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CONTRIBUTION OF THE LEGAL SERVICE *

to :	the Committee of Permanent Representatives (first part)
Subject :	External competence in the field of environment and climate change following the entry into force of the Lisbon Treaty - Letter to the UNFCCC Secretariat

1. At the meeting of the Committee of Permanent Representatives (first part) on 20 January 2010, the representative of the Council Legal Service made an oral intervention regarding external competence in the field of climate change and the question whether the entry into force of the Lisbon Treaty requires the external competence in this field to be treated differently from the past. This question was raised following the Commission's claim that, in view of the entry into force of the Lisbon Treaty, it alone should sign a letter to the UNFCCC Secretariat expressing the willingness of the EU to be associated with the Copenhagen Accord and submitting its quantified economy-wide emissions reduction targets for 2020. At the request of the Committee, the present contribution confirms the oral intervention in writing.

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2. The external representation of the Union is one of the areas in which the Lisbon Treaty introduces new provisions in primary law (Title V of the TEU and Part V of the TFEU). Often quoted in this context is Article 17 (1) of the TEU which states that "*the Commission shall ensure the Union's external representation, with the exception of the common foreign and security policy and other cases provided for in the Treaties*". Also of relevance for international agreements is Article 218(3) TFEU under which, outside the common foreign and security policy, it is for the Commission to present a recommendation for the nomination by the Council of the Union negotiator or the head of the Union's negotiating team.

3. It follows from the Treaty provisions that, where the Union has exclusive competence, the Commission is entitled to claim the right to represent on its own the Union in international negotiations provided it is authorised to do so by the Council and it respects its negotiating directives. The Council could not legally deny the Commission such a prerogative by appointing somebody else to act as negotiator on behalf of the Union in such a case. But this does not constitute a departure from the situation existing in this respect before the entry into force of the Lisbon Treaty.

4. The areas in which the Union has exclusive competence are listed in Article 3(1) TFEU. The second paragraph of that article adds that "*the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*". This provision is not a novelty in substance either since it codifies in primary law the established case law of the Court of Justice on the division of competences between the Union and the Member States in external relations.[1]

[1] Case 22/70, Commission v Council, AETR, [1971] ECR 263.

5. Several provisions of the Lisbon Treaty make it very clear that Member States competences continue to exist. Indeed, far from reducing it, the Lisbon Treaty strengthens the principle of conferral under which competences are conferred upon the Union. Article 5(1) TEU explicitly provides that "*The limits of Union competences are governed by the principle of conferral*", while Article 4(1) TEU states: "*... competences not conferred upon the Union in the Treaties remain with the Member States*". The competences remaining with the Member states are protected from 'invisible' transfers towards the Union by Articles 2 to 6 TFEU, which define the categories and areas of Union competences and specify certain areas in which the Union shall have exclusive or shared competence, and by Protocol No 25 to the Lisbon Treaty on the exercise of shared competence, which states that "*when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area*". It would hardly be logical in this context to base a claim of extended competences for the Union vis-à-vis the Member States in the area of external relations on the provisions of the Lisbon Treaty.

6. It follows from the foregoing that 'mixity' will continue to be possible in the negotiation and conclusion of international agreements for the future. Indeed within areas of shared competence, both the Union and the Member States enjoy the right to be present and to participate, directly or through their representatives, in international negotiations. It is up to the Member States to decide how and by whom their external competence will be exercised. They can decide to act directly themselves, or they can choose to designate someone to represent them. That representative can be the Commission, but it can also be the Presidency of the Council. There is nothing in the Lisbon Treaty which suggests that it is no longer possible to apply the arrangements which have applied until now as regards the parts of the external competence falling within the competence of the Member States. Indeed the Lisbon Treaty does not contain rules on how Member States are to exercise their part of the external competence on a given matter, just as the previous treaties did not address this issue.

7. External competence in the field of environment in general and climate change in particular has traditionally been dealt with as a matter of shared competence between the ex-Community and its Member States.[2] This division of competence is formally confirmed in the Lisbon Treaty, which lists the field of environment as one of the principal areas in which the Union and the Member States share competence (Article 4 TFEU). It also reaffirms the possibility for Member States to maintain or introduce more stringent protective measures than those adopted by the Union where they are compatible with the Treaties (Article 193 TFEU). Thus, the Lisbon Treaty does not as such alter the pre-Lisbon division of competence in the field of environment.

8. It follows from the foregoing that, in principle, the competence to negotiate and conclude international agreements relating to the protection of the environment remains one which is shared between the Union and the Member States. This means, on the one hand, that the Member States have the right to be present and to negotiate and conclude the agreement alongside the Union. It also means, on the other hand, that the Commission is entitled to come forward with a recommendation so as to receive a mandate to participate and negotiate on behalf of the Union.

9. In such a case, if the envisaged international agreement covers only areas which do not fall within the exclusive competence of the Union, or areas which fall both within this exclusive competence and outside it and which cannot be treated separately in the conduct of the negotiations, the nomination of the negotiator or negotiators on behalf of the Union and the Member States could be the object of a global arrangement which would be reached by a common accord of the Council and the representatives the Member States following a recommendation from the Commission as regards the representation of the Union.

[2] In the words of the Court, "*the external competence of the Community in regard to the protection of the environment is not exclusive but rather, in principle, shared between the Community and the Member States*" (Judgment of the Court (Grand Chamber) of 30 May 2006 in Case C-459/03, Commission v Ireland, paragraph 92).

10. This global arrangement should give the Commission its place of negotiator on behalf of the Union if it so requests and if the Union has the capacity to conclude the agreement under Article 216 TFEU. But there is no obligation to grant the Commission the right to act as sole negotiator. Alternatively, it is also possible, in the same circumstances, to grant the Commission a mandate to negotiate to the extent the Union is competent, and to reserve for coordination on the spot the practical arrangements for the sharing of responsibilities between the Commission on the one hand and the Member States or their representative(s) on the other. But of course this latter approach, which is more flexible and corresponds to current practice, does not offer any guarantees as to the outcome.

11. If, on the other hand, the negotiating context permits to treat separately issues falling within the Union's exclusive competence and issues on which competences are shared with the Member States or belong exclusively to these, the representation of the Union in the first category should be for the Commission; the representation of the Union and/or of the Member States in the second category could be the object of a global arrangement as above. But this of course does not in any way imply that the negotiators in the first and second category should not act together.

12. In practice, for international negotiations in the area of environment, the current state of development of European Union law implies that the Union and the Member States can be represented in the negotiations either by a sole negotiator which would normally be the Commission, or by a negotiating team of which the Commission should form part alongside another (or other) negotiator(s). The rotating Presidency can be this other negotiator, as has been the case in the past, where Member States choose to confer negotiating authority on it with respect to the matters falling within their national competence.

The practice whereby negotiating authority is conferred exclusively on the Presidency, for matters falling within Union and Member States competence, also remains possible in principle but only in the exceptional case where a mixed agreement predominantly concerns matters falling within national competence and where the Commission has not requested a negotiating mandate in respect of those aspects of the proposed agreement which fall within the competence of the Union. The duty of loyal cooperation makes it in all cases an obligation both on the institutions and on the Member States to do their utmost to reach an agreement on a mutually acceptable arrangement and to allow the institutions to exercise the role assigned to them by the Treaties.

13. Of course, whatever arrangement is reached in organisational terms is independent from the material content of the positions that will have to be defended on behalf of the Union and of the Member States. Under the case law of the Court of Justice, which is unaffected by the entry into force of the Lisbon Treaty, the requirement of unity in the international representation demands that the institutions of the Union and the Member States cooperate closely, both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into.[3] This requires coordinating the positions which will be assumed in international bodies or during international negotiations. It also requires that the institutions and the Member States speak with one voice to defend these positions. Therefore, when they exercise the part of the shared competence that falls within their own competence, Member States are at all times bound to respect Union law and to refrain from undertaking anything that could undermine the application of Union law. Their margin of manoeuvre is therefore limited. When the competence retained by Member States is based solely on Article 193 TFEU, Member States should only formulate positions separate from those agreed within the Union when these positions reflect the right of Member States to maintain or introduce more stringent protective measures than those adopted at Union level.

[3] See, by way of example, Opinion 2/91 of 19 March 1993 of the Court of Justice, 'International Labour Organization', paragraph 36.

14. But, even if the competence retained by Member States were to be regarded in some areas as marginal or residual, this would have no bearing on the right of the Member States to sit at the negotiating table. Such a right cannot be affected by reasoning in terms of the principal and the accessory aspects of an agreement, which is not relevant to assess the existence of a competence retained by the Member States, due account being however taken of Article 3(2) TFEU.

15. The question was raised whether, by virtue of the adoption of the Energy Climate Package, certain subject matters relating to climate change have become exclusive Union competence. In accordance with Article 3(2) TFEU, that could be the case in so far as the conclusion of a possible legally binding international agreement on emissions reductions may affect the common rules of the Energy Climate Package or alter their scope. At this point in time there is however no such agreement, which makes it impossible to assess whether or not parts of it would fall within exclusive Union competence. This being said, certain remarks can be made about the division of competence between Member States and the Union in the field of climate change.

16. In the field of environment, Article 193 TFEU (which uses the same terms as its predecessor Article 176 of the EC Treaty) explicitly confirms that Member States may adopt more stringent protective measures as long as they are compatible with the Treaties, a reference which is to be read as including secondary legislation. The Court of Justice has observed, in rather general terms, that "*the Community rules do not seek to effect complete harmonisation in the area of the environment*"[4] and that in 'minimum requirements' cases the fact that the Community exercises internal legislative competence does not mean that it acquires exclusive competence at external level, since Member States may always go beyond the minimum requirements of the internal legislation.[5]

[4] Judgment of the Court in case C-318/98, *Fornasar*, paragraph 46.
[5] Opinion 2/91 cited in footnote 3, paragraph 21.

17. When it comes to emissions reduction commitments, a relevant question is whether this possibility for Member States to adopt more stringent protective measures continues to exist, also with regard to emissions from those sectors that are included in the Union's Emissions Trading Scheme, or whether, conversely, such measures would undermine the uniform and consistent application of these common rules and the proper functioning of the system they establish, to paraphrase the words used by the Court in its Opinion on the conclusion of the Lugano Convention. [6] That question has not been answered to date and does not form the object of this contribution. However, as long as it is not established that, by virtue of the adoption of the Energy Climate Package, no competence remains with the Member States regarding certain issues relating to emissions reduction, it is correct to assume that Member States continue to share competence with the Union on these issues.

18. But even if it were established that there are elements in the Energy Climate Package on which Member States are no longer competent to negotiate internationally, that situation would still not have as a consequence that the whole field of emissions reductions became exclusive domain of the Union. A possible overall legally binding agreement would thus in all likelihood still remain a matter for both the Union and the Member States, albeit with some elements of exclusive Union competence. It is recalled that according to Article 3(2) TFEU, the Union's competence to conclude an international agreement is exclusive only in so far as the conclusion of that agreement may affect common rules or alter their scope.

19. It follows from the foregoing that the subject matters dealt with in the Copenhagen Accord fall undoubtedly within the shared competence of the European Union and of the Member States. The duty to cooperate loyally obliges both the Member States and the Commission to agree on the content of the positions which will be defended on behalf of the Union and its Member States.

[6] Opinion 1/03 of the Court of Justice on the conclusion of the Lugano Convention.

But it does not generate an obligation to designate a unique representative or a unique negotiator to defend the interests of the Union and its Member States. Nor does it deprive Member States of the possibility to announce, as Parties to the UNFCCC, their willingness to be associated with the Copenhagen Accord. And against that same background, the emissions reduction target is presented as one of the Union and of the 27 Member States which are also parties to the Convention.

20. Thus, the letter of response to the verbal note could legally be signed collectively by the Commission and the Presidency, on behalf of the EU and of its Member States, and announce the emissions reduction target of the Union and of its 27 Member States acting in common. It could also have been signed by the Commission alone, if it had been Member States' wish to designate the Commission to act on their behalf, which was not the case. The Member States also had the choice, in the exercise of their national competence, to notify individually the common target or to designate the Presidency for that purpose, which they did.

Conclusion

21. The Council Legal Service therefore concludes:

- that the subject matters dealt with in the Copenhagen Accord fall undoubtedly within the shared competence of the European Union and of the Member States

- that the Commission cannot lawfully claim that the letter to the UNFCCC Secretariat referred to above falls within the exclusive competence of the European Union or that it alone could be authorised to sign it;

- that the joint signature of the aforesaid letter by both the Commission and the Presidency of the Council acting on behalf of the Union and of the Member States is fully consistent with the provisions of the Treaties as they result from the entry into force of the Lisbon Treaty.