OPINION 1/08 OF THE COURT (Grand Chamber)

30 November 2009

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In Opinion 1/08,

REQUEST for an Opinion under Article 300(6) EC made on 18 February 2008 by the Commission of the European Communities,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta and C. Toader, Presidents of Chambers, C.W.A. Timmermans, K. Schiemann (Rapporteur), J. Malenovský, T. von Danwitz and A. Arabadjiev, Judges,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 10 February 2009,

after considering the observations submitted on behalf of:

— the Commission of the European Communities, by E. White, M. Huttunen and L. Prete, acting as Agents,

— the Czech Government, by M. Smolek, acting as Agent,

— the Danish Government, by C. Pilgaard Zinglersen, acting as Agent,

— the German Government, by M. Lumma and N. Graf Vitzthum, acting as Agents,

— the Greek Government, by A. Samoni-Rantou, S. Chala, and G. Karipsiadis, acting as Agents,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— Ireland, by D.J. O'Hagan, acting as Agent, and A. Collins and M. Collins SC,

— the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

— the Lithuanian Government, by D. Kriaučiūnas and E. Matulionytė, acting as Agents,

— the Netherlands Government, by C. Wissels and M. de Grave, acting as Agents,

— the Polish Government, by M. Dowgielewicz, C. Herma and M. Kamejsza, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes and M. João Palma, acting as Agents,

— the Romanian Government, by A. Ciobanu-Dordea, N. Mitu, E. Gane and C. Osman, acting as Agents,

— the Finnish Government, by J. Heliskoski, acting as Agent,

— the Swedish Government, by A. Falk, acting as Agent,

— the United Kingdom Government, by I. Rao, acting as Agent, and A. Dashwood, Barrister,

— the European Parliament, by R. Passos and D. Gauci, acting as Agents,

— the Council of the European Union, by J.-P. Hix and R. Liudvinaviciute-Cordeiro, acting as Agents,

after hearing First Advocate General Sharpston and Advocates General Ruiz-Jarabo Colomer, Kokott, Poiares Maduro, Mengozzi, Bot, Mazák and Trstenjak in closed session on 3 June 2009,

gives the following

Opinion

1 The request concerns the exclusive or shared competence of the European Community to conclude with certain members of the World Trade Organisation (WTO) agreements modifying the Schedules of Specific Commitments of the Community and its Member States under the General Agreement on Trade in Services (GATS), and the appropriate legal basis to which recourse must be had when concluding those agreements.

2 Pursuant to Article 300(6) EC '[t]he European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union'.

Background to the request for an Opinion

GATS

3 By Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), the Council approved the Agreement establishing the WTO as well as the agreements contained in Annexes 1 to 3 to that Agreement, one of which is the GATS.

4 Under Article I(2) of the GATS:

'For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member [("mode 1")];

(b) in the territory of one Member to the service consumer of any other Member [("mode 2")];

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member [("mode 3")];

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member [("mode 4")].'

5 Article V of the GATS, headed 'Economic Integration', provides:

'1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalising trade in services between or among the parties to such an agreement, provided that such an agreement [meets certain conditions].

…

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

…'

6 Within Part III of the GATS, 'Specific Commitments', Article XVI provides:

'1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule. …

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.'

7 Under Article XVII(1) of the GATS:

'In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. …'

8 Article XX of the GATS provides:

'1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

(a) terms, limitations and conditions on market access;

(b) conditions and qualifications on national treatment;

…

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.'

9 The specific commitments are in some cases of a horizontal nature in that they concern without distinction all services mentioned in the relevant Member's schedule ('horizontal commitments') and in some cases are of a sectoral nature where they concern a particular service sector ('sectoral commitments').

10 Article XXI of the GATS, headed 'Modification of Schedules', provides:

'1. (a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.

(b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.

2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified …, the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.

(b) Compensatory adjustments shall be made on a most-favoured-nation basis.

3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected

Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.

(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.

…

5. The Council for Trade in Services shall establish procedures for rectification or modification of Schedules. Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.'

11 The relevant procedural rules for the modification of schedules, adopted by the Council for Trade in Services on 19 July 1999, are included in WTO document S/L/80, of 29 October 1999, entitled 'Procedures for the implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules)' ('the Procedural Rules').

12 Paragraphs 5 and 6 of the Procedural Rules state:

'5. Upon completion of each negotiation conducted under paragraph 2(a) of Article XXI, the modifying Member shall send to the Secretariat a joint letter signed by the

Members concerned, together with a report concerning the results of the negotiations which shall be initialled by the Members concerned. The Secretariat will distribute the letter and the report to all Members in a secret document.

6. A modifying Member which has reached agreement with all [affected] Members that had identified themselves … shall, no later than 15 days after the conclusion of the negotiations, send to the Secretariat a final report on negotiations under Article XXI, which will be distributed to all Members in a secret document. After completing the certification procedure under paragraphs 20 to 22, such a modifying Member will be free to implement the changes agreed upon in the negotiations and specified in the report, and it shall notify the date of implementation to the Secretariat, for circulation to the Members of the WTO. Such changes shall not exceed the modification or withdrawal initially notified and shall include any compensatory adjustment agreed upon in the negotiations.'

13 Paragraph 8 of the Procedural Rules, which applies where no agreement on compensation has been reached, provides:

'If no [affected] Member that had identified itself … submits a timely arbitration request …, the modifying Member shall be free to implement the proposed modification or withdrawal, after completing the certification procedure under paragraphs 20 to 22. … The modifying Member shall notify the date of implementation to the Secretariat, for circulation to the Members of the WTO.'

14 Paragraph 20 of the Procedural Rules provides:

'Modifications in the authentic texts of Schedules annexed to the GATS which result from action under Article XXI shall take effect by means of Certification. The draft schedule clearly indicating the details of the modifications shall be communicated to the Secretariat for circulation to all Members. The modifications shall enter into force

upon the conclusion of a period of 45 days from the date of their circulation or on a later date to be specified by the modifying Member...'

Purpose and origin of the proposed agreements

15 The Commission states that, since the establishment under the GATS of the Schedule of specific commitments of the Community and its Member States, then numbering 12, the enlargements which took place in 1995 and 2004 made it necessary to draw up a new schedule, including the 13 new Member States which until then had their own Schedules of commitments.

16 On 28 May 2004, the Commission notified, under Article V(5) of the GATS, the list of the modifications and withdrawals of commitments intended to be made to the Schedules of the 13 new Member States in order to merge those various Schedules with the existing Schedule of the Community and of its Member States ('Document S/SECRET/8'). That notification was followed by a second on 4 April 2005 concerning the withdrawal of certain commitments contained in the Schedules of the Republic of Malta and the Republic of Cyprus ('Document S/SECRET/9').

17 Following claims of interest submitted by various WTO members which considered themselves affected by the proposed modifications and withdrawals of commitments, negotiations with a view to agreeing on compensatory adjustments under Article XXI(2) of the GATS were conducted by the Commission acting on behalf of the Community and its 25 Member States.

18 Upon completion of those negotiations, the parties agreed on the compensation to be provided in consideration of the modifications and withdrawals of commitments mentioned in Document S/SECRET/8. In contrast, they were unable to agree on

compensation in relation to the withdrawals of commitments listed in Document S/SECRET/9. No arbitration was initiated on that matter by the affected WTO members.

19 As is apparent from the Council's conclusions of 26 July 2006, the Commission was authorised to sign the agreements thus negotiated and to transmit the draft consolidated Schedule of commitments of the Community and of its Member States to the WTO Secretariat for certification.

20 Those conclusions stated in particular that, 'in circulating the consolidated schedule of specific commitments of the European Community and its Member States …, the Commission will indicate that the new schedule will enter into force following the completion of the internal decision-making procedures of the European Community and its Member States, where appropriate. In this respect, the Commission will submit a proposal to the Council'.

21 Agreements were thus signed with each of the following 17 States or territories: the Republic of Argentina, the Commonwealth of Australia, the Federative Republic of Brazil, Canada, the People's Republic of China, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), the Republic of Columbia, the Republic of Cuba, the Republic of Ecuador, Hong Kong (China), the Republic of India, Japan, the Republic of Korea, New Zealand, the Republic of the Philippines, the Swiss Confederation and the United States of America ('the agreements at issue').

22 The certification procedure was successfully completed on 15 December 2006.

23 On 27 March 2007, the Commission submitted to the Council a proposal for a decision to conclude the agreements at issue on the basis of Article 133(1) to (5) EC, in conjunction with Article 300(2) EC.

24 In the explanatory memorandum to that proposal, the Commission explained inter alia that it had negotiated the agreements at issue for and on behalf of the Community and its Member States on the premiss that it could not, from the outset, be ruled out that those agreements would require approval by Member States. In view of the compensatory adjustments actually negotiated, the Commission was, however, of the opinion that they did not go beyond the Community's internal powers and did not lead to harmonisation of the laws of the Member States in an area for which the Treaty rules out such harmonisation, so that the second subparagraph of Article 133(6) EC would not be applicable and conclusion of the agreements at issue would therefore be within the exclusive competence of the Community.

25 However, the Council and the Member States meeting within it considered that competence to conclude the agreements at issue was shared between the Community and its Member States.

26 Consequently, the Member States initiated their own internal procedures with a view to approval of those agreements.

27 On 13 July 2007, the Council, for its part, consulted the Parliament regarding the abovementioned Commission proposal. On that occasion, the Council informed the Parliament that it envisaged basing the decision to conclude the agreements at issue both on Article 133(1) to (5) EC, in conjunction with Article 300(2) EC, and on Articles 71 EC 80(2) EC, and 133(6) EC, in conjunction with Article 300(3) EC.

28 In its legislative resolution of 11 October 2007, the Parliament approved the abovementioned proposal. The recitals in the preamble to that resolution refer, however, only to Articles 133(1) and (5) EC and 300(2) and (3) EC.

Form and content of the agreements at issue

29 Emphasising that the agreements at issue are virtually identical in substance, the Commission produces only the agreement signed with Japan. The Council confirms that the agreements are substantially the same.

30 In accordance with paragraph 5 of the Procedural Rules, the agreement signed with Japan takes the form of a joint letter signed by the Commission on behalf of the Community and its Member States, on the one part, and by Japan, on the other ('the Joint Letter').

31 As provided for by paragraph 5 of those rules, a report on the result of the negotiations is annexed to the Joint Letter. That report has two annexes ('Annex I' and 'Annex II').

32 Annex I lists the planned modifications and withdrawals in respect of the Schedules of commitments of the new Member States. It comprises two parts.

33 Annex I(A) contains the list of the modifications and withdrawals set out in document S/SECRET/8.

34 As regards horizontal commitments, there is an extension to various new Member States of certain limitations appearing in the existing Schedule of commitments of the Community and of its Member States. That is the case with regard to the horizontal limitation concerning market access in mode 3 for services regarded in the Member States as public utilities at a national or local level which may be subject to public monopolies or to exclusive rights granted to private operators. That is also the case with regard to restrictions on the benefit of national treatment concerning branches or agencies established in a Member State by a third-State company or certain branches of third-State companies formed in accordance with the law of a Member State (mode 3) and national treatment restrictions concerning subsidies (modes 3 and 4). There is also an extension to a number of new Member States of certain horizontal restrictions relating to market access under mode 4 with regard to the temporary stay of (i) intra-corporate transferees, (ii) business visitors responsible for negotiating sales of services or concluding service contracts, (iii) persons responsible for establishing a commercial presence in a Member State and (iv) natural persons employed to supply services on a temporary basis by a legal person without a commercial presence in any Member State of the Community.

35 Annex I(A) also provides for the withdrawal of certain horizontal market-access commitments previously made by the Republic of Cyprus and the Republic of Lithuania and relating to mode 4.

36 As regards sectoral commitments, Annex I(A) first extends to various new Member States limitations in the existing Schedule of commitments of the Community and its Member States. Those limitations relate to market access as regards (i) aircraft rental/leasing services without operators (modes 2 and 3), (ii) educational services inasmuch as they are covered by the Schedule of the Community and its Member States but only in so far as they are privately funded and (iii) banking and other financial services (modes 1 and 3). The limitations also concern national treatment with regard to certain air transport services, namely transport sales and marketing and computer reservations systems.

37 Annex I(A) also withdraws sectoral commitments previously given by certain new Member States relating to space transport and services incidental to manufacturing industries. Further, it introduces in relation to certain new Member States new sectoral limitations on market access as regards air transport (rental of aircraft with crew) (modes 1 to 3) and services auxiliary to all modes of transport (mode 3).

38 Annex I(B) sets out the list of withdrawals of certain commitments, both horizontal and sectoral, of the Republic of Cyprus and the Republic of Malta regarding national treatment under mode 4, which are included in the document S/SECRET/9. The sectoral commitments concerned relate to computer and related services, research and development services in social services and humanities, insurance and insurance-related services, banking and other financial services, hotel, restaurant and catering services, travel agencies' and tour operators' services and maritime transport services for passengers and freight.

39 Annex II lists the commitments agreed by way of compensation in consideration for the modifications and withdrawals of commitments mentioned in Document S/SECRET/8 and included in Annex I(A). As regards horizontal commitments, Annex II sets out an adjustment relating to the abovementioned horizontal limitation regarding market access under mode 3 concerning services regarded in the Member States as public utilities, as well as a withdrawal of the horizontal limitation relating to investment concerning the Republic of Austria (mode 3) and of horizontal commitments made by the Republic of Malta and the Republic of Cyprus concerning intra-corporate transferees and business visitors (mode 4). Sectoral commitments, or withdrawals of limitations relating to them, regarding market access or national treatment are also listed in relation to various Member States. They relate, respectively, to engineering services (modes 2 and 3), integrated engineering services (modes 3 and 4), urban planning and landscape architectural services (modes 2 and 3), computer and related services (modes 1 to 4), advertising services (mode 1), telecommunications services, financial services (insurance services and banking) (mode 3), hotel, restaurant and catering services (mode 3), travel agencies' and tour operators' services (mode 3) and hairdressing services (modes 2 and 3).

40 The Joint Letter states that, together with Annexes I and II, it constitutes the agreement between the parties. It provides that the Community and the Member States are to transmit to the WTO Secretariat the draft consolidated schedule of their commitments with a view to its certification and that the results of the negotiations between the parties will enter into force after the certification procedure has been completed, on a date to be specified by the Community and its Member States after completion of the internal approval procedures. The letter also stipulates that the modifications and withdrawals proposed in Documents S/SECRET/8 and S/SECRET/9 will not enter into force before the entry into force of the compensatory adjustments negotiated.

The request for an Opinion

41 The Commission's request for an Opinion is worded as follows:

'1. Does the conclusion of the agreements with the affected WTO members, pursuant to Article XXI of the GATS, as described in this request for an Opinion, fall within the sphere of exclusive competence of the Community or within the sphere of shared competence of the Community and the Member States?

2. Do Article 133(1) and (5) [EC], in conjunction with Article 300(2) [EC], constitute the appropriate legal basis for the act concluding, on behalf of the European Community, or of the Community and its Member States, the aforementioned agreements?'

Written observations of the Member States and the institutions

The connection between the two questions raised in the request for an Opinion and the order in which they are to be examined

42 The Commission emphasises that the two questions raised in the request for an Opinion are closely linked and that numerous arguments submitted in relation to one are also valid for the other. In its view, if the answer to the first question is that the agreements at issue fall within the sphere of exclusive competence of the Community under the common commercial policy, the additional legal bases proposed by the Council will be automatically eliminated.

43 The Council and the Czech, Danish, Portuguese and United Kingdom Governments are of the opinion that the answer to the first question automatically flows from the answer to the second. In their view, the need to have recourse in particular to Articles 133(6) EC, 71 EC and 80(2) EC as legal bases implies ipso facto that conclusion of the agreements at issue falls within the competence shared by the Community and its Member States. According to the Portuguese and United Kingdom Governments, the Commission has thus reversed the natural order between the premiss and the conclusion of its request for an opinion.

The first question

44 According to the Commission, the agreements at issue fall within the common commercial policy and, therefore, within a sphere of Community competence which is by definition exclusive.

45 That policy, which is open and dynamic, requires constant adjustment to take account of any changes of outlook in international relations, and requires a non-restrictive interpretation so as not to become nugatory in the course of time. That is what would happen if that policy were confined to the traditional aspects of trade without encompassing agreements designed, as in the present case, to modify the terms and conditions under which the Community commits itself to opening access to its market to the services and suppliers of services of other countries which are WTO members. Such agreements have the direct and immediate aim of promoting and governing trade in those services.

46 The Commission submits that the dicta in Opinion 1/94 [1994] ECR I-5267, to the effect that only services provided under mode 1 fell within exclusive Community competence in commercial matters, have now been superseded in view of the changes made by the Treaty of Nice to Article 133 EC. Paragraph 5 of that article now provides that 'trade in services' (terminology that was borrowed from the GATS and is distinct from that used in Articles 49 EC to 55 EC which, for their part, refer to the 'freedom to provide services' and the 'liberalisation of services') falls, in general terms, within the common commercial policy, subject only to the provisions of Article 133(6) EC.

47 The aim of those changes was to simplify the situation and to reinforce the role of the Community in the negotiations to be undertaken within the WTO, by ensuring the consistency, effectiveness and credibility of the Community's action and by enabling it to perform its obligations swiftly and in good faith. Bilateral or multilateral negotiations within the WTO are continuous and the resultant agreements such as the agreements at issue, which simply modify Schedules of commitments under the GATS by means of a flexible and rapid negotiation procedure, need to be concluded and implemented as simply as possible. The interpretation of Article 133 EC proposed by the Commission is thus more consistent with the presumption of compatibility of the Community legal order with rules of public international law.

48 According to the Commission, the agreements at issue cannot, moreover, fall within Article 133(6) EC which, inasmuch as it provides for an exception to the principle set out in Article 133(5) EC, must be interpreted narrowly.

49 Thus, the second subparagraph of Article 133(6) EC, opening as it does with the words '[i]n this regard', merely draws the necessary inferences from the statement of principle in the first subparagraph of Article 133(6) EC. The exception in the second subparagraph of Article 133(6) EC therefore applies only where the conclusion of an agreement by the Community would involve the latter going beyond its powers because the agreement would lead to harmonisation of internal rules in the Member States in the service sectors referred to in that second subparagraph. That second subparagraph is therefore the corollary of Articles 137(2) EC, 149(4) EC, 151(5) EC and 152(4) EC, which specifically exclude competence to undertake harmonisation in the sectors concerned, namely social services, educational services, cultural and audiovisual services, and human health services.

50 According to the Commission, the second subparagraph of Article 133(6) EC cannot in any event be interpreted as meaning that any agreement which has even a limited effect on one of those sectors falls within the shared competence of the Community and the Member States. The fact that that provision refers to agreements 'relating to' those sectors leads moreover to the exclusion from its scope of agreements which do not specifically relate to those sectors but cover trade in services as a general category. Any other view would negate the meaning of the third subparagraph of Article 133(5) EC, which provides that the Council is to act unanimously with respect to the conclusion of horizontal agreements including those sectors.

51 In the present case, the agreements at issue do not give rise to any harmonisation of the sectors concerned. Moreover, none of the compensatory adjustments provided for in those agreements relates specifically to those sectors and the only withdrawal of a commitment relating thereto, concerning educational services, can in no way encroach on any powers of the Member States since it restores greater freedom to them. The horizontal commitments covered by the agreements at issue concern trade in services in general without being specific to those sectors.

52 The Parliament essentially endorses the arguments put forward by the Commission. The exclusive nature of Community competence is justified both by the need for the

Community to be able to fulfil its task in the defence of the common interest and by that of preventing distortions of competition and diversion of trade within the Community.

53 Article 133(5) EC reflects the wish of the Member States to ensure that the commercial policy should be effective in the context of an enlarged Union by bringing within its scope services which have become one of the major factors in the regulation of international trade.

54 To interpret the fourth subparagraph of Article 133(5) EC as meaning that the common commercial policy, when applied in relation to trade in services, would cease to be exclusive in character would have the result of depriving the first subparagraph of Article 133(5) EC and the amendments introduced by the Treaty of Nice of any useful effect. The same would apply if the second and third subparagraphs of Article 133(6) EC were to be interpreted as meaning that all horizontal commercial agreements which might have an impact on the services referred to by those provisions must be mixed agreements.

55 All the governments that have submitted observations and the Council consider, on the contrary, that conclusion of the agreements at issue falls within the shared competence of the Community and the Member States. Their views and arguments may be summarised as follows

56 First, the Italian Government maintains that, since the GATS was concluded as a mixed agreement, the general principles of international law and legal certainty require that the same apply to the agreements at issue which modify the GATS.

57 Second, the Polish Government submits that, since the Community has conferred powers only, shared competence between the Community and the Member States is the rule, whereas exclusive Community competence, which constitutes an exception,

requires either an express mention in the Treaty or the fulfilment of the strict conditions for recognition of the existence of implied exclusive competence in accordance with case-law.

58 Third, the Council, the Czech, Danish, Greek and Spanish Governments, Ireland, the Italian, Netherlands, Polish, Romanian, Finnish, Swedish and United Kingdom Governments point out that considerations linked with alleged delays or practical difficulties encountered in modifying the schedules of commitments or an alleged risk of loss of credibility and effectiveness of Community action cannot influence the division of competences between the Community and its Member States. The German Government adds that the division of competences within the Community legal order cannot be affected by considerations based on international agreements which enjoy no primacy over the Treaty and of which the lawfulness is, on the contrary, subject to compliance with the Treaty.

59 A number of governments also express strong doubts as to whether delays deriving from national approval procedures contribute decisively to delaying the process of modifying schedules of specific commitments. The practice of mixed agreements is in fact well established, the Community and its Member States exercising their competence in a coordinated manner under de facto direction from the Commission. Ireland and the Netherlands and United Kingdom Governments refer, in addition, to the duty of cooperation between the Member States and the Community institutions existing in that context.

60 Fourth, the Council maintains that the first subparagraph of Article 133(6) EC, under which the Council may not conclude an agreement containing provisions which go beyond the Community's internal powers, is applicable to the present case, so that the agreements at issue should also be concluded by the Member States. A number of compensatory commitments contained in the agreements, such as the commitment to withdraw the economic need tests applied by the United Kingdom for engineering services or the commitment to make less restrictive the permanent residency requirement for financial services supplied under mode 3 as regards the Republic of

Finland, in fact relate to matters for which there is no legal basis in the Treaty which justifies the Community having internal powers.

61 Fifth, most of the governments that have submitted observations in this regard and the Council are of the view, as they explain when examining the second question concerning the choice of legal basis, that the agreements at issue fall within the scope of the second subparagraph of Article 133(6) EC. The very terms of that provision confirm the shared nature of the competence concerned by requiring joint action by the Community and the Member States in concluding agreements in the areas to which it refers.

62 As regards, sixth, Articles 71 EC and 80(2) EC which, as they state in connection with examination of the second question, govern the conclusion of the agreements at issue, in accordance with the third subparagraph of Article 133(6) EC, those governments and the Council emphasise that Community competence regarding transport is not by definition exclusive. Moreover, the case-law concerning whether there is implied external competence on account of the exercise of internal powers likewise does not have the effect in this case of bringing the agreements at issue within the scope of such exclusive Community competence, since they do not affect internal Community rules on transport.

63 Seventh, the Member States that have submitted observations and the Council indicate, in more general terms, that they do not share the Commission's interpretation of Article 133 EC as a whole.

64 The Czech Government, Ireland, the Italian, Lithuanian, Netherlands, Polish, Romanian, Finnish, Swedish and United Kingdom Governments and the Council are of the opinion that, in contrast to the aspects of the common commercial policy covered by Article 133(1) EC, which encompass in particular trade in goods and supply of services under mode 1 and fall within the exclusive competence of the Community, the fields covered by the first subparagraph of Article 133(5) EC, including services

provided under modes 2 to 4 to which the agreements at issue mainly relate, do not fall within such exclusive competence.

65 That conclusion is particularly clear and apparent from the actual wording of the fourth subparagraph of Article 133(5) EC, according to which paragraph 5 is not to affect the right of the Member States to maintain and conclude agreements.

66 Contrary to what the Commission suggests, the fact of interpreting Article 133(5) EC as not conferring exclusive competence on the Community does not deprive of useful effect the amendments made by the Treaty of Nice. According to the Spanish and Swedish Governments, that provision displays, in particular, the advantage of now making it clear that Community competence of a commercial nature exists in relation to services and of clarifying its limits. According to the Swedish and United Kingdom Governments, Article 133(5) EC, and in particular the second and third subparagraphs thereof, also have the specific purpose of laying down various procedural rules on the matter.

67 In contrast to the other governments which have submitted observations and to the Council, the Spanish Government submits that the concept of 'trade in services' within the meaning of the first subparagraph of Article 133(5) EC cannot be assimilated to the corresponding concept in the GATS and extends only to services supplied under modes 1 and 2, which are the only ones that essentially correspond to the concept of the provision of services within the meaning of the Treaty.

The second question

68 According to the Commission, whatever may be the answer to the question whether the conclusion of the agreements at issue falls within the exclusive competence of the Community or is a competence shared with the Member States, the only legal basis for the Community act adopted for that purpose is Article 133(1) to (5) EC, in conjunction with the first subparagraph of Article 300(2) EC.

69 All of the governments that have submitted observations on this point and the Council consider, however, that recourse must also be had to Articles 71 EC and 80(2) EC, on the one hand, and Article 133(6) EC, on the other, in conjunction with the first subparagraph of Article 300(3) EC.

The second subparagraph of Article 133(6) EC

70 The Commission reiterates that, for the reasons which it set out when examining the first question, the second subparagraph of Article 133(6) EC cannot, in its view, apply to the agreements at issue.

71 The Commission adds, as a subsidiary point, that, even if it were applicable, the second subparagraph of Article 133(6) EC cannot serve as a legal basis for the Community act concluding those agreements. The provision merely lays down an exception to the exclusive competence of the Community in matters of commercial policy by reserving concurrent competence to the Member States.

72 The German, Netherlands, Polish, Romanian and United Kingdom Governments and the Council contend, however, that the second subparagraph of Article 133(6) EC is indeed capable of serving as a legal basis for Community action, since it sets out the

conditions for the application of Article 133 EC, limits the competence of the Community under paragraph 5 of that article and establishes a specific Community competence on a shared basis.

73 Most of the governments that have submitted observations and the Council maintain, moreover, that the second subparagraph of Article 133(6) EC does indeed fall to be applied to this case.

74 The agreements at issue modify commitments relating specifically to the services covered by that provision, namely sectoral commitments relating to educational services and horizontal commitments relating to subsidies. Moreover, the horizontal commitments modified by those agreements cover all the sectors appearing in the Schedule of commitments of the Community and its Member States and in particular the sectors of cultural services, educational, human health and social services, under modes 3 and 4.

75 The Czech, Danish, German, Greek and Spanish Governments, Ireland, the Lithuanian, Portuguese, Romanian, Finnish and United Kingdom Governments and the Council dispute the validity of the distinction drawn by the Commission between the withdrawing of commitments and the increase of commitments. Any modification of a commitment, whether it limits the freedom of the Member States or reinstates it, is a commitment that can be made only by the person vested with competence in the area concerned.

76 Furthermore, the interpretation adopted by the Commission in that regard with respect to the second subparagraph of Article 133(6) EC, as the Commission has explained it in its consideration of the first question, is disputed for various reasons.

77 First, the Netherlands, Polish and Swedish Governments argue that that provision must not be interpreted restrictively because, in particular, it does not create an exception to an alleged exclusive Community competence.

78 Second, the Czech, Italian, Lithuanian, Netherlands, Polish, Romanian, Finnish and United Kingdom Governments and the Council maintain that the first and second subparagraphs of Article 133(6) EC cannot be merged as suggested by the Commission. Their arguments on that point may be summarised as follows.

79 The first subparagraph of Article 133(6) EC is certainly not limited to the services sectors referred to in the second subparagraph of that provision but relates to all cases where there is no internal competence of the Community, and of those cases harmonisation, as is apparent from the use of the phrase 'in particular', is moreover only one example. The second subparagraph therefore is certainly not limited to clarifying the first subparagraph of Article 133(6) EC by allegedly setting out the areas of services in which harmonisation of national laws by the Community acting alone would not be possible. The areas referred to by the second subparagraph moreover do not correspond entirely with those in which the Community has no internal competence to undertake harmonisation, since, in particular, no mention is made of the field of employment or that of vocational training, regarding which Articles 129 EC and 150(4) EC nevertheless exclude such harmonisation. Furthermore, the Treaty contains no prohibition of harmonisation regarding audiovisual services even though they are also mentioned in the second subparagraph of Article 133(6) EC.

80 Third, the Czech, German, Greek, Polish, Portuguese and Finnish Governments submit that the third subparagraph of Article 133(5) EC is a strictly procedural provision having no bearing whatsoever on the issue of exclusive or shared Community competence.

81 Fourth, the agreements at issue do indeed 'relate' to the service sectors referred to in the second subparagraph of Article 133(6) EC.

82 According to the Czech and German Governments, Ireland and the Italian and Romanian Governments, the expression 'relating to' in that provision is not, regardless of the language version considered, at all unambiguous, nor is it conducive to restricting the application of that provision only to agreements which relate 'exclusively' or 'above all' to such service sectors, as suggested by the Commission on the basis of an interpretation which appears to be purely semantic or literal.

83 According to the Lithuanian and United Kingdom Governments, the terms thus used indicate on the contrary that any agreement governing aspects of trade in services within any of the sectors referred to falls within the scope of that provision. The Czech, Romanian and United Kingdom Governments consider that interpretation to be the only one consistent with the manifest intention of the authors of the Treaty of Nice to ensure that the sensitive sectors referred to in the second subparagraph of Article 133(6) EC, in which the Community, internally, has only supporting, coordinating or supplementary competences, cannot fall outside the competence of the Member States.

84 In the Netherlands Government's view, the interpretation advocated by the Commission is also belied by the very terms of the third subparagraph of Article 133(5) EC, since that provision specifies the voting rules applicable in the case of 'horizontal agreement[s]' 'in so far as [they] also [concern] the … second subparagraph of paragraph 6'.

Articles 71 EC and 80(2) EC

85 The Commission maintains that, whilst it is apparent from the third subparagraph of Article 133(6) EC that agreements in the field of transport do not fall within the common commercial policy, that is not so in the case of the agreements at issue which relate to trade in services. It is not the aim, object or effect of those agreements to regulate transport services and, moreover, they confine themselves in that regard to making certain withdrawals of commitments concerning maritime or air transport services.

86 The Commission submits that any impact on transport services is in any event merely incidental compared with the essentially commercial object of the agreements at issue, so that preference should be accorded to Article 133(1) to (5) EC alone as a legal basis, as is clear both from the case-law of the Court on the choice of an appropriate legal basis and from legislative practice, which provides a number of examples of both internal acts and international agreements which incidentally have direct effects on transport services, although they were adopted without reference to the Treaty provisions on transport.

87 The Parliament essentially shares the Commission's view.

88 Most of the governments that have submitted observations and the Council contend, by contrast, that recourse to Articles 71 EC and 80(2) EC is necessary, since some of the sectoral commitments modified and withdrawn by the agreements at issue relate to transport services and since the horizontal commitments that have been withdrawn, modified or given by way of compensation also relate, inter alia, to such services. They dispute the interpretation supported by the Commission, according to which only agreements relating exclusively or predominantly to the transport sector, and not horizontal agreements, are covered by the third subparagraph of Article 133(6) EC.

89 First, the Czech and Danish Governments, Ireland, the Italian, Lithuanian, Netherlands, Polish, Portuguese, Finnish and United Kingdom Governments and the Council point out that it is settled case-law that transport, even in the context of a trade agreement such as the GATS, does not fall within the common commercial policy. That tenet is now expressly enshrined in the third subparagraph of Article 133(6) EC, which provides in that regard that the negotiation and conclusion of agreements relating to transport 'shall continue to be governed' by the provisions relating to the common transport policy.

90 Second, the Danish and United Kingdom Governments draw attention to the terminology used in that provision which, in various language versions, refers broadly to agreements 'in the field' of transport.

91 Third, the Danish Government maintains that the interpretation supported by the Commission runs counter both to the objective pursued by the third subparagraph of Article 133(6) EC and to the need to endow that provision with useful effect. It would be pointless to specify in connection with Article 133 EC that an agreement falling solely within the field of transport falls within the common transport policy. The object and purport of the clear indications in the text of the third subparagraph of Article 133(6) EC is precisely to remove all possibility of applying the case-law relating to the choice of legal basis by reference to the predominant and incidental elements of a measure.

92 Fourth, according to the Czech and United Kingdom Governments, that case-law is applicable, moreover, only where a choice must be made between Treaty provisions

conferring competence on the Community for different purposes and not where, quite apart from any conflict of legal bases, there is a conflict of competences as between the Community and the Member States.

93 Fifth, the Czech, Netherlands, Romanian, Finnish and United Kingdom Governments and the Council maintain that the provisions of the agreements at issue relating to the transport sector are not in any way ancillary. First of all, there is, in the Council's view, no criterion that makes it possible to identify service sectors which might be more ancillary than others. The Romanian Government emphasises that the various modifications made by the agreements at issue to the Schedules of commitments are necessary to the same extent in order to attain the objective of those agreements, namely to ensure consolidation of those schedules following the enlargements that have taken place. Finally, the Netherlands, Romanian and Finnish Governments argue that the specific commitments peculiar to the field of transport in the agreements are likewise not ancillary measures needed to guarantee the effectiveness of a principal measure embodied in the agreements at issue.

94 According to the Danish and United Kingdom Governments, the transport sector, to which a large number of modifications of specific commitments relate, is in fact the most prevalent. The Danish Government adds that such modifications are also particularly important in that they affect in particular modes 3 and 4, which are particularly important in the field of international maritime passenger transport, characterised by the need to carry out locally certain activities associated with the supply of services in that field.

95 As regards, sixth, the legislative practice cited by the Commission, the Czech and Danish Governments, Ireland, the Italian, Lithuanian, Netherlands, Romanian, Finnish and United Kingdom Governments and the Council consider it to be irrelevant.

Opinion of the Court

Subject-matter of the agreements at issue

96 It is not disputed that, in accordance with the terms of Article XXI(2)(a) of the GATS, the compensatory adjustments in Annex II to the agreements at issue were the subject of an 'agreement' negotiated with the WTO members which declared themselves affected by the withdrawals and modifications of commitments proposed in Document S/SECRET/8.

97 As regards the withdrawals and modifications of commitments proposed in Documents S/SECRET/8 and S/SECRET/9 and reproduced in Annex I(A) and Annex I(B) respectively to the agreements at issue, the Commission, in response to a question put by the Court, maintained at the hearing that they were not the subject of an agreement between the parties and that they should not therefore be taken into account by the Court in the procedure brought under Article 300(6) EC. First, WTO members have the right to withdraw or modify commitments even though other members are opposed to them doing so. Second, there were never any agreements on compensatory adjustments with regard to the commitments identified in Document S/SECRET/9.

98 That argument, which is challenged by the Danish, Greek and Spanish Governments, Ireland, the Polish, Finnish and Swedish Governments and by the Council, cannot succeed.

99 As the latter have pointed out, it must, first of all, be observed that the Joint Letter expressly provides that Annex I constitutes, together with that letter and Annex II, the agreement between the parties and that it also provides that the modifications and withdrawals proposed in Documents S/SECRET/8 and S/SECRET/9 are not to enter into force until the compensatory adjustments indicated in Annex II to the agreements at issue have entered into force.

100 Next, as regards more specifically the modifications and withdrawals of commitments set out in Document S/SECRET/8 and included in Annex I(A) to the agreements at issue, it is apparent from Article XXI(2)(a) of the GATS that, in seeking agreement on compensatory adjustments, the various members involved must endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations. The 'compensatory adjustments' negotiated are thus directly dependent on the withdrawals and modifications proposed and must, by way of consideration, contribute to re-establishing a balance which may have been upset by those withdrawals and modifications.

101 It follows that, although the modifications and withdrawals of commitments proposed by a WTO member are initially unilaterally set by the member, once compensatory adjustments have been negotiated, those adjustments and the modifications and withdrawals become indissociably linked. That is borne out in particular by paragraph 6 of the Procedural Rules, which stipulates that any changes actually made to the Schedules following such an agreement are not to exceed the modifications or withdrawals initially notified and are to include any compensatory adjustment agreed upon in the negotiations.

102 Finally, as regards more particularly the modifications and withdrawals of commitments set out in Document S/SECRET/9 and included in Annex I(B) to the agreements at issue, admittedly it is clear from the Joint Letter that they did not give rise either to an agreement on compensatory adjustments or to a request for arbitration. In such a case, it is apparent from Article XXI(3)(b) of the GATS and from paragraph 8 of the Procedural Rules that the member which has proposed such modifications and withdrawals is as a rule free to implement them unilaterally once the certification procedure is completed.

103 In the present case, however, it is apparent that Documents S/SECRET/8 and S/SECRET/9 both pursue the same objective, namely the adjustment of the Schedules of commitments of the new Member States and the merging of those Schedules with the existing Schedule of commitments of the Community and its Member States following the accession of the new Member States to the Union, and that they form, in that light and as is shown in particular by the facts set out in paragraph 99 of this Opinion, an indissociable whole.

104 Moreover, it is established that both the modifications and withdrawals of commitments included in Annex I and the compensatory adjustments included in Annex II are intended to be binding on the parties to the agreements at issue and on the other WTO members as well.

105 It follows from all the foregoing that all those modifications, withdrawals and compensatory adjustments form the content of the agreements at issue, which must be taken into consideration in order to reply to the request for an Opinion.

Purpose of the questions put to the Court and the order in which they are to be examined

106 The Commission's request for an Opinion concerns, on the one hand, the question as to whether the Community is empowered to act alone to conclude the agreements at issue and, on the other, the choice of the appropriate legal basis for the act by which the Community will conclude those agreements. Concerning the latter point, the Opinion has the more specific object of determining whether the Community's consent to be bound should, as the Commission maintains, be founded solely on Article 133(1) to (5) EC, in conjunction with Article 300(2) EC, or whether reference should also be made for that purpose to Article 133(6) EC and Articles 71 EC and 80(2) EC, in conjunction with Article 300(3) EC, as the Council proposes.

107 It must be borne in mind that the procedure laid down in Article 300(6) EC is intended to make it possible to settle the question — prior to the conclusion of an agreement — as to whether the agreement is compatible with the Treaty. Article 300(6) EC thus has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community (see, in particular, Opinion 1/75 [1975] ECR 1355, 1360).

108 The procedure provided for in Article 300(6) EC must therefore be available for all questions capable of submission for judicial consideration, in so far as such questions give rise to doubt as to either the substantive or the formal validity of the agreement with regard to the Treaty (Opinion 1/75, p. 1361, and Opinion 2/92 [1995] ECR I-521, paragraph 14). A judgment on the compatibility of an agreement with the Treaty may in that regard depend not only on provisions of substantive law but also on those concerning the powers, procedure or organisation of the institutions of the Community (Opinion 1/78 [1979] ECR 2871, paragraph 30).

109 According to the settled interpretation of the Court, its opinion may in particular be obtained on questions concerning the division, between the Community and the Member States, of competence to conclude a given agreement with non-member countries. Article 107(2) of the Rules of Procedure supports that interpretation (see, most recently, Opinion 1/03 [2006] ECR I-1145, paragraph 112).

110 Moreover, it must be recalled that the choice of the appropriate legal basis has constitutional significance. Since the Community has conferred powers only, it must tie the agreement that it seeks to conclude to a Treaty provision which empowers it to approve such a measure. To proceed on an incorrect legal basis is therefore liable to invalidate the act concluding the agreement and so vitiate the Community's consent to be bound by the agreement it has signed. That is so in particular where the Treaty does not confer on the Community sufficient competence to ratify the agreement in its entirety, a situation which entails examining the allocation as between the Community and the Member States of the powers to conclude the agreement that is envisaged with non-member countries, or where the appropriate legal basis for the measure concluding the agreement lays down a legislative procedure different from that which has in fact been followed by the Community institutions (Opinion 2/00 [2001] ECR I-9713, paragraph 5).

111 As regards the order in which the two questions referred to the Court must be considered, the Court accepts that, as most of the interveners have stated and as the Commission itself indeed acknowledges, the character, whether exclusive or not, of

Community competence to conclude the agreements at issue and the legal basis to which recourse must be had for that purpose are two questions which are closely linked.

112 Indeed, whether the Community alone has competence to conclude an agreement or whether such competence is shared with the Member States depends inter alia on the scope of the provisions of Community law which are capable of empowering the Community institutions to participate in the agreement (see, to that effect, Opinion 2/92, paragraph 12).

113 Thus it is appropriate to consider together (i) the question of which legal bases underpin the Community's competence to conclude the agreements at issue and (ii) the question whether such Community competence is exclusive or whether, on the contrary, the Member States retain a share in competence to conclude those agreements.

The competence of the Community to conclude the agreements at issue and the legal bases for such conclusion

114 As a preliminary point, it must be recalled that, in the present case, the agreements at issue amend the GATS and more specifically the Annex thereto which includes the Schedules of specific commitments of WTO members. The GATS is a mixed agreement concluded both by the Community and by its Member States. The single Schedule of commitments of the Community and its Member States — the modification of which is inter alia the purpose of the agreements at issue — sets out, like the Schedules of the other WTO members, a collection of specific commitments which contribute to the establishment of a multilateral balance between the commitments of the various WTO members.

115 In those circumstances, it is important to make clear from the outset that the Schedule of commitments of the Community and its Member States cannot be modified as the

result of unilateral action by the Member States, whether they act individually or together. For such modifications, the Community's participation is essential.

116 However, it does not necessarily follow from those circumstances that the same is true as far as the participation of the Member States in the agreements at issue is concerned. Indeed, whether the participation of the Member States is necessary depends, in this instance, on, inter alia, whether, by virtue of the amendments made to Article 133 EC by the Treaty of Nice, external Community competence has evolved in such a way as to justify the Community alone concluding the agreements at issue — a question which will be examined in this Opinion.

Concerning recourse to Article 133(1) and (5) EC, relating to the common commercial policy

117 The competence of the Community to participate in conclusion of the agreements at issue under Article 133(1) and (5) EC is beyond doubt.

118 First, it is not in dispute that those agreements contain provisions which concern inter alia services supplied under mode 1. As the Court held in paragraph 44 of Opinion 1/94, such a mode which covers cross-frontier supplies of services falls within the concept of the common commercial policy referred to in Article 133(1) EC. That provision, which, as the Court has consistently held, confers exclusive competence on the Community, has not been amended.

119 Second, it follows from the first subparagraph of Article 133(5) EC, which was introduced by the Treaty of Nice, that the Community is now also competent to conclude, under the common commercial policy, international agreements relating to

trade in services supplied under modes 2 to 4. Such modes of supply of services, which the GATS refers to as 'consumption abroad', 'commercial presence' and 'presence of natural persons' respectively and which were formerly outside the sphere of the common commercial policy (see Opinion 1/94, paragraph 47), now fall within it on the conditions laid down in Article 133(5) and (6) EC.

120 Contrary to the submission of the Kingdom of Spain, nothing permits the inference that only trade in services through supplies made under mode 2, within the meaning of the GATS, is covered by the external Community competence thus established in the first subparagraph of Article 133(5) EC.

121 First, it may be noted that, given both its general nature and the fact that it was concluded at world level, the GATS assumes, as regards in particular the concept of 'trade in services' (an expression used both by the GATS and by the first subparagraph of Article 133(5) EC), particular importance in the sphere of international action relating to trade in services.

122 Second, the stipulation in the first subparagraph of Article 133(5) EC to the effect that the conclusion of agreements in the field of trade in services is now to fall within the common commercial policy 'in so far as those agreements are not covered by [Article 133(1) to (4) EC]' must particularly be read in the light of the context following Opinion 1/94, in which the Court — as has been recalled in paragraphs 118 and 119 of this Opinion — held that trade in the services supplied under mode 1 within the meaning of the GATS fell within the scope of Article 133(1) EC, to the exclusion of trade in the services supplied under modes 2 to 4 within the meaning of that agreement.

123 In this case and as is clear from paragraphs 34 to 39 of this Opinion, it is moreover established that the agreements at issue, particularly the modifications, withdrawals

and compensatory adjustments which they include in relation to both horizontal and sectoral commitments, concern to a very great extent trade in services provided under modes 2 to 4.

124 Having regard to the foregoing, it may be concluded, in the context of the answer to be given to the second question raised in the request for an Opinion, that the Community has competence to conclude the agreements at issue in part under Article 133(1) EC and in part under Article 133(5) EC, so that the Community act concluding those agreements must be based inter alia on those two provisions.

Concerning recourse to the second subparagraph of Article 133(6) EC and the participation of the Member States in the conclusion of the agreements at issue

125 In contrast to the Commission and the Parliament, which submit that conclusion of the agreements at issue falls within the exclusive competence of the Community, the Member States which have submitted observations and the Council take the view that the conclusion of those agreements requires the joint participation of the Community and its Member States. To explain why joint participation is necessary, they base their argument in particular (as is clear from paragraph 62 of this Opinion) on the second subparagraph of Article 133(6) EC.

126 Two preliminary observations must be made.

127 First, it must be recalled that concerns such as those expressed by the Commission relating to the need for unity and rapidity of external action and to the difficulties which might arise were the Community and the Member States to participate jointly in conclusion of the agreements at issue cannot change the answer to the question of competence. Replying to similar arguments advanced by the Commission in the procedure concerning the request for Opinion 1/94 relating to conclusion of the

agreements annexed to the WTO agreement, the Court held that the resolution of the issue of the allocation of competence could not depend on problems which might possibly arise in administration of the agreements concerned (Opinion 1/94, paragraph 107; see also, to that effect, Opinion 2/00, paragraph 41). The same clearly holds for possible problems relating to the conclusion of agreements.

128 Second, the fact, emphasised by the Commission, that the provisions in Annex I to the agreements at issue withdraw or modify commitments and accordingly result in service markets in the Member States being less open to suppliers of services from non-member countries and thus in a reduction in the external commitments with which the Member States have to comply, likewise cannot have any bearing on the determination of the rules establishing competence to make such withdrawals or modifications.

129 Indeed, external competence whereby commitments may be made to determine the conditions on which suppliers of services from non-member countries may have access to a service market within the Community necessarily includes competence to abandon or reduce such commitments.

130 Having made those preliminary points, it is now appropriate to consider the scope of the second subparagraph of Article 133(6) EC in order to ascertain whether that provision requires, as the Council and all the Member States which have expressed a view on this point have maintained, that the agreements at issue be concluded jointly by the Community and its Member States.

131 In the interpretation of that provision, it should be borne in mind, as has already been pointed out in paragraph 110 of this Opinion, that the Community has, as is clear from Article 5 EC, conferred powers only.

132 Furthermore, the first subparagraph of Article 133(5) EC, which establishes external Community competence in respect of international trade in services under modes 2 to 4, expressly provides that that competence is 'without prejudice' to Article 133(6) EC.

133 For its part, the second subparagraph of Article 133(6) EC provides that 'by way of derogation' from the first subparagraph of Article 133(5) EC, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services are to fall within the shared competence of the Community and its Member States and are to be concluded jointly by the Member States and the Community.

134 It is thus apparent from the very wording of those provisions that, in contrast to the agreements relating to trade in services which do not concern the services identified in the second subparagraph of Article 133(6) EC, agreements which relate to those services cannot be concluded by the Community acting alone, such conclusion requiring the joint participation of the Community and the Member States.

135 The second subparagraph of Article 133(6) EC reflects a concern to prevent trade in such services being regulated by means of international agreements concluded by the Community alone under its external competence in commercial matters. Without in any way excluding a Community competence in that regard, the second subparagraph of Article 133(6) EC requires, however, that that competence which the Community in this instance shares with its Member States be exercised jointly by those States and the Community.

136 It may be observed that, by providing in that way for common action by the Community and its Member States by virtue of their shared competence, the second subparagraph of Article 133(6) EC allows the interest of the Community in establishing a comprehensive, coherent and efficient external commercial policy to be pursued whilst at the same time allowing the special interests which the Member States might wish to defend in the sensitive areas identified by that provision to be taken into

account. The requirement of unity in the international representation of the Community calls in addition for close cooperation between the Member States and the Community institutions in the process of negotiation and conclusion of such agreements (see, to that effect, inter alia, Opinion 2/00, paragraph 18 and case-law cited).

137 In view of the foregoing, the various arguments put forward by the Commission and the Parliament to restrict the scope of the second subparagraph of Article 133(6) EC cannot succeed.

138 As regards the contention of those institutions that that provision covers only agreements which concern exclusively or predominantly trade in services in the sectors referred to by it, the following points should be noted.

139 Besides the fact that it finds no support in the wording of the second subparagraph of Article 133(6) EC, such an interpretation cannot be reconciled with the aim pursued by that provision which, as has been pointed out in paragraph 135 of this Opinion, seeks to preserve for the Member States an effective external competence in the sensitive areas covered by the provision.

140 Indeed, one of the consequences of such an interpretation would be to remove from the sphere of application of the second subparagraph of Article 133(6) EC all the 'horizontal' agreements which concern trade in services as a whole. In addition, it would follow from that interpretation that international provisions with strictly the same object contained in an agreement and concerning the areas of sensitive services specified in the second subparagraph of Article 133(6) EC would fall within or outwith the shared competence of the Community and its Member States to which that provision refers depending solely on whether the contracting parties to the agreement

decided to deal only with trade in such sensitive services or whether they agreed to deal at the same time with that trade and with trade in some other type of services or in services as a whole.

141 For the same reasons, the fact, also highlighted by the Commission, that the third subparagraph of Article 133(5) EC provides that a Community act concluding a horizontal agreement requires unanimity within the Council insofar as such an agreement also concerns the second subparagraph of Article 133(6) EC likewise cannot support the conclusion that Community competence to conclude such an agreement must, contrary to the case of sectoral agreements which specifically concern the sensitive areas referred to in that second subparagraph, be exclusive in character.

142 The third subparagraph of Article 133(5) EC articulates moreover a rule whose purpose is to state the manner in which Community competence must be exercised and not to specify the nature of that competence. Furthermore, the requirement for unanimity within the Council in relation to the adoption of a Community act concluding an agreement is not in any way incompatible with the fact that such conclusion falls within a competence which is shared with the Member States.

143 As regards the argument which the Commission also espouses that it follows from the first subparagraph of Article 133(6) EC that the second subparagraph thereof is applicable only where provisions of an agreement would lead to harmonisation in the sensitive service sectors covered by that second subparagraph, the following points should be noted.

144 As the Council and most of the Member States which have submitted observations have maintained, the premiss on which that argument is based, namely that the first subparagraph of Article 133(6) EC has the sole object of excluding external Community competence where the provisions of a proposed agreement lead to harmonisation of national laws or regulations in an area in which the Treaty rules out such

harmonisation, cannot be inferred from that provision. Indeed, the case of harmonisation is mentioned in that provision only by way of example as use of the phrase 'in particular' shows.

145 That conclusion alone serves to rule out the Commission's interpretation which seeks, on that basis, to restrict the sphere of application of the second subparagraph of Article 133(6) EC to only those cases in which the provisions of a proposed agreement would lead to harmonisation in one of the service sectors identified in that second subparagraph.

146 In those circumstances, and having regard, in particular, to the points made in paragraphs 131 to 136 of this Opinion and specifically to the actual wording of the second subparagraph of Article 133(6) EC and to the aim which it pursues, the interpretation advocated by the Commission in respect of the second subparagraph cannot follow from the content of the first subparagraph of Article 133(6) EC.

147 In this instance, it is clear from the agreements at issue that the matters they cover include, as is stated in paragraph 36 of this Opinion, the extension to a number of new Member States of a sectoral limitation relating to educational services mentioned in the existing Schedule of commitments of the Community and its Member States and seeking to ensure that those services be covered by that Schedule only in so far as privately funded education services are concerned.

148 As has been seen in paragraph 34 of this Opinion, the agreements also extend to all or some of the new Member States various horizontal limitations concerning market access and national treatment. Such horizontal limitations are, as a general rule, applicable in all the service sectors covered by the Schedule of commitments of the Community and its Member States, which include services that are mentioned in the second subparagraph of Article 133(6) EC, such as privately funded education services or certain social or health services.

149 Thus, for example, the extension to the new Member States of the horizontal limitation relating to access under mode 3 to services regarded as public utilities at a national or local level which may be subject to public monopolies or to exclusive rights granted to private operators may, in particular, apply in relation to health services, as is expressly stated in the explanatory note relating to that limitation in the existing Schedule of commitments of the Community and its Member States.

150 In those circumstances, it follows from the second subparagraph of Article 133(6) EC that the Community and the Member States have in this instance a shared competence to conclude the agreements at issue jointly. That finding suffices to answer the first question raised in the request submitted to the Court for an Opinion.

151 It remains to point out, in view of the answer to be given to the second question raised in that request, that, since it is established that the second subparagraph of Article 133(6) EC governs the conclusion of the agreements at issue, that provision, which makes clear the shared nature of the Community competence in that regard and, in doing so, supplements the rule in the first subparagraph of Article 133(5) EC, must, like the latter provision, serve as a legal basis for the Community act concluding those agreements.

Concerning recourse to Articles 71 EC and 80(2) EC, relating to the common transport policy

152 The Commission and the Parliament submit that Article 133(1) and (5) EC constitute the sole legal basis to which recourse must be had for the purposes of adoption of the Community act concluding the agreements at issue.

153 Conversely, the Council and all the Member States which have intervened in these proceedings and which have expressed a view on this point contend that, since the agreements cover inter alia transport services — in particular maritime and air transport services — the Community act concluding the agreements must, in addition to Article 133(1), (5) and (6) EC, also be based on Articles 71 EC and 80(2) EC.

154 In order to give an opinion on these divergent views, it is necessary, as all the governments and institutions which have submitted observations agree, to consider the third subparagraph of Article 133(6) EC, which specifically provides that the negotiation and conclusion of international agreements in the field of transport is to continue to be governed by the provisions of Title V of the Treaty and Article 300 EC.

155 According to the Commission and the Parliament, the third subparagraph of Article 133(6) EC must be interpreted as being applicable only in the case of agreements which are exclusively, or at the very least predominantly, concerned with transport. In the view of those institutions, that is not the case of the agreements at issue, whose object is trade in services in general, transport services for their part being only ancillary or secondary within the agreements.

156 In order to clarify the scope of the third subparagraph of Article 133(6) EC, it should, in the first place, be recalled that the first subparagraph of Article 133(5) EC, which, as has been stated above, confers external competence on the Community in respect of the common commercial policy in the field of trade in services supplied under modes 2 to 4, expressly states that that competence is 'without prejudice to paragraph 6'.

157 Second, it is highly unusual that a Treaty provision conferring external Community competence in a given field should resolve, as the third subparagraph of Article 133(6) EC does, a potential conflict of Community legal bases by specifically stating that another provision of the Treaty is to be preferred to it so far as concerns the conclusion

of certain types of international agreements which are prima facie liable to be covered by one or other legal basis.

158 Third, there is no doubt that the expression 'international agreements in the field of transport' covers, inter alia, the field of trade concerning transport services. It would make no sense to specify in the middle of a provision relating to the common commercial policy that agreements in the field of transport which are not related to trade in transport services fall within the transport policy and not the common commercial policy.

159 Fourth, the provision stating that the negotiation and conclusion of agreements in the field of transport 'shall continue' to be governed by the provisions of the Treaty relating to transport policy reflects the intention that a form of status quo ante should be preserved in that field.

160 It should be recalled in that regard that in Opinion 1/94, given precisely in relation to the conclusion of the GATS which the agreements at issue are to modify, the Court held that international agreements in transport matters were not covered by Article 113 of the EC Treaty (now, after amendment, Article 133 EC) making clear that that was the case irrespective of the fact that such agreements concern safety rules such as those at issue in Case 22/70 *Commission* v *Council ('ERTA')* [1971] ECR 263 or that they constitute, like the GATS, agreements of a commercial nature (see Opinion 1/94, paragraphs 48 to 53; see also, to that effect, Opinion 2/92, paragraph 27).

161 In order to arrive at that conclusion, the Court pointed out, in particular, (in paragraph 48 of Opinion 1/94) that transport was the subject of a specific title of the Treaty, distinct from the title on the common commercial policy, and recalled in that regard that it followed from settled case-law that the Community has an implied external competence under the common transport policy.

162 It follows from the foregoing that, before the entry into force of the Treaty of Nice, trade in services in transport matters remained wholly outside the common commercial policy. Even if supplied under mode 1, trade in such services thus continued, unlike other types of services, to be covered by the title of the Treaty relating to the common transport policy (Opinion 1/94, paragraph 53).

163 Fifth, the interpretation proposed by the Commission, by virtue of which only agreements exclusively or predominantly relating to trade in transport services are covered by the third subparagraph of Article 133(6) EC, would to a large extent deprive that provision of its effectiveness. Indeed, the consequence of that interpretation would be that international provisions with strictly the same object and contained in an agreement would fall in some cases within transport policy and in some cases within commercial policy depending solely on whether the parties to the agreement decided to deal only with trade in transport services or whether they agreed to deal at the same time with that trade and with trade in some other type of services or in services as a whole.

164 It is apparent, however, from all the foregoing that the third subparagraph of Article 133(6) EC seeks to maintain, with regard to international trade in transport services, a fundamental parallelism between internal competence whereby Community rules are unilaterally adopted and external competence which operates through the conclusion of international agreements, each competence remaining — as previously — anchored in the title of the Treaty specifically relating to the common transport policy.

165 It may, moreover, be observed that the particularity of Community action in respect of transport policy is underlined in Article 71(1) EC, which specifies that the Council is required to establish the common transport policy taking into account 'the distinctive features of transport'. Similarly, it may be noted that, with regard more specifically to the field of trade in services, Article 71(1)(b) EC expressly confers competence on the Community to lay down, for the purpose of implementing that policy, 'the conditions under which non-resident carriers may operate transport services within a Member State'.

166 As regards the case-law concerning the choice of legal basis by reference to the criterion of the principal and the incidental purpose of a Community act, to which the Commission has also referred in order to justify recourse to Article 133(1) and (5) EC alone when concluding the agreements at issue, it is sufficient, in this instance, to state that the provisions of the agreements at issue relating to trade in transport services cannot be held to constitute a necessary adjunct to ensure the effectiveness of the provisions of those agreements concerning other service sectors (see, in that regard, Opinion 1/94, paragraph 51) or to be extremely limited in scope (see, in that regard, Opinion 1/94, paragraph 67, and Case C-268/94 *Portugal* v *Council* [1996] ECR I-6177, paragraph 75).

167 First, trade in transport services, like trade in the other types of services covered by the GATS or by the agreements at issue, falls within the very purpose of the GATS and of those agreements, which, moreover, have a direct and immediate effect on trade in each of the types of services thus affected, no distinction being possible in that regard between those types of services.

168 Second, it is established that the agreements at issue include, in this instance, a relatively high number of provisions whose effect is to modify both horizontal and sectoral commitments made by the Community and its Member States under the GATS, as regards the terms, conditions and limitations on which the Member States grant (i) access to transport services markets, in particular air or maritime, to suppliers of services from other WTO members and (ii) national treatment.

169 It is clear for example from paragraph 34 of this Opinion that Annex I(A) to the agreements at issue extends to various new Member States the horizontal limitation relating to access under mode 3 to services regarded as public utilities at a national or local level which may be subject to public monopolies or to exclusive rights granted to private operators. As is specifically made clear by the explanatory note relating to that horizontal limitation in the existing Schedule of commitments of the Community and its Member States, that limitation may affect, inter alia, transport services and services related and auxiliary to all modes of transport. Likewise, the horizontal restrictions relating in some cases to national treatment and in others to market access, with which

paragraph 34 of this Opinion is also concerned, are as a rule applicable in the service sectors covered by that Schedule of the Community and its Member States, which include, for example, certain air transport services such as services for the repair and maintenance of aircraft, sales and marketing of transport services or computer reservations systems as well as road transport services for passengers or freight.

170 Furthermore, as is clear from paragraphs 36 and 37 of this Opinion, Annex I(A) to the agreements at issue also includes a number of provisions relating to sectoral commitments concerning transport services, which in some cases involve extension of sectoral limitations to certain new Member States and in some cases introduce such limitations in their regard.

171 Annex I(B) to the agreements at issue effects, as can be seen from paragraph 38 of this Opinion, various withdrawals of horizontal commitments previously given by the Republic of Malta and the Republic of Cyprus in relation to national treatment under mode 4, as well as the withdrawal of a sectoral commitment given by the Republic of Malta concerning maritime transport services for passengers and freight.

172 With regard, finally to the legislative practice invoked by the Commission, it is sufficient to recall that a mere practice on the part of the Council cannot derogate from rules laid down in the Treaty and cannot therefore create a precedent binding on the Community institutions with regard to the correct legal basis (Opinion 1/94, paragraph 52). According to settled case-law, the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review and not on the legal basis used for the adoption of other Community measures which might, in certain cases, display similar characteristics (see, inter alia, Case C-155/07 *Parliament* v *Council* [2008] ECR I-8103, paragraph 34 and case-law cited).

173 On the basis of all the foregoing it must be concluded, in the context of the answer to be given to the second question raised in the request for an Opinion, that the 'transport' aspect of the agreements at issue falls, in accordance with the third subparagraph of Article 133(6) EC, within the sphere of transport policy and not that of the common commercial policy.

In conclusion, the Court (Grand Chamber) gives the following opinion:

1. **The conclusion of the agreements with the affected members of the World Trade Organisation, pursuant to Article XXI of the General Agreement on Trade in Services (GATS), as described in the request for an Opinion, falls within the sphere of shared competence of the European Community and the Member States.**

2. **The Community act concluding the abovementioned agreements must be based both on Article 133(1), (5) and (6), second subparagraph, EC and on Articles 71 EC and 80(2) EC, in conjunction with Article 300(2) and (3), first subparagraph, EC.**

[Signatures]