

EXTERNAL TRADE RELATIONS OF THE EC AND ITS MEMBER STATES: ADMISSIBLE GENERAL EXCEPTIONS

DAVID SEHNÁLEK
Faculty of Law, Masaryk University

Key words

External trade, exclusive competence, restrictive measures, international trade, GATT

Abstract

This article reviews the legal regulation of international trade in the Community law. The problem is that competences of the EC in this area are mostly exclusive which excludes Member states. The question which is whether a Member states may legally adopt a protective measure in order to hinder imports of goods from third states if they have potential to harm some important interests of respective Member state like protection of public morality, public policy or public security, etc. The answer is that there is such possibility notwithstanding the exclusivity of competences of the EC in the sphere of common commercial policy.

1. Aim of the Article

The aim of this article is to review the legal regulation of international trade in the Community law and to give answers on following questions:

1. to what extent were Member states replaced by the EC in the sphere of external trade relations?
2. do Member states have a right to adopt protective measures against potentially harmful imports from third states also in the sphere of international trade where the competences of the EC are exclusive?
3. if the answer on the previous question is positive – which reasons may justify such restrictive measures – are they similar or even same as those which could be applied in case of discrepancies in internal trade based on Art. 30 of the EC Treaty?

2. Introduction

From the perspective of a Member state of the EC/EU trade relations can be classified as:

1. trade within the state;

2. trade within the EC/EU - with other Member states of the EC/EU;
3. trade with third states - non Member states of the EC/EU.

Only the trade within the EC/EU and with third states does have an international character. However, as the EC/EU established the single market, these trade relations must be examined separately. The current situation is such that single market in fact resembles a national market. For these reasons the trade with third states will be hereinafter referred to as the *external trade* whereas the first category (trade within the EC/EU) will be referred to as the *internal trade*. This differentiation is necessary as the legal regulation of international trade is contained in a number of provisions and acts of the EC/EU law and is separate for the external on one side and internal trade on the other side. Some of the most important provisions of the EC Treaty regulating the internal and external trade are listed in a table below.

EC/EU Legal Regulation of Int. Trade	
Internal trade	External trade
Art. 23 TEC: ES = Customs union → ban on customs Art. 25 TEC: prohibition of customs Art. 28 TEC: prohibition of quotas Art. 39 TEC: free movement of workers Art. 47 TEC: freedom of establishment Art. 49 TEC: free movement of services Art. 56 TEC: free movement of capital Art. 90 TEC: ban on tax discrimination	Art. 23 TEC: ES = CU → common customs tariff Art. 131 TEC: aims of the common commercial policy (CCP) Art. 132 TEC: harmonization of export subsidies Art. 133 TEC: Principles of the CCP Competences in the field of CCP Negotiation of the intl. treaties in the field of CCP

Table 1: Overview of the EC/EU Legal Regulation of Int. Trade

These provisions create just a general framework regulation for international trade. They are further specified and implemented by a number of regulations, directives and European court of Justice's case law as well. Important trade rules are also contained in international treaties, in particular those concluded within the WTO.

As it has been mentioned already, I am not going to further deal with the legal regulation of the internal trade in the EC/EU law in this article. It will be focused only on the legal regulation of the external trade.

3. Relationship between the EC and its Member states in the field of external trade

The common commercial policy is based on **uniform principles** from on Art. 131 TEC. It is important to note, that the uniformity is more a question of fact than law as the existence of the customs union is technically possible only if the approach itself is uniform. The demand of uniformity also implies that it is the EC that can adopt measures regarding in particular

changes in tariff rates, the conclusion of tariff and trade agreements, the export policy and measures to protect trade such as those to be taken in case of dumping or subsidies. As this enumeration contained in Art. 131 TEC is only enumerative, the European court of Justice held, that the EC is empowered to govern the common commercial policy from a wide point of view and not only with having regard to the administration of precise systems such as customs and quantitative restrictions. According to the European Court of Justice any restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries.¹

The current situation is such that the EC has replaced Member states in the field of common commercial policy. In many areas related to this policy it is the exclusive participant of the international trade. However, Member states have not fully lost their position in the field of international trade. They still can exercise some limited competence and fulfill some important functions.² Reasons are both legal and factual.

One of the most important factual reasons is that the EC does not have developed advanced repressive administration which would be responsible for everyday enforcement of the EC law in practice. The EC is not therefore nowadays able to independently and without the cooperation with Member states' administrations to ensure the application of the EC law against individuals and give sanctions in case these rules are breached. This has to be mostly administered by Member states and their administration. Member states and their administration are also responsible for administering of export/import duties and relevant licenses. In these case the administrations of Member states act within the sphere of competences of the EC, however they still remain a part national administrations. There is no such "federal" community structure.

It is also important to mention that not all issues of external trade fall within the scope of the common commercial policy. Some issues were not submitted to the EC and still remain at least partly within the competences of the Member states. We will discuss this problem later.

¹ See Sec. 45 of the Opinion 1/78.

² See Rozehnalová, N., Týč, V. *Vnější obchodní vztahy Evropské unie*. 1. vyd. Brno : Masarykova univerzita, 2006. 207 s. (Spisy PrF MU v Brně. Řada teoretická ; 299). p. 66, ISBN 8021040734.

The fact that Member states have been replaced by the EC in the field of common commercial policy has some important consequences. International trade is regulated by a number of international trade agreements. Moreover, most of them are negotiated in international organizations. This created a lot of questions and fortunately, most have already been answered. Therefore, at this moment it is the EC which can within the scope of common commercial policy negotiate international agreements instead of Member states.³ And of course it has also the competence to conclude them.⁴ The EC can also be a member of international trade organization.⁵

4. The question of the exclusivity of the EC's competence

The question of a character of the EC's competence has been solved by the European court of Justice a number of times. One of the first rulings of the ECJ was its opinion 1/78 where the ECJ broadly interpreted the scope competence of the EC in the area of common commercial policy and also argued in favor of a mixed agreement format for negotiation and conclusion in cases where an agreement covers also some issues which do not fall within the scope of the common commercial policy.⁶ The ECJ also held that where an international agreement forming part of the common commercial policy involves certain financial aspects, the powers of the EC to negotiate and conclude such an agreement may depend on the system of financing. If the financial burdens fall within the EC budget the powers will belong to the community; if the burdens are charged directly to the budgets of the member states their participation, together with the EC, will be necessary.⁷

The scope of rather vague provisions on the common commercial policy in the EC Treaty was also clarified by case law of the European court of Justice. Sara Dillon emphasizes in particular decision known as "ERTA" where the ECJ held that the EC enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined by the EC Treaty.⁸ This authority arises not only from an express conferment by the treaty, but may equally flow from other provisions of the treaty and from measures adopted, within the framework of those provisions, by the community institutions. In particular, each time the

³ It is necessary to note that according to the Art. 281 the EC has legal personality.

⁴ See Art. 300 TEC and Art. 133 TEC.

⁵ For further Info on this topic see .. Hendry D., Macleod I., Hyett Stephen. The External Relations of the European Communities. Clarendon Press, Oxford, 1996. p. 169, ISBN-0198259301.

⁶ See International Trade and Economic Law and the European Union page 328.

⁷ See Opinion 1/78.

⁸ See Dillon, S. International Trade and Economic Law and The European Union, Hart Publishing, 2002. p. 329, ISBN: 1-84113-113-X.

community, with a view to implementing a common policy envisaged by the EC Treaty, adopts provisions laying down common rules, whatever form they may take, the member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope. According to the Court, **the system of internal community measures may not be separated from that of external relations.**⁹

Division of powers between the EC and the Member States were further examined by the European Court of justice in its opinion 1/94. This opinion was to give an answer on question whether the European Community has the competence to conclude all parts of the Agreement establishing the WTO and agreements annexed to this agreement.

In this opinion the Court has held differently from its opinion 1/76 that since the World Trade Organization is an international organization which has only an operating budget and not a financial policy instrument. The fact that the Member States will bear some of its expenses cannot of itself justify the participation of the Member States in the conclusion of the agreement.¹⁰

The Court of Justice also held, that following agreements can be concluded by the EC on the basis of Article 133 of the Treaty alone without the participation of Member states:

- the General Agreement on Tariffs and Trade (GATT)
- the Agreement on Agriculture
- the Agreement on the Application of Sanitary and Phytosanitary Measures
- the Agreement on Technical Barriers to Trade

In case of the General Agreement on Trade in Services (GATS) the exclusive competence of the EC was given only in the sphere of cross-frontier supplies not involving any movement of persons. On the other hand, according to the European Court of Justice the other modes of supply of services referred to by GATS as 'consumption abroad', 'commercial presence' and the 'presence of natural persons' are not covered by the common commercial policy.

⁹ See judgment of the Court of 31 March 1971. Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport. Case 22-70.

¹⁰ See Sec. V. of the summary of the opinion 1/94.

In regard to intellectual property, the harmonization achieved within the Community in certain areas covered by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) is either partial or non-existent. With regard to the measures to be adopted to secure the effective protection of intellectual property rights, the Community is competent to harmonize national rules only on those matters which directly affect the establishment or functioning of the common market. Therefore it follows that the EC and its Member States are jointly competent to conclude TRIPs.¹¹

5. The scope of competence after Treaties of Amsterdam and Nice

The importance of the opinion 1/94 is however now days lessened as the EC Treaty provisions on common commercial policy have changed significantly since 1994. In regards to services, according to a new wording of the EC Treaty, the ES has now competence to negotiate and conclude agreements in the fields of trade in services and the commercial aspects of intellectual property.¹² This power is, however not absolute and does not cover all services at all. Agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, are excluded and fall within the shared competence of the EC and its Member States.¹³ On the other hand, the scope of competences of the EC may be extended by the Council which acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the scope of exclusive competences to international negotiations and agreements on intellectual property.¹⁴ To my best knowledge, I am not aware of existence of such a decision.

6. Regulation of the external trade

All that has been said so far implies that in the field of external trade, Members states have lost their position in favor of the EC. It is the EC who is in responsible for negotiation and conclusion of international agreements which fall within the scope of the common commercial policy. Such agreements are then one of the sources of the Community law binding on states and under certain conditions also on individuals.¹⁵ Please note that the

¹¹ See Opinion 1/94.

¹² See Art. 133 Sec. 5.

¹³ See Art. 133 Sec. 6.

¹⁴ See Art. 133 Sec. 7.

¹⁵As effects of international will not be examined in this article, for more info on this topic see for example Herboczková, J. GATT/WTO and the European Court of Justice. In *Days of Public Law*. 2007. vyd. Brno : Masarykova univerzita Právnická fakulta, 2007. pp.. 986-997, ISBN 978-80-210-4430-2 or Valdhans, J., Myšáková, P. Přímý účinek práva WTO v ES z pohledu ESD. In *Efektivnost právních předpisů pro zvýšení*

Member states still may conclude international agreements even within the field of common commercial policy as long as such agreements comply with the EC law and other relevant international agreements.¹⁶

At this moment, the external trade is governed by both international agreements (concluded by the EC) and by a set of autonomous regulations adopted by the EC.¹⁷ One of our initial questions was whether there exists a possibility to protect certain interests and value against potentially harmful imports of goods from third states. As the autonomous measures of the EC must be in compliance with international treaties concluded by the EC, we will examine the later first.

General framework of the international trade in goods is given by the General Agreement on Tariffs and Trade (GATT). Article XX of GATT allows the EC to act on trade in order to protect certain important values, provided it does not discriminate foreign goods or use this as disguised protectionism. In addition, there are two specific WTO agreements dealing with food safety and animal and plant health and safety and with product standards in general.¹⁸ Both try to identify how to meet the need to apply standards and at the same time avoid protectionism in disguise.¹⁹

According to the general exceptions listed in Article XX of GATT it is possible to adopt and/or enforce measures in particular to:

1. protect public morals;
2. protect human, animal or plant life or health;
3. measures relating to the importations or exportations of gold or silver;
4. necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II

konkurenceschopnosti v ekonomice. Ostrava : Vysoká škola báňská - Technická univerzita Ostrava, 2007. od s. 174-181, 182 s. ISBN 978-80-248-1553-4

¹⁶ See Art. 133 Sec. 5.

¹⁷ See Rozehnalová, N., Týč, V. Vnější obchodní vztahy Evropské unie. 1. vyd. Brno : Masarykova univerzita, 2006. 207 s. (Spisy PrF MU v Brně. Rada teoretická ; 299). pp. 90 - 170, ISBN 8021040734 or Rozehnalová, N. Právo mezinárodního obchodu. Vyd. 2., aktualiz. a dopl. Praha : ASPI, 2006. 555 s. učebnice vysokých škol. p. 132 et sequential, ISBN 807357196X.

¹⁸ the Sanitary and Phytosanitary Measures Agreement and the Technical Barriers to Trade Agreement

¹⁹ Standards and safety <http://www.wto.org>

and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

5. relating to the products of prison labor;
6. measures imposed for the protection of national treasures of artistic, historic or archaeological value; ...²⁰

As the EC has only a limited capacity to eventually enforce and protect above mentioned interests, it will be the Member States that would have to actually take such measures. Please note, that their authority is most probably limited in this area by an autonomous measures of the EC law. In other words, any protective measure against the potentially dangerous import from a third country must be in compliance not only with GATT but with the secondary legislation as well.

General common rules on imports to the EC Member states are given by the Council regulation (EC) No 3285/94 on the common rules for imports and repealing Regulation (EC) No 518/94 (Hereinafter referred to as the “Regulation”). From the point of view of this article it is important the Article 24 of the Regulation which states that this Regulation shall not preclude the adoption or application by Member States of prohibitions, quantitative restrictions or surveillance measures on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property. This provision obviously reflects the Article XX of GATT.

It is not surprising that the wording of Article 24 of the Regulation is similar to the Article 30 of the EC Treaty which states a general exception from the prohibition of quantitative restrictions on imports and all measures having equivalent effect between Member States (in other words allows protective measures in internal trade). It would not be really logical, if the more integrated internal trade could be restricted under stricter conditions than less integrated external trade.

7. Examples of protective measures which can be adopted by Member states

²⁰ For further Info on general exceptions under Art. XX of GATT see Van Houte H. The Law of International Trade. 2nd edition, London: Sweet & Maxwell. chapter 3.43, ISBN 0421 764 805.

A French Decree No. 96-1133 concerning asbestos and products containing asbestos (*décret no. 96-1133 relatif à l'interdiction de l'amiante, pris en application du code de travail et du code de la consommation*) (hereinafter referred to as "the Decree"), which entered into force on 1 January 1997 set forth prohibitions on asbestos and on products containing asbestos fibres, followed by certain limited and temporary exceptions from those prohibitions. By these prohibitions (set by a national law), also imports from third states were affected. Canada claimed that this Decree is not compatible with the obligations arising from membership of France, or more precisely of the EC in the WTO. However, this French legislation banning asbestos was held to be in conformity with international trade law. The Appellate Body found that respective provisions of GATT 1994 were not violated, as among others, the French measures can be considered as measures necessary for the protection of human health within the meaning of Article XX(b) GATT 1994.²¹

Another example of a legal protective measure affecting imports from third states set by a national legislation can be found in the Czech Act No. 191/1999 Coll. on measures concerning export, import and re-export of goods which violate some intellectual property rights. This legislation concerning the protection of intellectual property rights which is complementary to the regulation 1383/2003, concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, covers a wider area of application than does the abovementioned EC Regulation. Under this act it is possible to detain or confiscate goods which infringe intellectual property rights. Also the Czech Act No. 634/1992 Coll. on protection of a consumer allows the Czech Customs Administration act against the import of illegal goods which is not under customs surveillance. All these measures may hinder the international trade and even though not adopted by the EC, yet they are compatible not only with EC law, but also with the WTO law.

8. Conclusion

The European Community has replaced Member states to a great extent within the field of regulation of international trade. The legal basis of this competence in external relations can

²¹ See WTO Environmental and related cases <http://www.eel.nl> or see Report of the Appellate Body - EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS, No. WT/DS135/AB/R

be found in several provisions of the EC Treaty. The most important are those contained in Chapter 2 labeled as Prohibition of quantitative restrictions between Member states.

The character of competence of the European Community in the sphere of international trade must be exclusive. Otherwise the system wouldn't work. This implies that it is the European Community and not Member states that is in charge in case of negotiation and conclusion of international trade agreements. The European Community has the power to act, speak and vote in international trade organizations.

The question of the division of powers between the European Community and Member states was of a high importance. As the EC Treaty was rather vague in this respect, it was the European Court of Justice that contributed to the solution of this problem. In its several opinions²² the European Court of Justice helped to clarify this issue. However, the significance of these opinions is nowadays lessened as the Treaties of Amsterdam and Nice the provisions of the EC Treaty amended respective provisions on common commercial policy.

At this moment the European Community has the exclusive power to regulate import and export of goods and services (however some services are explicitly excluded and fall within the shared competence of the European Community and its Member States – namely agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services). The exclusive competence of the European Community covers also issues of the commercial aspects of intellectual property.

The above mentioned text implies that a vast amount of international trade agreements is negotiated and concluded by the European Community instead of Member states (where the competence is exclusive). Such international trade agreements are one of the sources of the Community law and their effects in the sphere of Member states is also given by the Community law. Member states, however, still have the right to maintain and conclude international trade agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements.

²² According to the Art. 300 Sec. 6 6. the 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.

The question is whether Member states may independently on the European Community adopt any restrictive measures in order to protect some important values (eg. protection of human, animal or plant life or health, protection of public moral etc.).

The international trade law (for example Art. XX of GATT) generally allows such restrictions on import and/or exports of goods subject to condition that they are proportional to the aim which they shall pursue. However, the question still remains, because as the party to the GATT is the European Community and not Member states. The division of powers between the European Community and Member states may imply that since most of these issues fall within the area of exclusive competence of the European Community, any action of Member states is precluded. This is not, however, the truth.

Notwithstanding the exclusive character of the European Community competence in the sphere of international trade with goods, most of services and also in issues related to commercial aspects of intellectual property, Member states still may protect their interests. They are allowed to adopt restrictive measures which are justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property.

According to my opinion such restrictive measures may only be adopted by Member states in the form of prohibitions on imports or other quantitative restrictions or surveillance measures. On the other hand, customs duties on imports and charges having equivalent effect which would be adopted solely by Member states are prohibited absolutely and cannot be justified under any condition.²³

A different approach would be illogical and against the interests of Member states since even the more integrated internal trade within the European Community may be hindered under same conditions.

²³ For same opinion see Říhová, K. *Nástroje obchodní politiky ES týkající se ochranných opatření - 2. část* [online]. E-polis.cz, 22. duben 2006. [cit. 1. June 2008]. Available at: <<http://www.e-polis.cz/mezinarodni-pravo/141-nastroje-obchodni-politiky-es-tykajici-se-ochrannych-opatreni-2-cast.html>>. ISSN 1801-1438.

Literature:

- [1] Rozehnalová, N., Týč, V. *Vnější obchodní vztahy Evropské unie*. 1. vyd. Brno : Masarykova univerzita, 2006. 207 s. (Spisy PrF MU v Brně. Řada teoretická ; 299). p. 66, ISBN 8021040734
- [2] Dillon, S. *International Trade and Economic Law and The European Union*, Hart Publishing, 2002. p. 329, ISBN: 1-84113-113-X
- [3] Herboczková, J. *GATT/WTO and the European Court of Justice*. In *Days of Public Law*. 2007. vyd. Brno : Masarykova univerzita Právnická fakulta, 2007. pp. 986-997, ISBN 978-80-210-4430-2
- [4] Rozehnalová, N. *Právo mezinárodního obchodu*. Vyd. 2., aktualiz. a dopl. Praha : ASPI, 2006. 555 s. učebnice vysokých škol. p. 132 et sequential, ISBN 807357196X
- [5] Van Houte H. *The Law of International Trade*. 2nd edition, London : Sweet & Maxwell. chapter 3.43, ISBN 0421 764 805
- [6] Říhová, K. *Nástroje obchodní politiky ES týkající se ochranných opatření - 2. část* [online]. E-polis.cz, 22. duben 2006. [cit. 1. June 2008]. Available at: <<http://www.e-polis.cz/mezinarodni-pravo/141-nastroje-obchodni-politiky-es-tykajici-se-ochrannych-opatreni-2-cast.html>>. ISSN 1801-1438
- [7] Valdhans, J., Myšáková, P. *Přímý účinek práva WTO v ES z pohledu ESD*. In *Efektivnost právních předpisů pro zvýšení konkurenceschopnosti v ekonomice*. Ostrava : Vysoká škola báňská - Technická univerzita Ostrava, 2007. od s. 174-181, 182 s. ISBN 978-80-248-1553-4

Contact - email:

david@sehnalek.cz