres sur le plan interne mérite d'etre approfondie. . ."

Both authors pursue a common objective: they consider that the competence in external matters should be coextensive with the Community's powers for internal purposes. This idea as expressed in the Latin phrase: *in foro interno, in foro externo* dates back to 1953[59]. It would lead to a parallelism of the Community's powers in regulating the Internal Market and shaping external relations. The same thinking can be found in the Single Act Art. 130 Q and N. It confers powers on the Community to regulate R & D in the Internal Market, Art. 130 Q and in external relations, Art. 130 N.

**72** What should be understood by "parallelism"? When has the moment arrived for the Community to claim its power to regulate external relations? Is it on the establishment of a procurement policy for the Internal Market in Directive 77/62[60] or alternatively, after adopting the Council Decision 80/271[61] concerning the conclusion of the Multilateral Agreement or again after publishing the Council Resolution of 22 July 1980[62] based on Art. 113 (No. 37) concerning the access to Community public supply contracts for products originating in third countries?

The Directive 77/62 regulated procurement for public supply in the Internal Market for the first time. The Decision 80/271 approves inter alia the GATT agreement on public procurement. The Resolution of 22.7.1980 intends to safeguard the interests of the Member States' producers by enabling them to participate in public contracts awarded by the various third countries[63]. The idea of parallelism requires engagement of the Community in external relations. That is why we would assume the Community's competence existed under Art. 113 in 1980. The two measures taken by the Community indicate that it has definitely decided to integrate the regulation of public procurement when shaping a Common Commercial Policy in 1980.

59 Cf. Pescatore, CMLR 1979, 615 et seq. at 618, Fn. 5 with reference to the forerunner of the doctrine, Paul Reuter.

60 OJ L 13/34, 15.Jan.1977

61 OJ L 71/1, 17.Mar.1980.

62 OJ C 211/2, 19.Aug.1980.

63 We are not going into details here.

c) *Virtual capacity or factual capacity of the Community to regulate public procurement in the space sector*

The last opportunity for the Member States (so far) to invoke their competence in regulating the ESA procurement rules could be through claiming that the Community has assumed the power to regulate public procurement but that it has waited until 1988 to formulate a procurement policy in the space sector which is still very vague and does not yet indicate what the Community's objectives are (No. 40). Briefly: in such a situation the Member States remain competent for the regulation of public procurement in the space sector. **73**

In the Kramer case[64] the parallel problem arose. The Court concluded that "the Community has authority to enter into international commitments"[65], although it has not made use of the powers provided for in the framework of the North-East Atlantic Fisheries Convention[66]. Perhaps the most outspoken dictum of the court relating to the problem of a *virtual* versus a *factual* power of the Community under Art. 113 can still be found in opinion 1/76[67]:

> ". . . 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 international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection[68].
>
> This is particularly so in all cases in which internal power has already been used 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. . ., the power to bind the Community vis-a-vis third party 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

64 1976 ECR 1279 at 1305.

65 Loc. cit. Nos. 30-33.

66 Pescatore, loc. cit. Fn. 59, p. 620.

67 1977 ECR 741 at 754, — Draft agreement establishing a European laying-up fund for inland waterway vessels.

68 Loc. cit. No. 3.

> international agreement is, as here, necessary for the attainment of one of the objectives of the Community"[69].

The Court has neither withdrawn nor corrected its view, although the occasions on which the Court could have acted were rather limited. Pescatore concludes "that the existence of a virtual capacity is sufficient in this respect, even if it has not yet been exercised for internal purposes"[70]. Based on the case-law in the light of the interpretation given to the notion of Common Commercial Policy, the objections which could be raised by the Member States remain meaningless. The non-exercise of the Community's competence on public procurement in the space sector does not lead to an automatic re-transfer of competence to the Member States.

*d) The Community's competence in regulating the procurement rules on an international level and the importance of Art. 234*

Our analysis has demonstrated a constant expansion of the Community's competence in the Common Commercial Policy. Since 1980 we must assume that the Community is competent to regulate public procurement at an international level. The Community can build up its strategy in the foreseen difficulties with the Member States on a possible mandate to renegotiate the ESA Convention on this date. But can the Community go a step further and blame the Member States for having violated EEC law whilst concluding the ESA Convention because the emergence of the Community's competence in the Common Commercial Policy to regulate public procurement was *objectively foreseeable* for them? (No. 55d). Is the Community even entitled under international public law, to claim priority for the EEC law on external relations over the ESA procurement rules? (No. 55e).

69 Loc. cit. No. 4.

70 CMLR 1979, 621, sceptical Gilsdorf, loc. cit., see furthermore Groux, CDE 1978, at 32; Philip, RMC 1978, at 62.

(1) Foreseeability requires us first to determine that which should have been foreseen by the Member States, the extension of the case-law of the Court of Justice in external relations or the development of secondary Community law, mainly Council Decision 80/271 and the Council Resolution of 22 July 1980 (72). There is no precedent on this particular problem to date. We wonder whether it is possible to separate the development of primary Community as exercised by the Court from the development of secondary Community law. The Commission might feel encouraged by basic jugdements of the Court and initiate new directives or decisions under Art. 100, 113 and 235. Foreseeabiltiy should be coupled with the development of the Common Commercial Policy as a whole. It seems to be somewhat arbitrary to connect the foreseeability to the choice of the regulatory means and to the legal basis on which there were based. 74

Then, however, it comes down to determining the precise date from which Member States could have been aware of the extension of the Common Commercial Policy as exercised by the the Court. The Convention was concluded in 1975 and ratified in 1980. This appears to be the first problem, as both dates might be considered appropriate to serve as a yardstick[71], and the second follows suit. The predictability of the case-law development requires us to assess the different judgments and to draw them together with the Member States capacity to arrive at the right conclusions. Only then would we be in a position to decide whether the Member States have infringed the rules on the Common Commercial Policy whilst negotiating the ESA Convention.

Legal doctrine which has introduced the idea of applying Art. 234 to agreements concluded after 1957 does not, by analogy, consider the evolutionary character of the Common Commercial Policy. The rules of the Treaty are in a constant process of change and extension. If 1980 should be the point of departure, Member States must be considered to have violated EEC law when ratifying the Convention. If 1975, the date of the conclusion of the Convention, should be the starting point, a possible infringement of EEC law would have to be discussed in the light of the ERTA judgement which was handed down in 1971[72]. To our mind such a retrospective analysis is not very helpful, not even in light of renegotiation the ESA Convention. The Community could strongly invoke its regulatory competence in respect of the procurement rules in external relations since 1980.

71 Zuleeg, loc. cit. Fn. 3, p. 262 et seq., pleads for the date of the conclusion (Annahme), in order to the decide the question of priority.

72 1971 ECR 263.

(2) What has been said with reference to a possible violation of the Member States' duty not to impede the achievement of the development of a Common Commercial Policy, is grosso modo valid for the deciding whether the ESA Convention supersedes the EEC law or vice versa. Art. 234 as a rule which governs the decision on the contradictory treaties would lead to the same result. Priority is bound to the date since the Community's competence in regulating public procurement in external relations was objectively foreseeable (No. 55e). The reference to the "political decision" does not very much enlighten the problem of priority. The analysis of the development of the Common Commercial Policy has underlined the predominant role of primary Community law in external relations as shaped by the Court of Justice. That is why Member States efforts to exempt the ESA procurement rules from the application of primary Community law, can not be used as an argument to back political decisions which indicate priority of the ESA rules over the EEC rules. Our construction of the development is as follwos: Member States when entering the ESA Convention have taken the political decision to establish within ESA procurement rules which deviate from the EEC law in order to guarantee the proper fonctioning of the European Space Agency. This political decision has come more and more under pressure from the Community and the adoption of the Single Act must be understood as some kind of a revision of the earlier decision. Only such a perspective enables the Member States and the Community to reconcile the divergent rules in the ESA Convention and the EEC law in external relations.

(3) Once the issue of renegotiating the ESA Convention has emerged the question arises whether the EFTA countries can reject a revision of the ESA procurement rules. Their legal arguments might be built on the rule of good faith as laid down in the Vienna Convention (No. 19)[73]. Here again the problem arises of the understanding to be given to "good faith". It might be considered whether the EFTA countries are bound by the EEC/EFTA agreements to accept the extension of the Community's competence in external relations. Such a reading of the agreements seems to be possible as they profit from the concept of an inner European market which guarantees access to all undertakings irrespective of whether they are located in an EEC Member State or an EFTA country. Then, however, one might argue, they have to bear the burdens which result from the growth of the Community's powers in public procurement. This seems to be all the more true as the EFTA countries are linking their economy more and more to the idea of having one Inner European and not simply one Internal Market.

73 Cf. Petersmann in: v.d. Groeben et al., Art. 234 Rdnr. 18.

## 5. Exclusive or Shared Powers for Regulating Public Procurement at the International Level

The applicability of Art. 113 entails as a possible consequence that the Community must step into the renegotiation procedure of the ESA Convention. What does that mean? Has the Community become the only competent organ under Community law, or are Member States eliminated from the procedure or has a joint competence been formed? Two possiblities must be clearly distinguished to determine the distribution of powers: 75

(1) the ESA Convention, as concluded in 1975, may involve matters simultaneously belonging to the jurisdiction of the Community, the Common Commercial Policy, and other issues coming, at least nowadays, under the authority of the Member States (R & D). The Convention does not respect the dividing line between Community and national spheres as delineated by the Treaty and by practice. In such a case, resort has to be made to a "mixed procedure"[74] according to which the Community and its Member States appear jointly as contracting parties;

(2) once the jurisdiction of Community law has been established and this conclusion must be drawn from our analysis insofar at least as the Common Commercial Policy is concerned, it must be inquired whether the existence of the Community power excludes a concurrent or parallel power of the Member States. "This is the most touchy issue of the whole complex" of external relations[75]. Though Member States could rightfully claim respect for their own jurisdiction i.e. in the R & D sector, they may not necessarily claim to share competence in the ESA Convention or such parts of the Convention as come under the jurisdiction of the Community i.e. Common Commercial Policy.

The case law of the Court of Justice on the so called mixed procedure as well as on the exclusive power of the Community shows a common tendency. The first statements, set out in the early seventies start from the distinct perspective of restricting mixed procedures and to extend the

74 Bleckmann, EuR 1976, 301; Meesen, EuR 1980, 36; Behr, EuR 1983, 128; Stein, Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Gemeinschaft, 1986, p. 84.

75 Cf. Pescatore, loc. cit. 622.

Community's exclusive powers[76]. Later cases indicate a growing preparedness to respect the Member States authority in external relations and to come to joint solutions.[77]

*a) Exclusive competence of the Community in regulating public procurement*

76 In the ERTA judgment[78] the Court, on concluding that the subject-matter of the contemplated agreement falls within the ambit of the Community, says:

> "These Community powers exclude the possiblity of concurrent powers on the part of the Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law"[79].

In its Opinion 1/75[80] the Court reiterated its broad and outspoken interpretation of the Community's competence in external relations:

> "... It cannot therefore be accepted that, in a field such as that governed by the Understanding (on Local Cost Standard) in question, which is covered by export policy and more generally by the Common Commercial Policy, the Member States should exercise a power concurrent to that of the Community, in the Community sphere and in the international sphere. The provisions of Articles 113 and 114 concerning the conditions under which, according to the Treaty, agreements on commercial policy must be concluded show clearly that the exercise of concurrent powers by the Member States and the Community is impossible"[81].

The judgment triggered off a flood of comments, also critical ones on the exclusive nature of the Community's competence in the Common Commercial Policy. In the late seventies one might assume an acquis

76 Opinion 1/76, 1977 ECR 741 at 754 — Draft Agreement establishing a European laying fund for inland waterway vessels and; and to confer the exclusive power in external relations to the Community Judgment of 1971 ECR 263 at 270 — ERTA.

77 According to Weiler, in: O'Keefie/Schermers, Mixed Agreements 1983, 35 at 83: "mixed agreements are apt to bind the main actors, Community and Member States, and make the European Foreign Policy more effective and thereby more coherent".

78 1971 ECR 263 at 270.

79 Loc. cit. No. 31.

80 1975 ECR 1355 at 1356 — Understanding on Local Cost Standard.

81 Loc. cit. No. B 2 at 1364.

communautaire just like Pescatore by saying: "in other words, whenever and so far as the matter belongs to the Community's sphere, jurisdiction over it is exclusive of any concurrent power of Member States"[82]. The ERTA judgment could lead to the conclusion that the Community holds the exclusive power since 1980 (. . .).

The Kramer judgment[83], however, modifies the ERTA doctrine to some extent. The Court considered the Community the proper authority to enter into the North-East Atlantic Fisheries Convention signed in London in 1959. All present members of the Community except Italy and Luxembourg were initial parties to the Convention. The Court based its judgment on a thoroughgoing analysis of the primary and secondary Comunity law and concluded by saying: 77

> ". . . In these circumstances it follows from the very duties and powers which Community law has established and assigned to the institutions of the Community on the internal level that the Community had the authority to enter into international commitments for the conservation of the resources of the sea"[84].

Such a reading followed the common approach of the Court to parallelize internal and external powers of the Community. However the Court then turned to the question "whether the Community institutions in fact assumed the functions and obligations arising from the Convention and from the decisions taken thereunder"[85]. Simply stated: the Community was not a member of the Fisheries Convention, but had obtained the respective powers in the Internal Market and now it had to be considered whether the Community might even act on behalf of the Member States although the Community had no vested power to do so. Here the Court (apparently in contradiction to the ERTA judgment) upheld the competence of the Member States.

The case-law on the exclusive competence of the Community appears in a different light if one considers the judgments on the scope of application in the so-called mixed procedure. For us the relationship between the shaping of jurisdiction and the sovereignty of financing is striking. The Court seems to be much more reluctant to assume the

82 CMLR 1979, 624.
83 1976 ECR 1279 at 1305.
84 Loc. cit. No. 33.
85 Loc. cit. No. 34.

exclusive power of the Community once the judgment entails burdens on behalf of the Member States.

*b) Joint competence of the Member States and the Community in the regulation of public procurement within ESA ?*

**78** In its Opinion 1/76 the Court strikes a rather critical note on the concept of shared powers. The participation of the Member States as contracting partners in an agreement contemplated with Switzerland alongside of the Community, says the Court, could be justified only in view of the necessity for removing legal obstacles arising from prior Conventions. However:

> "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... 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 Art. 228, para 2 of the Treaty, exclusively for the conclusion of the latter by the Community"[86].

Pescatore summarizes: "in other words, apart from one very particular aspect of the matter, Member States had no right to participate in the contemplated agreement and the "mixed procedure" was therefore to be ruled out in principle"[87]. The next occasion for the Court to further develop the relationship between Member States and the Community concerned Opinion 1/78 on the International Agreement on Natural Rubber[88]. After giving a wide notion to the Common Commercial Policy under Art. 113 the Court had to decide whether the participation of the Member States in the agreement was necessary. The crucial point concerned the *financing of the so-called buffer-stock*.

> "... The Council and those of the governments which have supported its views state that since those negotiating the agreement have opted for financing by means of public funds, the finances of the Member

86 Loc. cit. Nos. 7 and 8.

87 CMLR 1979, 623.

88 1979 ECR 2871.

States will be involved in the execution of the agreement so that it cannot be accepted that such undertakings could be entered into without their participation. The Commission for its part takes the view that the question of competence precedes that of financing and that the question of Communtiy powers can therefore not be made dependant on the choice of financial arrangements"[89].

"... The Court feels bound to have regard to two possible situations: one which the financial burdens envisaged by the agreement would be entered into the Community budget and one in which the burdens would directly be charged to the budgets of the Member States. The Court itself is in no position to make any choice between the two alternatives"[90].

The parallel to the ESA optional programmes is obvious. The solution to the distribution of competences might already be found. This seems to be all the more true as the Council has transformed the Rubber judgment into a generally applicable rule, the so-called PROBA 20 formula, as proposed by the Commission[91]. The basic principles concerning participation in international negotiation on Raw Materials are defined as follows:

"The essential element upon which the deal put forward by the Commission is based on consists in the leaving out of any legal or institutional consideration with regard to the respective powers of the Community and the Member States.

It has been agreed that

- there shall be joint participation of the Commission and the Member States in all agreements in which both wish to participate.
- this participation shall be in the form of a joint delegation which will express the common position through a single spokesman".

89 Loc. cit. No. 53.

90 Loc. cit. No. 58.

91 Translation from the French text in Völker/Steenbergen, Leading cases and Materials on the External Relations Law of the EC, 1985, p. 48.

79 One might summarize the Council's and even the Courts attitude as follows: "he who pays the piper calls the tune!". The only problem to be solved concerns the possible tranference of the rulings found for the financing of raw materials to the space sector. Opposition has been voiced against the possibility of generalizing the judgment as well as the Council's rules. The opinion 1/78 has been heaviliy criticised for putting it into the hands of the Member States to decide whether an agreement comes under the exclusive competence of the Community. By simply refusing financing through the Community, Member States could circumvent its' exclusive power[92]. Gilsdorf joins the Commission's view when he claims the Community's exclusive competence in all cases where financing is necessary to realize measures related to the Common Commercial Policy. It is true: the PROBA agreement reflects neither the Treaty nor the case-law of the Court of Justice[93]. The agreement however sets out the framework by which a joint shaping of the Common Commercial Policy though perhaps not legally required is nevertheless politically sound. Opinion 1/78 has paved the way for such a joint approach by the Member States and Community in regulating public procurement. The mixed-procedure can be accepted at least for the actual process of renegotiating the ESA Convention (No. 92).

*c) The evolutive character of Community case-law*

80 The Court has underlined in several judgments what is known as the evolutive character of Community law[94]. The Court emphasises the transitional character of joint competence and the long-term perspective of the Community's exclusive jurisdiction. The Kramer case may serve as an example for the Court's attitude. After conferring the power on the Member States, it continued by saying:

> "... it should be stated first that this authority which the Member States have is only of a transitional nature and secondly that the Member States are now bound by Community obligations in their negotiations within the framework of the Convention and of other comparable agreements"[95].

92 Cf. Gilsdorf, loc. cit. p. 27, who does not discuss the PROBA agreement.

93 Cf. Ehlermann in: O'Keefie/Schermers, Mixed Agreements, Leiden 1983, p. 8 and Petersmann, ZaÖRV 1975 p. 217, 267.

94 Pescatore, CMLR 1979, 624.

95 1976 ECR 1279 at 1310 No. 40.

Similar wording can be found in the ERTA judgment. Both judgments may be considered as a type of prospective ruling insofar as the Court has found that the actual facts had to be judged from the point of view of a transitional situation where the transfer of powers to the Community had not yet been accomplished.

Against the background of the Court of Justice case-law on the so-called mixed procedure as well as on the exclusive power of the Community, one might come to the following conclusions with regard to the Community's role in renegotiating the public procurement of space activities within ESA. The Court begins from the idea that the transfer of powers from the Member States to the Community must be seen as a process which might undergo three stages of development:

(1) in the beginning exclusive competence of the Member States — mostly in fields where the Community has not yet vested powers;

(2) in a transitional phase shared powers of the Member States and the Community — the division might be the result of a political self-restraint or of overlapping competences between the Community and the Member States; and

(3) in the end exclusive powers of the Community. Procurement policies in the space sector should be associated with the second phase. The Community is empowered to regulate the commercial activities under Art. 113 and to lead the negoatiation with ESA, the Member States remain competent for R & D.

The second message of the Court of Justice case law concerns the conditions under which the change from the second to the third stage, from the concept of shared powers to the concept of exclusive Community powers might occur. Having the two opinions 1/76 and 1/78 in mind, one is of the impression that the Court is willing to accept a certain autonomy from the Member States in deciding if they accept the transfer of the regulatory power to the Community alone. Even if measures relating to the Common Commercial Policy lead principally to a transfer of power from the Member States to the Community, the Member States are permitted to

escape the exclusive competence of the Community by retaining financing in their hands. The question of competence might not precede that of financing, at least not in the present state of the Community's development. The completion of the Internal Market gives the opportunity to re-consider the Court's view. In other words: Member States are legally permitted to finance ESA directly. They may reject any attempt by the Community to obtain the exclusive power to regulate the commercial activities of ESA.

## 6. Possible Justification for Derogation by the ESA Procurement Rules from EEC Law — Exemptions under the Common Commercial Policy and the Directives on Public Work and Public Supply

Our foregoing analysis shows that the ESA rules are not compatible with Art. 113. They affect the Community's joint competence in external relations. The rules on the basic economic freedoms, Art. 30 and 59 provide principally for the application of the EEC procurement rules. Deviating ESA rules do not come under the justifications of Art. 30/36 and 59/62 (Nos. 21-23, 27), because the procurement involved also carries economic aspects. If this conclusion can be transferred to the EEC law on external relations, there would be no opportunity for the Member States to defend the derogations in the process of renegotiating the ESA Convention.

(1) The situation in the law on external relations, however, is different. **81**
There are no rules similar to Art. 36, 56 and 66 and there is no Court of Justice case law simililar to the Cassis-de Dijon doctrine submitting Common Commercial Policy to a rule of reason test (No. 22). There are efforts in the legal doctrine to apply Art. 36 and probably Art. 56 and 66 to the notion of a Common Commercial Policy in order to put the concept of the Internal Market and the external relations on an equal footing[96]:

> "... la voie la plus simple (pour harmoniser les différentes comptences de la Communauté et des Etats Membres H.-W.M.) serait ..., d'interpréter l'article 113, c'est-à-dire la notion de la politique commerciale commune, en y incorporant les clauses d'exception analogues, d'abord à celle prévue à l'Art. 36, ensuite également à celle consacrée par la jurisprudence Cassis-de-Dijon et la jurisprudence ultérieure".

Such an interpretation (which has not yet been approved by the Court of Justice) does not contribute to a solution of our problem. Due to the non-economic character of the possible justifications, even a broad interpretation would not allow the exemption of ESA rules from the concept of a Common Commercial Policy which provides for similar rules on the Internal Market as well as in external relations. We wonder however whether the "harmonisation" of the rules on the Internal Market and the rules on external relations might exclude any possibility for the Member States as well as the Community to justify derogations from basic EEC law for economic reasons like, for example, industrial policy. One might argue that the essential idea of Art. 36, transferred to the Common Commercial

96 Timmermanns loc. cit. p. 96 and Gilsdorf loc. cit. 1988.

Policy requires a less stricter application than in the context of the Internal Market. The issue will be further discussed in the context of Art. 115 (Nos. 83 ss.).

82 (2) A possible justification for the derogation by the ESA rules on public procurement from basic EEC law might be founded on the exemptions provided for under the directives on public work and public supply (Nos. 34-36a). The question has been dealt with in the analysis of the relationship between ESA rules and the Internal Market. Here the answer seems to be clear. The Directive 77/62 implicitly excludes ESA procurement from the application of the directive although Directive 88/295 and Com (88)378 final show a clear tendency to narrow down the exemptions (No. 36a). Member States however are not allowed to escape the rule of primary Community law (Art. 30 and 59) by formulating exemptions in the directives which are contrary to the basic economic freedoms of the Internal Market. The exemptions must be interpreted narrowly in the light of Art. 30 and 59, which means that the exemption of ESA only concerns the specific transparency obligations of the Directive, not the application of primary Community law (No. 35).

Here, however, we are concerned with the Common Commercial Policy. This is not a matter of the effects of exemptions to the Internal Market, but rather the capacity of Member States to exclude space procurement rules in their external relations from the Common Commercial Policy, for economic and political reasons. There is no consistent case law at hand which discusses the ability of Member States and the Community to deviate in secondary Community law from the Common Commercial Policy, which in principle requires the same rules on public procurement for external relations as for the Internal Market[97].

The problem has been raised by the Advocate General in the TEZI case 59/84[98]. He argued that once a Common Commercial Policy has been established in a specific sector, the Community and the Commission could not reintroduce rules which deviate from the *Common* Commercial Policy and allow for national derogations. The Court has avoided taking a view on the rather sensitive relationship between an established Common Commercial Policy and possible exemptions therefrom under secondary Community law by simply stating that the Common Commercial Policy was not yet accomplished. An incomplete Common Commercial Policy however

97 Petersmann, loc. cit. Art. 234 Rdnr. 7 et seq., discusses the opportunity of the Member States to use the secondary Community law as an instrument to solve the conflict between divergent international public law rules and Community law.

98 1986 ECR 887 at 905/906.

permits exemptions[99]. Although the Court had no opportunity to further develop its understanding of the relationship between the Common Commerical Policy and possible derogations therefrom, we would like to draw attention to the very cautious approach of the Court. Completeness as a criterion enables the Court to decide case by case and to consider a certain discretion for the Member States and the Community in shaping the scope of the Common Commercial Policy. The Court has developed its understanding in the context of Art. 115. That is why we are somewhat reluctant to justify the ESA rules by referring to the incomplete character of the Common Commercial Policy in the field of space activities. (For further details see Nos. 89 ss.)

99 We will come back to the problem of completeness of the Common Commercial Policy, Nos. 89 et seq.

### 7. "Block Exemptions" for the ESA Procurement Rules under Art. 115

83 Art. 115 must be understood as the counterpart of Art. 113. It allows the Member States to derogate from the Common Commercial Policy in order to protect their home industries against economic difficulties resulting from imports, namely those of non-Member State origin in free circulation, if so authorized by the Commission. A parallel should be drawn with Art. 92 (3) which allows for state aids but binds the Member States to pursue a specific procedure. The legitimate reference to Art. 115 would strengthen the Member States position within the process of renegotiating the ESA procurement rules. They would be allowed to maintain the derogations from primary Community law and could refute the Community's request of amending the ESA procurement rules at least till the end of 1992.

For our analysis a whole set of questions arises as to the importance of Art. 115, which might be summarized as follows:

- Are the Member States entitled to justify the ESA procurement rules under Art. 115 in order to protect their national space industries against economic difficulties resulting from an open competitive bidding in which the undertakings of other Member States, of EFTA countries and of third countries like the United States and Japan participate?
- What type of explanation should they be allowed to submit in order to justifying the derogations from primary Community law, e.g. their financial contributions to ESA?
- Have they already done so by exempting international organisations from Directive 88/295 (No. 36a) — "block exemption"?
- Last but not least, does the "block exemption" in directive 88/295 cover only trade in goods — phase C to F or does it embrace likewise trade in services — phase A and B.

Art. 115 has to balance out the conflicting objectives of the overall principle of free trade with open rules on competitive bidding and legitimate protectionism — if such a concept can be said to exist — undertaken by the Member States in order to restrict application of the procurement rules to their home industries. There is little or no case-law at

hand contributing to a solution for our problem. The constantly growing number of authorizations given by the Commission under Art. 115 underlines the overwhelming importance of this article in shaping the Common Commercial Policy[100]. The Commission's efforts are directed, with a view to 1992, towards a reduction of the exemptions granted under Art. 115[101]. Art. 115 seems to have become the key provision in the law on external relations which defines, restricts and determines the Common Commercial Policy of the Community[102]. The reasons for this development are manifold: the crumbling situation of some home industries of the Member States which are not competitive on the international level, the Member States efforts to protect their home industries in order to ensure job security and fight against unemployment, to build up an industry competitive with the United States and Japan, and last but not least, the extension of the Common Commercial Policy of the Community which seems to call for a flexible rule to compensate for the strict requirements of Art. 113.

To analyse the rather complicated provision of Art. 115 more concisely, we have divided the items of interest into four issues:

(1) The scope of application: Art. 115 uses the term "deflection of trade". This term needs to be described and applied to ESA procurement rules. Art. 115 might concern the procurement rules between Member States and third countries only or the procurement rules between Member States as well;

(2) The possibility of a "block exemption" justified under Art. 115, but contradicting the Community's joint competence under Art. 113 to define public procurement rules similar to the rules governing the Internal Market;

(3) The reasons which might be invoked by the Member States to justify the "block exemption" sought, (i.e. what is meant by economic difficulties ?);

100 Latest statistics Neme, RMC 1988, 578 at 579, and Hailbronner/Bierwagen, NJW 1989, 1385 at 1388.

101 Cf. Commission decision of 22.Juli1987, 87/433/EWG OJ L 238/26 of 21.Aug.1987; as amended OJ L 36/23 of 8.Feb.1989; see in this context the analysis of Hailbronner/Bierwagen, loc. cit. 1389.

102 The majority of the legal doctrine does not discuss Art. 115 in such a broad perspective. It focusses on the classical situation of deflection of trade and rejects the possibility of linking Art. 113 and Art. 115 together in one concept. The overall situation is, to narrow down the importance of Art. 115 and to defend the idea of a Common Commercial Policy which should be developed by the Community, cf. Vedder, in: Grabitz, Art. 115 Rdnr. 1; Ernst/Beseler in: v.d. Groeben Art. 115, Rdnr. 3.; Neme, RMC 1988, 578; Lauwaars in: J. Schwarze (ed.) op. cit. 1988, 83; Hailbronner/Bierwagen, NJW 1989, 1385 at 1388.

(4) The procedure to be followed if the Member States wish to obtain an authorization. Does it fit into the overall concept of Art. 115 to grant "block exemptions"?

Last but not least, it has to be kept in mind that the completion of the Internal Market should be achieved by 1992 and the question arises to what extent "block exemptions" can be maintained beyond that date.

*a) Scope of application — deflections of trade in the space sector*

**84** Art. 115 empowers the Member States, upon authorization by the Commission, to close their borders to indirect imports through other Member States where they have been brought into free circulation, namely those goods of non-Community origin. Its function is to ensure that the execution of commercial policy measures, taken in accordance with this Treaty by Member States, is not obstructed by deflections of trade. Art. 115 infringes the fundamental principle of free movement of goods laid down in Art. 9 of the Treaty. That principle applies to products originating within the Community, as well as to products coming from third countries if brought into free circulation in any Member State.

**85** (1) How can we envisage deflections of trade occurring in the space sector? There are no problems in cases where supply contracts are involved, e.g. in phase C and namely in phase D and E once the full commercialisation of a project has begun. Phase A and B however concern service contracts. Although there are no objections in principle to applying Art. 115 to services (No. 70), there are some difficulties in imagining deflections of trade resulting from the import of services. Phase A and B concern pre-feasibility and feasibility studies. One might assume that deflections of trade could result from services offered across frontiers by an international supplier to possible customers in the EEC Member States, without having an established business seat or subsidiary in that country[103]. Although one needs some imagination to conjure up incidents in the space sector which could come under the scope of application of Art. 115, it cannot however be excluded from applying Art. 115 to the ESA procurement rules.

103 See for the different alternatives to shape the intra-community supply of services No. 26.

86 (2) To whom is Art. 115 addressed?

(a) only third country imports; or

(b) imports of Member State origin, also?

The first reading of the text as well as the example given seems to indicate that Art. 115 applies only to imports from non-Member States. Legal doctrine has raised the issue of whether Art. 113 could or should cover Member States imports[104]. Such considerations have been fully refuted and indeed the numerous and ever-increasing number of authorizations concern goods only of non-Community origin[105]. The consequence seems to be clear: Art. 115 covers deflections of trade resulting from imports by EFTA countries and from the United States and Japan, but is not applicable to the trade in those goods which are of Community origin. Therefore we will have to examine whether the different agreements concluded between the Community and the EFTA Countries as well as the GATT rules on public procurement necessitate a different view on the applicability of Art. 115. We wonder whether the restriction might be maintained if one assumes the applicability of Art. 115 to the Common Commercial Policy (No. 90). The multiple purposes of the exemption provided for in the directives might be endangered if one requires free competitive bidding in the Internal Market. That is why the possible scope of application of Art. 115 must be tied together with the reasons which the Member States may invoke to justify the exemption in Directive 88/295 (Nos. 91 ss.).

104 Cf. Kretschmer in: v.d. Groeben et al., Art. 115 Rdnr. 21, as well as Weber, EuR 1979, 30.

105 Cf. Vogelenzang, loc. cit. p. 177 Fn. 19 where a list of the number of authorizations is added.

*b) Applicability of Art. 115 to the Common Commercial Policy*

87 Art. 113 requires a Common Commercial Policy and empowers the Community to take the necessary measures once the jurisdiction of the Community has been established in public procurement. Such a mandate as well as its' prospect is hardly compatible with the objective of Art. 115 whose aim is to grant the Member States authorization for setting up national procurement rules for building up their space industries and protecting their industries against economic difficulties. Such a view, although well settled in the legal doctrine, creates a somewhat artifical contradiction between the two provisions. When discussing the scope and meaning of Art. 113 we have tried to make clear that only a broad concept similar to Art. 30 is appropriate for achieving the overall ojective of a Common Commercial Policy. Such a broad concept, however, requires flexible rules for justifying exemptions. It is based on a line of thought similar to the reasoning in the Cassis-de Dijon doctrine which in turn should apply to the notion of a Common Commercial Policy. In the law on external relations, economic justifications cannot be ruled out per se. The question is much more one of integrating them into a procedure in order to create transparency. It is against that background that we will try to delineate the relationship between Art. 113 and Art. 115.

88 (1) The relationship between the contradictory objectives of Art. 113 and 115 have *first* been considered in the Court's judgment in Case 41/76 Donckerwolcke[106]. The Court has been said to apply an either/or philosophy. Once Art. 113 applies when the jurisdiction of the Community has been established, there is no longer an opportunity to apply for the exemptions under Art. 115. The rulings laid down in this context are still valid and may be understood as the basic and nearly commonly agreed understanding of the relationship between Art. 113 and 115. Since those passages from the judgment in Donckerwolcke featured prominently in the assessment of any conflict, the relevant paragraphs are quoted in full:

> "25. The assimilation to products originating within the Member States of goods in free circulation may only take full effect if these goods are subject to the same conditions of importation both with regard to customs and commercial considerations, irrespective of the State in which they were put in free circulation.
>
> 26. Under Article 113 of the Treaty this unification should have been achieved by the expiry of the transitional period and supplanted by the

106 1976 ECR 1921.

establishment of a common commercial policy based on uniform principles.

27. The fact that at the expiry of the transitional period the Community commercial policy was not fully achieved is one of a number of circumstances calculated to maintain in being between the Member States differences in commercial policy capable of bringing about deflections of trade or causing economic difficulties in certain Member States.

28. Article 115 allows difficulties of this kind to be avoided by giving to the Commission the power to authorize Member States to take protective measures particularly in the form of derogation from the principle of free circulation within the Community of products which originated in third countries and which were put into free circulation in one of the Member States.

31. First of all it should be stressed with regard to the scope of such provisions, that under Article 115 limitations may only be placed on the free movement of goods enjoying the right to free circulation by virtue of measures of commercial poliy adopted by the importing Member state in accordance with the Treaty.

32. As full responsibility in the matter of commercial policy was transferred to the Community by means of Article 113 (1) measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorizations by the Community"[107].

Transferred to the ESA procurement rules one might assume the application of Art. 113 and exclude the application of Art. 115. We wonder however how such a reading of the Treaty complies with the GATT agreement on public procurement and the exemptions provided for under Directive 88/295 (No. 36a). There remains a short statement in para. 27 which casts some doubt on this conclusion. The Common Commercial Policy must be accomplished in order to invoke the jurisdiction of the Community. Indeed precisely this problem of *completeness* came up in the Court's judgment in the case 59/84 and 242/84 TEZI[108].

107 These rulings have been repeated by the Advocate General Verloren van Themaat in the TEZI case 59/84, 1986 ECR 887 at 901 et seq.

108 1986 ECR 887 at 923 et seq.

89 (2) The Court reconsidered the fore-mentioned either/or philosophy of the Donckerwolcke case and took an attitude of compromise. Instead of schematic alternatives, it allowed for the application of Art. 115 as long as the Common Commercial Policy in a given field has not been *completed.* The Court had to decide whether the Community already had established a Common Commercial Policy in the field of textiles, under the auspices of the second Multi-Fibre Arrangement, thereby excluding the applicability of Art. 115 in the trade of textiles or alternatively whether the Multi-Fibre Arrangement must be understood as an incomplete agreement thereby leaving room for the application of Art. 115.

(a) The Advocate General struck a rather critical note on the Member States attempt to safeguard the application of Art. 115 notwithstanding the conclusion of the Multi-Fibre Arrangement. He went beyond existing case law and formulated as a rule that Art. 113 must be understood as a legal obligation to establish a Common Commercial Policy[109]:

> "... I do not regard the attainment of a genuinely uniform commercial policy pursuant to Art. 111 and the Court's decisions... as an ultimate ideal and an objective for the future *but as a legal duty which ought to have been fulfilled by the end of the transitional period (emphasis by H.-W.M.)...*"

Such an understanding brings Art. 113 near to Art. 30, in terms of scope and mainly in its effects. The concrete shaping of the procurement rules would be of no account. Member States would be obliged to develop a Common Commercial Policy parallel to the procurement rules on the Internal Market thereby avoiding distortions of competition between them.

It goes without saying that completeness of the Common Commercial Policy could never be an argument for the Advocate General to escape the legal obligation under Art. 113:

> "... it is still not possible to infer from the mere fact that the policy is incomplete any direct legal consequences which may be invoked before national courts; whether such legal consequences may flow from specific measures of commercial policy must be inferred from the wording of the measures themselves"[110].

109 1986 ECR 887 at 904.

110 Loc. cit. at 905.

The only way to maintain the application of the authorization procedure of Art. 115 could theoretically be to refer to the rules of the Second Multi-Fibre Arrangement and to check whether they provide for the possiblity of allowing distortions to the Common Commercial Policy. Transferred to the space sector: Are the exemptions for international procurement as laid down in the different directives on public procurement to be understood as legally permitted derogations from primary EEC law ?

The Advocate General refuted the argument put forward by the Commission and some Governments to the effect that disparities in commercial policies brought about by the Community itself might justify the application of Art. 115[111]:

> "I also consider that it would be incompatible with the system of the Treaty, especially with its standstill provisions — here I am thinking in particular of Art. 31 and 32 — for the Community to make it possible in that way for the Member States to introduce new obstacles to trade (with the Commission's authorization)"[112].

If we understand the Advocate General correctly, we should assume that there is no opportunity for the Member States to escape the application of primary Community law i.e. Arts. 30 and 59, to the procurement rules in the formulation of the directives relating to public procurement which provide for exemptions at the international level.

(b) The legal doctrine departs from the socio-economic context of Art. 115's scope of application. Timmermanns is correct when he states:

> "J'ai plutôt l'impression que la pratique maintenant devenue fréquente, de protection régionale s'explique en tant que solution facile de compromis qui permet de reconcilier en matière de politique commerciale les points de vue souvent diamétralement opposés des Etats Membres, certains préconisant une politique de libre-échange, d'autres plus séduits par des approches protectionistes"[113].

Indeed, any effort to found wide Community powers on the Treaty cannot escape the political reality which sets the tone for understanding the relationship between the objective of a Common Commercial Policy and the competence of the Community to grant exemptions therefrom. There are authors like Timmermanns who draw a legal argument from the Treaty

111 The issue is discussed in the legal doctrine under the heading of "irrévérsibilité", see Timmermanns, loc. cit. p. 101.

112 Loc. cit. at 906.

113 Loc. cit. p. 104.

which supports the Advocate General's analysis[114]. There are others who underline the Member's autonomy in shaping a Common Comercial Policy whilst referring to the very same articles[115]. Legal doctrine is not yet settled.

(c) The Court in the TEZI decision takes a rather pragmatic view on the controversy. It avoids intervening in the highly political field of protectionism and free trade, and whilst upholding the rulings laid down in the Donckerwolcke case, it starts from the analysis that a Common Commercial Policy which is incomplete allows for the application of Art. 115 even after the expiry of the transitional period:

> "In the same judgment (Donckerwolcke), after observing that, despite the expiry of the transitional period, a Common Commercial Policy based, in accordance with Art 113. (1) of the Treaty, on uniform principles had not yet been fully achieved, the Court recognized that the incompleteness of the Common Commercial Policy, together with other circumstances, was likely to maintain differences in Common Commercial Policy between Member States capable of causing deflections of trade or economic difficulites in some Member States"[116].

For the Court's approach the problem of completeness turns out to be the crucial point for the relationship between Art. 113 and Art. 115[117]. Such an interpretation of the Treaty confers a wide discretionary power on the Commission outside of any judicial control. "Completeness of the Common Commercial Policy" opens up opportunities to decide that a Common Commercial Policy has not yet been achieved, whenever it appears to be politically wise for the Community organs not to infere with Member States autonomy.

114 Loc. cit. p. 101 et seq.

115 Cf. Kretschmer, in: v.d. Groeben et al., loc. cit. Art. 115.

116 1986 ECR 887 at 923 No. 32.

117 See Lauwaars, op. cit. p. 84, in: J. Schwarze (ed.).

(3) What consequences has the scope of application according to the TEZI judgment for the effects of the ESA procurement rules? Must the EEC's policy on public procurement be regarded as complete in the sense of the TEZI judgment? The very same judgment makes clear that the Court hesitates from striking down the Member States' capacity in defining their own national approach. The Court's approach raises the problem of what the yardstick should be: the procurement rules as such or the EEC's engagement in the space sector. Taking the procurement rules as a basis one might assume completeness — just as we have presupposed the Community's competence in the regulation of public procurement — despite the exemptions provided for in the directives. The solution would be different if we start from the EEC's role in the space sector. The Commission has now taken the initiative on integrating the space policy in the Common Commercial Policy[118]. It intends to bring primary community law to bear on the Internal Market. The communication must be understood as the Commission's intention to step into the space sector. Such a statement of purpose can hardly be regarded as establishing a comprehensive policy. **90**

In our opinion the complications can be avoided by referring to the relationship between the broad range of the Common Commercial Policy and the applicability of Art. 115. It would be contradictory to opt for a broad application of Art. 113 and at the same time to narrow down possible justifications available through Art. 115. That is why we plead for the applicability of Art. 115 in the regulation of public procurement. Our conclusion might be somewhat confirmed by referring to the Council Resolution of 22 July 1980 which provides for the application of Art. 115 in public procurement[119].

118 Cf. Com (88) 417 final of 26.July.1988.

119 Cf. OJ C 211/2, of 19.Aug.1980.

*c) Economic reasons for justifying the "block exemption"?*

What are the arguments on which the Member States could base their call for an authorization prior to the establishment of the measures concerned? Are they definitely allowed to refer to "economic problems" in sensitive regions, as in Bremen for example? And can they justify the application of the ESA procurement rules in the Internal Market? Art. 115 indicates two kind of grounds which the Member States could invoke:

- (1) the execution of measures of commercial policy taken in accordance with this Treaty by any Member state should not be obstructed by deflections of trade, or
- (2) differences between such measures should not lead to economic difficulties in one or more Member States.

Quite a number of questions have been raised, namely for the purpose of checking the conditions under which deflection of trade might be justified[120]. They remain more or less useless, at least for the problem with which we are concerned[121]. Today both alternatives under Art. 115 culminate in one particular question: whether the given "economic difficulties" justify the application of Art. 115[122]. Are the Member States entitled to maintain the ESA procurement rules simply by referring to their financial contributions to ESA or are they obliged to base a possible exemption on R & D policy and regional policy?

120 Cf. Weber, loc. cit., and Kretschmer, loc. cit. 1983.

121 They concentrate on efforts to restrict the scope of application of Art. 115; cf. references, loc. cit. Fn. 102.

122 This tendency is not given enough weight in a recent analysis of Art 115: Hailbronner/Bierwagen, loc. cit.

There is little evidence in the Court rulings as well as in the legal doctrine as to the interpretation of "economic difficulties"[123]. Along the line of the general acceptance that Art. 115 is an exception to the objectives in the Treaty's provision on free trade rules, even world-wide, the Donckerwolcke-judgment as supported by legal doctrine calls for a restrictive interpretation of "economic difficulties"[124] with a view to limiting derogations from the free trade principle. In that context legal doctrine accepts the reference to regional policies and refers to the Commission's decision 80/47[125]. The latter tends to grant authorizations in cases where the derogations are justified by the interest of protecting regional industries[126]. The Court has not yet officially recognised regional policies as falling under the heading of "economic difficulties" but there exists some "fear" that the Court is not far from doing so[127]. 91

As there is no case-law as yet which discusses the precise meaning of "economic difficulties" and which simultaneously determines the role of regional policies, we must base our evaluation on the general framework into which we have integrated the Common Commercial Policy and its possible exemptions. This is true for the scope of application of the possible exemptions: whether it concerns the external relations of the EEC Member States only with the EFTA countries, Japan and the United States or whether it might be put forward to justify derogations from primary Community law in the *Internal Market*, too.

It lies within the logic of our argument that the notion of "economic difficulties" should be given a broader scope of application in indirect effects on trade than in the classical field of deflection of trade. Member States and the EFTA Countries are bound to the same destiny (No. 74). The alternative under Art. 115 would then be (1) either to restrict derogations from primary community law to the relation of EEC/EFTA countries exclusively, leaving outside the rest of the world or (2) to extend the derogations from primary Community law in the directives to the Inner European (not only the Internal!) Market[128]. The solution to be found is strongly linked with the reasons which Member States (and the EFTA

123 Cf. Vedder, in: Grabitz, Art. 115, Rdnr. 21 "entzieht sich einer abstrakten Umschreibung"

124 The importance of this rule is elaborated in Vogelenzang, loc. cit. p. 182 et seq.

125 At 4 and 5 in relation with 8; see Vedder, in: Art. 115 Rdnr. 12.

126 This is the overall message of Vogelenzang, loc. cit. p. 169 et seq.

127 Cf. Timmermanns, loc. cit. p. 107: "La jurisprudence TEZI fait craindre que la Cour ira aussi loin"; Lauwaars in: J. Schwarze (ed.) op. cit 84 et seq.

128 We do not discuss the impact of the exemptions on the GATT. This might be done at a later point.

countries!) might bring forward to justify the derogations in Directive 88/295 and under the foreseen amendment Com (88) 378 final (No. 36a). If they are permitted to invoke regional policies against risks resulting from the application of the EEC procurement rules in external relations, it would not make sense to impose on them the obligation to provide for open competitive bidding in the inner European (not the Internal) Market. Such a duty would run counter to their pretended legitimate interests. So it is all the more important to decide on the function of regional policy in the interpretation of Art. 115.

92 The Commission's, not the Court's standpoint is clear. It is willing to accept regional policies so as to justify derogations from the free trade principle in external relations. Regional policy then emerges as a bullwork against a tax-payer mentality. That means, Member States cannot simply invoke their financial contributions to justify the "fair-return", they have to make clear that the ESA procurement rules are necessary to build up a competitive space industry and that this infant industry can only be set up by protecting regional industries and guaranteeing job security. Only such a set of argument might suffice to justify derogations from Directive 88/295 in open competitive bidding, although the draft directive narrows down the margin for exemptions. Within this context, it goes without saying that "block exemptions" can be considered only for a transitional period[129]: that is, for long as the measures protecting the home industry are necessary for setting up a competitive European space industry. The moment to reconsider the exemptions will come once the directives on public procurement will be renegotiated. This will happen long before 1992 in connection with the completion of the Internal Market when all the other exemptions granted to public services should be revoked (cf. similar propositions for state aids No. 54). The proposed draft Directive Com (88) 378 final on telecommunication makes clear that the Commission has already started to review its exemption policy in external relations[130].

129 See in that context especially the recital of the decision of the Commission 87/433 loc. cit. and Hailbronner/Bierwagen, loc. cit. 1389.

130 Mattera, Le Marché unique Européen — Ses règles, son fonctionnement, 1989, p. 543 starts from the idea that Art. 115 will no longer be applicable after 1992, at least not in the sense given to that rule. Without discussing our suggestion as to a block exemption, he comes to the very same conclusions.

*d) "Block exemptions" under the authorization procedure*

Exemptions from the free trade principle are bound to an *ex ante* authorization procedure. Does the "block exemption" in the Directives 77/62 and 88/295 (No. 35) and in the proposed Directive Com (88) 378 final suffice for the requirements of the authorization procedure or must there be an individual, explict and distinct authority in each and every case provided for under secondary Community law? Does it cover the trade in goods only — Phase C to F, or the trade in services, Phase A and B also? The case law of the Court of Justice has undergone two stages of development, although a clear concept does not seem to exist. The possibility of a "block exemption" under Art. 115 has not been discussed so far[131].

(1) The basic procedural requirements have first been formulated in **93** three judgments, Bock, Kaufhof and Donckerwolcke. In Bock the Court struck down a Commission authorization under Art. 115 because it found that its coverage of pending imports was unnecessary in view of the negligible quantity of those imports[132]. In Kaufhof the Court came to the same conclusion, due namely to the Commission's failure to independently review the necessity of applying Art. 115[133]. These first two judgments led judge Pescatore to the opinion that the rather restrictive application of Art. 115 withholds the Community's exclusive power to formulate the Common Commercial Policy once the subject has come under its jurisdiction[134]. Donckerwolcke as handed down in 1979 seemed to confirm such a reading. Here the Court dealt with the permissibility of requiring declarations of origin and import licenses in the administration of Art. 115. Although Vogelenzang[135] has become much more sceptical on the possibility of deriving such a view from these judgments, he nevertheless points out that all three contain substantially the identical phrase:

> "Because they constitute not only an exception to the provision of Art. 9 and 30 of the Treaty which are fundamental, but also an obstacle to the implementation of the common commercial policy

131 Helpful Neme op. cit. 582 in her considerations on the future importance of Art. 115 and Mattera, loc. cit.

132 1971 ECR at 909 No. 15.

133 1976 ECR at 443 No. 6.

134 Cf. the short analysis of the Court of Justice Case-law in external relations, CMLR 1979, loc. cit.

135 CMLR 1981, p. 182/183.

provided for by 113, the derogations allowed under Art. 115 must be strictly interpreted and applied"[136].

This mandate of strict interpretation and application led to a well developed EC monitoring system. The court has mandated close supervision of all actions taken by the Member States under Art. 115. This provides that the necessity to grant an authorization arises only after an independent review of the need to take such action and requires a distinct authorization by the Commision instead of a blanket authorization[137]. In other words: the Court demonstrated its willingness to accept a broad application of the authorization mechanism even in cases where regional policies played an important role. But this political self-restraint was accompanied by attempts to tighten the procedural requirements for obtaining an authorization. The exemption formulated in the directives might then be understood as an unlawful blanket exemption which cannot justify the deviating ESA procurement rules.

94 (2) Recent developments indicate a change in the Court's attitude similar to the shift from the Donckerwolcke judgment to the TEZI judgment. In the Bulk-Oil judgment[138] the Court seemed to have surrendered the idea of linking the broad scope of application to sophisticated rules on procedure.

The United Kingdom imposed export restrictions on trade with Israel. The decisive question was whether the UK was allowed to do so although the Member States had formulated a Common Commercial Policy. An affirmative answer to the question under well established Court of Justice case-law shows that Member States may adopt national measures only if specifically authorized to do so by Community institutions[139]. The Court understood Art. 10 of the generally-formulated Regulation 2603/69 on the export policy of the Community to serve as a basis for national export restrictions taken in 1979. This decision has been interpreted as a shift in the Court of Justice case-law, away from the three above mentioned judgments requesting a distinct authorization by the Commission and a return to some kind of a blanket authorization which does not allow for any Community monitoring over measures taken by the Member States[140]. The

136 This quotation is taken from Donckerwolcke, 1976 ECR 1921 at 1937 No. 29; identical language appears in 1971 ECR 897 at 909 No. 14 — Bock and 1976 ECR 431 at 443 No. 6. — Kaufhof

137 Cf. Vogelenzang, loc. cit. p. 196.

138 1986 ECR 559; thereto Lauwaars, loc. cit. in: J. Schwarze (ed.) op. cit. 1988, 85 with reference to Feenstra, 35. S.E.W. 1987, 152.

139 1986 ECR 559 at 585 No. 26.

140 Cf. Timmermanns, loc. cit. p. 101.

Court does not really discuss the issue. It refers in the same context to its well-established case law without quoting specific decisions and without quoting the rule on the strict interpretation and application of Art. 115. Timmermanns found a change in policy.

(3) Transferred to the exemptions provided for under the directives on **95**
public procurement, one is tempted to conclude that the Member States would not even need a specific authorization by the Commission in order to exclude EFTA-Countries or other third countries like the United States and Japan from the participation of public procurement. The parallel between Regulation 2603/69 and Directive 88/295 is striking. It is only one step further from the Bulk-Oil judgment to the assumption that block exemptions as such comply with the authorization procedure of Art. 115. The early efforts of the Community to restrict the exemptions would be watered down to the benefit of integrating regional policy, competition policy and industrial policy in one and the same procedure. It is bound, however, to the legitimacy of arguments which Member States have invoked when pushing for the exemptions provided for under Directive 88/295 and under Com (88) 378 final. Art. 3 of Directive 77/62, stipulating the exemption of public supply contracts which are awarded in accordance with the particular procedure of an international organization, remained unchanged in 1988. Contrary to Directive 77/62, Directive 88/295 refers in the recitals to the relationship between national procurement rules and the "regional development". Despite some doubts we assume that the "block exemption" suffices to justify the derogation from primary Community law although the policy issues are not really discussed therein. This is true for three reasons:

- (1) the overall perspective of protecting the home industries and guaranteeing employment in specific regions is obvious and;
- (2) Member States might legitimately invoke the rule of good faith. The exemption dates back to the early seventies and the justification has never been challenged so far.
- (3) The Internal Market sets a new tone, however, which needs to be considered in the process of renegotiating Directive 88/295 and its exemptions with the view to amending the ESA Convention.

96 (4) A second problem emerges as to the scope of the exemption rule. Directives 77/62 and 88/295 regulate public procurement only as far as goods or services related to goods are concerned. Services alone, as provided for in Phase A and B, are definitely not covered by Directive 88/295. Here the Member States have to choose whether they provide for open competitive bidding within ESA or whether they request the Commission to grant them an authorization which can be given in the form of a "block exemption". Member States would then have to call upon ESA Council and its IPC which monitors the "fair return" principle (Nos. 3, 5, 8). The latter alternative would then enable the Member States to ensure that the doubts raised on the quality of arguments presented in Directive 88/295, might be dispelled. If the Member States have equipped the Commission with the necessary arguments and if they have requested an authorization for exempting services contracts in Phase A and B from Directive 88/295, the ESA procurement rules might be regarded as respecting Community law for a transitional period of time. Since they have not done so they have an obligation under primary Community law, namely through Art. 5, 116, 234 (Nos. 19, 27) to insist on open competitive bidding for service contracts by ESA in the industrial committee, thereby initiating the process of renegotiating the whole procurement rules with a view to the completion of the Internal Market.

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