AEL 2021/11
Academy of European Law

WORKING PAPER

**The Court of Justice in the Archives Project
Analysis of the Opinion of the Court of 11
November 1975 (1/75)**

Jaka Kukavica

European University Institute
Academy of European Law

The Court of Justice in the Archives Project
Analysis of the Opinion of the Court of 11 November 1/75

Jaka Kukavica

AEL Working Paper 2021/11

ISSN 1831-4066

© Jaka Kukavica, 2021

This work is licensed under a [Creative Commons Attribution 4.0 \(CC-BY 4.0\)](#) International license.

If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the series and number, the year and the publisher.

Published in June 2021 by the European University Institute.

Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy

www.eui.eu

Views expressed in this publication reflect the opinion of individual author(s) and not those of the European University Institute.

This publication is available in Open Access in [Cadmus](#), the EUI Research Repository:

With the support of the
Erasmus+ Programme
of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Abstract

This Working Paper is part of the CJEU in the Archives Project and it discusses the *dossier de procédure* of the Opinion 1/75 case. It does so in three parts. Firstly, it discusses the state of the art in literature on Opinion 1/75, highlighting the narratives and understandings of the case we have built before the opening of the CJEU archives. Secondly, it analyses the contents of the Opinion 1/75 *dossier de procédure* – the procedural documents, observations submitted by the Member States and the Community institutions, and the evidence submitted to support those observations. None of these documents have been available to the public prior to the opening of the Archives. Finally, the Working Paper discusses how our existing understanding of the Opinion 1/75 case, and the narratives we have surrounding it, can be enriched on the basis of materials found in the *dossier de procédure*. It demonstrates that the case was marked by efforts of President Lecourt to micro-manage the case, while there was an atmosphere of novelty and urgency within the Court at the time. On the basis of an analysis of arguments submitted to the Court by Member States and Community institutions, which were not reported by the Court in the Opinion and are thus revealed for the first time, the Working Paper argues that there was a hidden *kompetenz-kompetenz* dimension in the case which has remained hidden thus far. It also demonstrates how the Court responded to certain types of arguments; most importantly it shows that teleological arguments that permeate Opinion 1/75 were not advanced by any of the parties but were devised by the Court *proprio motu*.

Keywords

CJEU archives – Opinion 1/75 – kompetenz-kompetenz – External relations – Methods of interpretation – President Lecourt

Acknowledgment

I would like to thank the participants of the fora where this work has been presented at various stages in the past two years for their useful comments. I am especially grateful to the Project Directors of the 'The Court of Justice in the Archives' project for leading such a stimulating and original research project. I am especially grateful to Marise Cremona for her thoughtful and thorough guidance and comments.

Executive summary

A. Insights into legal issues and arguments

Unlike in other types of cases and later Opinion procedures, in Opinion 1/75, the Court did not report the arguments that were made in the submissions. Thus, the dossier revealed for the first time the positions taken in the submissions, what arguments were employed to advance those positions, how the arguments influenced the Court, where the arguments the Court was discussing in the Opinion originated from, and how the Court treated the arguments. We learned in particular what types of arguments the Court routinely responded to and what types it ignored. Finally, we also learned that there was a strong *kompetenz-kompetenz* dimension which has thus far been missing from the narratives surrounding the case.

B. Insights into procedures and Institutions

For internal procedures, please see below (actors). Opinion 1/75, being the Court's first ever Opinion, scrutinising the arguments submitted revealed diverse views regarding the purpose of the opinion procedure held at the time. The archival material provides a glimpse into the inter-institutional dynamics between the Commission and the Council, as well into the internal dynamics within the Council.

C. Insights into actors

President of the Court Robert Lecourt took a very hands-on approach in (micro)managing the case internally, insisting on speeding up the procedure and having requests for deadline extensions forwarded directly to him. Another interesting actor is Jean Groux, the Agent of the Commission before the Court, who, about a decade later, wrote a book chapter that partially contradicted the submissions he made for the Commission to the Court in this case.

D. Dossier as a document

Opinion 1/75 can be considered a very special case in terms of the value added by the dossier due to the very limited information we had had before the Court opened its archives. Because of the nature of the Opinion procedure in those early years, there was nothing publicly available that could give insight into the life of the case except for the Opinion itself. There was no Report of the oral hearing, nor was there an Opinion of the AG. The 550-page dossier was not redacted.

E. Significance

While not easy to single out, I would argue that insights into legal issues and arguments (category A) provide the most significant contribution to enhancing our knowledge of this case.

F. Key paragraphs

'The field of the common commercial policy, and more particularly that of export policy, necessarily covers systems of aid for exports and more particularly measures concerning credits for the financing of local costs linked to export operations. In fact, such measures constitute an important element of commercial policy, that concept having the same content whether it is applied in the context of the international action of a State or to that of the Community.' (1362)

‘Such a policy is conceived in that article in the context of the operation of the Common Market, for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other. Quite clearly, however, this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community.’ (1363)

Table of contents

1. Introduction	5
1.1 The context of the case: the facts	5
1.2 The Opinion of the Court	6
1.3 Academic commentary on the Opinion	7
2. The dossier's added value	9
2.1 Composition of the Dossier	9
2.1.1 Evidence	10
2.1.2 Procedure-related documents	11
2.1.3 Documents previously not available to the public	13
2.1.4 Documents not available to the public	13
2.1.5 Opinion of the Advocate General	13
2.2 Argumentation employed in the case	13
2.2.1 Submissions	14
2.2.2 Opinion 1/75 of the Court	22
3. The Court's treatment of arguments: taking the easy paths and cutting the hardest ones?	25
3.1 Paths not taken and paths ignored on the way to admissibility: a hidden Kompetenz-Kompetenz struggle	26
3.2 Some arguments are more persuasive than others: the path to exclusive competence	28
4. Conclusion	30
Annex 1: List of documents in the dossier	32
Annex 2: Table of contents of the dossier	38
Annex 3: Actors mentioned in the dossier	40
Annex 4: A consolidated list of arguments made in the submissions and the court's treatment thereof	42

List of tables and figures

Table 1: Quantitative overview of the composition of the Opinion 1/75 dossier	10
Figure 1: Procedural timeline of the opinion 1/75	12
Table 2: Positions taken by the actors in the proceedings	14

1. Introduction

Opinion 1/75,¹ delivered in November of 1975 by the Court of Justice, is a seminal case in the history of EU law for many important reasons. It was the first time ever that the procedure foreseen by what was then Article 228 of the EEC Treaty was triggered by the Commission. By doing so, it requested the Court to resolve the two ongoing power struggles between, on the one hand, the European Community and the Community Members States and, on the other hand, the institutional struggle between the Council and the Commission of the Community. Opinion 1/75 is also one of the key cases in the development of the meaning of a 'common commercial policy' (CCP). It has also been considered a key case in the field of exclusive Community competence that precludes the Member States from acting independently of the Community. The Court recognised that such exclusivity may be an inherent characteristic of some policy fields, such as the CCP. Finally, Opinion 1/75 is also one of the crucial cases in the development of exclusive competence of the Community in the field of external relations.

This introductory section provides the general context in which Opinion 1/75 arose, gives a brief overview of what the Court decided in the Opinion, and provides a general idea of what the hitherto academic commentary was about the case and what narratives it constructed around it.

Section 2 examines the contents of the *dossier*, including the arguments that were put forward in all the submissions. It discusses the insight that the procedure-related documents found in the *dossier* give into the atmosphere at the Court of Justice at the time when the case being decided. It also outlines every single argument made in the submissions, giving a completely new insight into how the case was argued, considering that the Court did not report any arguments in the Opinion. And finally, this section also summarises all of the arguments that the Court made in its Opinion.

Section 3 discusses in-depth how the Court of Justice treated and responded to, or ignored, all of the arguments made in the case. It also discusses the different lessons that we can learn from these insights. Section 4 concludes.

1.1 The context of the case: the facts

At the crux of Opinion 1/75 was contestation of the competence to regulate the field of export credits. For quite some time before the matter reached the Court, from the mid-1960s in fact, a process of harmonisation of export credits had been ongoing. Not only within the Community, but also more generally within the Organisation for Economic Co-operation and Development (OECD), states had been looking to progressively harmonise regimes of export credits. One of the more important stages in that process was the successful negotiation² of the draft OECD 'Understanding on a Local Cost Standard'.³

This draft Understanding contained two standards to which OECD member states agreed. First, they agreed that the percentage of local costs that may be financed on export credit terms could not exceed 100% of the value of the goods and services exported. They also agreed that export credit granted could not come with an interest rate or maturity terms more favourable than those that were granted for the exports of goods and services to which local costs were related.

¹ Opinion 1/75 (Understanding on a Local Cost Standard) ECLI:EU:C:1975:145.

² The extent to which the Community (and more specifically the Commission) actually participated in and shaped these negotiations is a matter of contention. For these diverging accounts, see the Section 2.2.1.4 below.

³ Please note that for ease of reference this Understanding is hereafter referred to as the 'OECD Understanding' or simply as the 'Understanding'.

But even though the substantive negotiations on the draft Understanding were concluded, there remained the open issue of the form of Community participation in the OECD Understanding that prevented the agreement from being concluded. It was unclear whether the Member States would be concluding it, whether the Community alone would be concluding it, or whether both the Community and the Member States would be concluding it. There was no agreement on the distribution of competences, neither between the Member States within the Council of the European Communities,⁴ nor between the Council and the Commission.⁵

To break the deadlock and to enable the conclusion of the draft Understanding, the Commission decided for the first time to use Article 228(1) of the EEC Treaty⁶ and request the Court of Justice to provide an opinion on the compatibility of the OECD agreement with the provisions of the EEC Treaty. In particular, the Commission requested the Court to decide 'whether the Community even has power to negotiate and conclude the proposed agreement and, should the reply to this question be in the affirmative, whether or not such power is exclusive'.⁷

1.2 The Opinion of the Court

The Court structured Opinion 1/75 into three sections: (i) admissibility of the request for an opinion; (ii) the existence of a Community power to conclude the OECD Understanding on a Local Cost Standard; and (iii) the exclusive nature of the Community's power.

Regarding admissibility concerns, the Court decided that there were no reasons for the Request to be declared inadmissible. In so doing, the Court explained that the purpose of the Opinion procedure was 'to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community'.⁸ The Court ruled that the OECD Understanding that was to be put under compatibility review with the EEC Treaty was to be understood as an 'agreement envisaged' as required by Article 228 of the Treaty.⁹ The Understanding was both legally binding and its content was already sufficiently determined for it to be considered as 'envisaged'. The Request for an Opinion on the issue of competence was admissible, the Court ruled, since compatibility of the agreement with the Treaty was to be assessed in light of all Treaty provisions, not only substantive ones.¹⁰ Finally, the Request by the Commission was not filed out of time.

⁴ Please note that any references in this Report to 'the Council' are references to the Council of the European Communities. References to the OECD Council will be made explicit so as to avoid any terminological confusion.

⁵ See Section 2.2.1.1 below. See also Graham Butler, 'Pre-Ratification Judicial Review of International Agreements to Be Concluded by the European Union' in Mattias Derlén and Johan Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart Publishing 2018) 61.

⁶ Article 228(1) second subparagraph of the EEC Treaty at the time read: 'The Council, the Commission or a Member State may obtain beforehand the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 236.'

⁷ Doc 3, Request for an Opinion, p 2-3. For a list of Documents in the dossier and their numeration, please see Annex 1.

⁸ Opinion 1/75 (n 1) 1360.

⁹ The Court also provided a definition of what constitutes an 'agreement', which is 'any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.' See *ibid*.

¹⁰ In the words of the Court, '[t]he compatibility of an agreement with the provisions of the Treaty must be assessed in the light of all the rules of the Treaty, that is to say, both those rules which determine the extent of the powers of the institutions of the Community and the substantive rules.' See *ibid* 1360.

Regarding the existence of Community competence, the Court opined that both Articles 112 and 113 of the EEC Treaty gave the Community competence to regulate export credits, since they fell under ‘aids for exports’ in Article 112 and ‘common commercial policy’ in Article 113. In a crucial passage, the Court wrote:

The field of the common commercial policy, and more particularly that of export policy, necessarily covers systems of aid for exports and more particularly measures concerning credits for the financing of local costs linked to export operations. In fact, such measures constitute an important element of commercial policy, that concept having the same content whether it is applied in the context of the international action of a State or to that of the Community.¹¹

The Court also ruled that the Community had external competence to conclude international agreements in the field on the basis of Article 113(2) and 114 of the Treaty. Commercial policy, according to the Court, is a combination of internal and external measures with no innate priority for one or the other and it is thus not necessary for internal measures on a particular aspect of commercial policy to be adopted before entering into an external agreement.

Regarding the exclusive nature of Community competence over the CCP, the Court of Justice also agreed with the Commission. In another key passage, the Court wrote:

Such a policy is conceived in that article in the context of the operation of the Common Market, for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other.

Quite clearly, however, this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community.¹²

1.3 Academic commentary on the Opinion

An overview of some classic textbooks on EU law confirms the above sentiment that Opinion 1/75 is seminal in the history of EU law in multiple ways. Contexts in which the Opinion features in those texts range from explanations of the purpose of the *ex ante* opinion procedure at the Court of Justice¹³ to descriptions of the procedure for concluding international agreement by the Union.¹⁴ But most often and most consistently, Opinion 1/75 features in narratives and explications of the meaning of a common commercial policy,¹⁵ exclusive external Community competence,¹⁶ and, by far most often, of exclusive Community competence.¹⁷

¹¹ Ibid 1362.

¹² Ibid 1363-64.

¹³ Paul P Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (Sixth Edition, Oxford University Press 2015) 370.

¹⁴ Ibid 350–51; Koenraad Lenaerts and others, *European Union Law* (Third edition, Sweet & Maxwell, Thomson Reuters 2011) 1025, 1037–39.

¹⁵ Craig and De Búrca (n 13) 337; Lenaerts and others (n 14) 967; Alan Dashwood and others, *Wyatt and Dashwood's European Union Law* (Sixth Edition, Hart Publishing 2011) 942–43, 945.

¹⁶ Catherine Barnard and Steve Peers (eds), *European Union Law* (Second Edition, Oxford University Press 2017) 725; Craig and De Búrca (n 13) 327; Dashwood and others (n 15) 923.

¹⁷ Robert Schütze, *European Union Law* (2.ed, Cambridge University Press 2018); Barnard and Peers (n 16) 725; Craig and De Búrca (n 13) 327; Dashwood and others (n 15) 101, 923; Lenaerts and others (n 14) 125; Damian Chalmers and others (eds), *European Union Law: Text and Materials* (Cambridge University Press 2006) 188.

A very similar treatment of Opinion 1/75 can be found not only in textbooks on EU law, but also in more specialised academic literature. By far most prevalent are references and analyses of the Opinion in the literature exploring exclusive competence of the Community, especially in the context of the CCP.¹⁸ Opinion 1/75 is also the subject of discussions in literature dealing with the external dimension of exclusive Community/Union competence,¹⁹ and in literature dealing with the purposes of preliminary review of compatibility of international agreements with the Treaty.²⁰

Some other narratives have also been created around the Opinion. The teleological reasoning that seems to be the *ratio decidendi* for the finding of *exclusive* Community competence has been under the spotlight, legitimately so.²¹ In a piece of writing published immediately after the Opinion was delivered, Maas also pointed to the novelty of the opinion procedure.²²

Arguably the most elaborate narrative on Opinion 1/75 was the one developed by Holdgaard, who credited the reasoning in the Opinion as giving birth to the ‘state analogy’ argument in defining the scope of the CCP,²³ as well as initiating a discourse on the ‘external actorness’²⁴ of the Community.²⁵ According to Holdgaard, however, both of these narratives were short-lived in the jurisprudence of the Court and only had symbolic values.²⁶

As explained in detail below, however, the contents of the *dossier* reveal that these narratives and explanations fail to account for an important dimension of the case that was

¹⁸ Rass Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Kluwer Law International 2008) 24–27; Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (Kluwer Law Internat 2001) 37; Jacques HJ Bourgeois, ‘The Common Commercial Policy - Scope and Nature of Powers’ in ELM Völker (ed), *Protectionism and the European Community* (Second Edition, Kluwer Law and Taxation Publishers 1987) 7; CD Ehlermann, ‘The Scope of Article 113 of the EEC Treaty’, *Etudes de droit des Communautés européennes: mélanges offerts à Pierre-Henri Teitgen* (A Pedone 1984) 147–48; Joseph HH Weiler, ‘The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle’ in David O’Keeffe and Henry G Schermers (eds), *Mixed Agreements* (Kluwer Law and Taxation Publishers 1983) 69–73; Pierre Pescatore, ‘External Relations in the Case-Law of the Court of Justice of the European Communities’ (1979) 16 *Common Market Law Review* 615, 624, 638; Edmund Wellenstein, ‘Twenty-Five Years of European Community External Relations’ (1979) 16 *Common Market Law Review* 407, 418.

¹⁹ Holdgaard (n 18) 92–96; Pescatore (n 18) 617; Wellenstein (n 18) 418; Marise Cremona, ‘The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community’ [1982] *Oxford Journal of Legal Studies* 393.

²⁰ Butler (n 5) 61; Pescatore (n 18) 626–30.

²¹ Bart Van Vooren and Ramses A Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press 2014) 108, 143, 306, 497; Marise Cremona, ‘Defining Competence in EU External Relations: Lessons from the Treaty Reform Process’ in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press 2008) 59.

²² HH Maas, ‘The External Powers of the EEC With Regard to Commercial Policy, Comment on Opinion 1/75’ (1976) 13 *Common Market Law Review* 379, 380.

²³ Holdgaard (n 18) 28–38. This ‘state analogy’ argument refers to the following part of the Opinion: ‘The field of the common commercial policy, and more particularly that of export policy, necessarily covers systems of aid for exports and more particularly measures concerning credits for the financing of local costs linked to export operations. In fact, such measures constitute an important element of commercial policy, that concept having the same content whether it is applied in the context of the international action of a State or to that of the Community.’

²⁴ Note that a similar idea of ‘international personality’ and its manifestation in Opinion in 1/75 was also explored by Pescatore (n 18) 639–43.

²⁵ Holdgaard (n 18) 378, 442.

²⁶ *Ibid* 50.

very much present in the background, as evidenced by the submissions. More specifically, the case was not defined only by *kompetenz* struggles as one would think from merely reading the Opinion and the subsequent academic literature discussing it. In fact, there was a very strong *kompetenz-kompetenz* struggle in the background, which is not apparent from the text of the Opinion. As Section 3 of this Report demonstrates, some Member States were very uncomfortable with the Court of Justice having the competence to rule on the existence of *exclusive* Community competence in this opinion procedure as this would, by implication, mean that the Court also had the competence to indirectly rule on the competence of Member States.

2. The *dossier's* added value

2.1 Composition of the Dossier

Drawing inspiration from the classification of documents devised by Petti in his report on the *ERTA dossier*,²⁷ the contents of this *dossier* may be divided into five (non-exclusive) categories of documents:

- Submissions of the Commission, Council and Member States;
- Evidence;²⁸
- Process-related documents;²⁹
- Opinion of the Court;
- Documents previously not available to the public.³⁰

There are three further categories that can be found in Petti's categorisation but are omitted from an in-depth discussion in this Report due to the specific nature of the Opinion procedure:

- Report of the Oral Hearing by the judge rapporteur;
- Opinion of the Advocate General;
- Documents not available to the public.³¹

There is no Report of the Oral Hearing in the *dossier* as the Court delivered its Opinion on the basis of a written procedure. As for the Opinion of the Advocate General and documents not available to the public, a separate subsection is dedicated to these two (non)categories below.

The table below provides a quantitative overview of the composition of the Opinion 1/75 *dossier*. All of the categories of documents that are found in the *dossier* are briefly analysed in turn, apart from the Submissions and the Opinion of the Court, which are discussed more fully in later sections of this report.

²⁷ Alessandro Petti, 'The Court of Justice in the Archives Project. Analysis of the ERTA case (22/70)', EUI AEL Working Papers no. WP AEL 2021/08.

²⁸ This refers to documents and annexes submitted to the Court by the parties to support their arguments.

²⁹ This comprises correspondence between the Court and the parties, internal correspondence within the Court, and internal process-related decisions of the Court.

³⁰ This refers to all the documents that were unavailable to the public before the granting of access to the case *dossier*.

³¹ This category refers to all the documents that are a part of the *dossier* in the Archives but have been redacted or removed from the version of the *dossier* made available to the public.

Table 1: Quantitative overview of the composition of the Opinion 1/75 dossier

Category of Document	No. of documents (N=127) ³²	% of number of documents	No. of pages (N=551)	% of the dossier
Submissions	16	12.6%	231	41.9%
Evidence	29	22.8%	151	27.4%
Procedure-related documents	76	59.8%	81	14.7%
Opinion of the Court	6	4.72%	88	16.0%
Documents previously not available to public	121	95.3%	464	84.2%
Documents not available to the public	0	0%	0	0%
Report of the Oral Hearing	0	0%	0	0%
Opinion of the Advocate General	0	0%	0	0%

2.1.1 Evidence

Evidence refers to any documents submitted with the aim of substantiating the written submissions. In this case, all such documents were submitted as annexes to the original submission. As this was an Opinion procedure in which the compatibility of the Understanding with the provisions of the Treaty was assessed in the abstract, it is not surprising that evidence does not comprise an enormous portion of the *dossier*. And even the numbers that we see in the Table above can be considered to be somewhat inflated as the Commission's Request for an Opinion is produced in the *dossier* in six different language versions. With evidence forming 15 pages of the Request, which amounts to about one third of it, this increases the amount of evidence in the *dossier* in proportion to the other categories. While these are new documents that had not been previously available to the public, there is nothing revolutionary that one can find in terms of the content of the evidence in the *dossier*.

Evidence was offered by the Commission in its Request for an Opinion and by the UK in its Observations. The Commission attached for the Court the following documents:

- Draft Understanding on an OECD Local Cost Standard;
- Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard;
- Technical Data on Export Credits;
- Numerical Example of the Application of the Various 'Local Costs Standard'.

While none of these documents are likely to alter our assessment of the case or of the reasoning, it is quite interesting how detailed some of them are. The first two documents are copies of the Draft Understanding and the Commission's Recommendation for a Council Decision through which the Community would conclude the Understanding. It is clear from the text of the draft Understanding that EEC participation was envisaged, although the form it

³² Please note that different language versions of the same document were counted for the purposes of this table as separate documents. For instance, Request of the Commission for an Opinion in French, English, and Danish would count as three discrete documents, as would the Opinion of the Court in German, Dutch, and Italian. On the other hand, three photocopies of the same document were counted as one single document.

would take was not yet clear.³³ With the latter two documents, the Commission aimed to explain to the Court in great detail how the concepts of export credits and of the local costs standard function to ensure that a solid factual background of the case was established and to facilitate the decision-making process of the Court.

Other documents, provided as evidence by the UK as Annexes to its Observations, were:

- Summary Record of the 23rd Meeting of the OECD Trade Committee Group on Export Credits and Credit Guarantees of 15 May 1975;
- Results of the Experts' Meeting of the OECD Trade Committee Group on Export Credits and Credit Guarantees on the Local Cost Standard of 5 September 1974;
- Summary Record of the 23rd Meeting of the OECD Trade Committee Group on Export Credits and Credit Guarantees of 3 and 4 October 1974;
- Draft Understanding on an OECD Local Cost Standard;
- Council Resolution Concerning an Understanding of Export Credits for Ships of 18th July 1974.

In the UK's view these documents served to show the long-term ongoing participation of the Member States in the OECD negotiations on export credits and the 'extent to which other Members of the Group have grounds for expecting that, whether or not the Community will participate in the formalised Understanding, Member States will do so'.³⁴ Similar to the evidence provided by the Commission, these documents do not call into question our perception of Opinion 1/75 or the narratives built around it. However, and again much like the evidence provided by the Commission, these documents are remarkably detailed and provided the Court with a full picture of the facts.

2.1.2 Procedure-related documents

In terms of numbers of documents, procedure-related documents constitute a very significant part of the *dossier* at almost 60%. As this category comprises a wide range of documents, including correspondence between the Court and the Member States, internal correspondence within the Court, and process-related decisions of the Court, we will here mention only a few that are especially interesting and insightful. None of the documents related to procedure were previously available to the public and they provide a very interesting, albeit somewhat limited insight into the inner workings of the Court and the ways in which the Court communicated with the EC institutions and the Member States. There are three closely related themes or discoveries that can be picked up from these documents.

The first relates to the novelty of the procedure. Opinion 1/75 was the first Opinion delivered by the Court of Justice and it was the first time that the entire procedure leading up to the eventual Opinion was instituted. This sense of novelty, and with it an associated sense of confusion, can be perceived from a number of documents. For instance, in a letter to the Registrar of the Court, Mr Chevallier, the Attaché of the Court, spoke of '*la procédure très particulière*'.³⁵ Likewise, the UK Government sought some procedural guidance from the Registrar due to the 'absence of precedent for an application of this nature'.³⁶

³³ See, for instance, Note by the Chairman of the Group on Export Credits and Credit Guarantees of the OECD Trade Committee, Doc 3, Annex I, 3; See also Draft Resolution of the OECD Council, Doc 3, Annex I, 6.

³⁴ Doc 68, Observations of the UK, 5.

³⁵ Doc 9, Letter of the Attaché to the Registrar, 260 of the *dossier*.

³⁶ Doc 26, Request for a deadline extension and procedural questions from the UK, 279 of the *dossier*.

The second and the third themes that emerge from the *dossier* in an overlapping way are, secondly, a sense of urgency to deliver the Opinion as soon as possible, which, thirdly, originated from the President of the Court, Judge Lecourt, who seems to have taken a very hands-on approach in micromanaging this case internally. For instance, in another letter to the Registrar, Mr Chevallier writes that the President of the Court had given him a phone call with some specific instructions on the case, in particular, that it would be useful not to waste time and proceed with the matter immediately.³⁷ President Lecourt had also set the deadline for the submission of observations as 1 September 1975,³⁸ even though the UK Government had still not received the English language version of the Commission's Request on 4 August 1975.³⁹ In another piece of internal correspondence, Mr Chevallier suggested to explain such a brief deadline with the fact that the Court must respond to the Request without delay.⁴⁰ The President of the Court also 'insisted' that any potential request for the extension of this deadline should be delivered to him personally.⁴¹ When the UK Government, the only party to have done so, actually requested a deadline of one calendar month,⁴² the President only agreed to postpone the deadline by 20 days to 20 September 1975.⁴³ This sense of urgency can also be seen from the procedural timeline of the case below, which demonstrates the crucial procedural stages through which the case progressed. It took less than 4 months from the time the Request for an Opinion was filed by the Commission for the case to be resolved and the Opinion delivered.

Figure 1: Procedural timeline of the opinion 1/75

It could be, of course, that in the 1970's, with a significantly smaller case-load than today, the President of the Court could afford the luxury of having such a hands-on proactive approach to managing most cases. Comparing the findings from this *dossier* with what other *dossiers* hold might shed some additional light on this. However, it does seem intuitively unlikely that such an approach to case management was normal. The more likely explanation might be that it was due to the novel and extraordinary nature of Opinion 1/75 that the President opted to micromanage the procedure in this way.

³⁷ Doc 10, Follow-up letter of the Attaché to the Registrar, 261 of the *dossier*.

³⁸ Doc 15, Decision of the President on the deadline for the submission of observations, 268 of the *dossier*.

³⁹ Doc 26, (n 36) 279 of the *dossier*.

⁴⁰ Doc 9 (n 35) 260 of the *dossier*.

⁴¹ Ibid.

⁴² Doc 26 (n 36) 279 of the *dossier*.

⁴³ Doc 27, President's Decision extending the deadline for the submission of observations, 280 of the *dossier*.

2.1.3 Documents previously not available to the public

Before the *dossier* was released, the only documents in the *dossier* which were previously publicly available were the various language versions of the final Opinion of the Court. All the remaining documents, which amount to 95.3% of all the documents in the *dossier*, are new to the public eye. This demonstrates the immense value of the opening of the archives, particularly in the case of this first Opinion, about which not much was known previously.

2.1.4 Documents not available to the public

Unlike most other *dossiers* that are being investigated in this project, the Opinion 1/75 *dossier* is exceptional as it was not redacted prior to its public release – none of the pages in the *dossier* are marked as having been omitted. This perhaps reflects that the redaction policies of the Court are not triggered by the (non-contentious) nature of the opinion procedure, its subject-matter and the fact that no private parties were involved.

2.1.5 Opinion of the Advocate General

Since, at the time the Court delivered Opinion 1/75, an individual AG opinion did not form part of the Opinion procedure, there is no opinion of the AG in the *dossier*. Nonetheless, the entire body of AGs played an admittedly less visible, but arguably no less important role in the decision-making process. In line with Article 108(2) of the then applicable Rules of Procedure, and also as obvious from the contents of the *dossier*,⁴⁴ all of the Advocate Generals were heard by the Court, most likely during the deliberations. Obviously, as deliberations are not available in the *dossier*, and as these were not opinions of (an) AG(s) in the formal sense, none of their views are publicly available.

2.2 *Argumentation employed in the case*

Because of the way the Court structured its Opinion, the submissions of the EC institutions and the Member States are arguably the most interesting part of the *dossier*. While in most other types of decisions the Court of Justice reports (some of the) arguments of the parties, the Court did no such thing in this first Opinion. Here, given the structure of the Opinion 1/75, the Court seemingly pronounced the law as an Oracle, providing an authoritative pronouncement as to the legally correct response to the inquiry without any regard to the arguments submitted. Since those arguments are not reported explicitly it is not clear what the main sources of contention underlying the case were. The content of the *dossier* gives us an in-depth glimpse into these by providing us with all the submitted observations. As noted, all the information contained in these plentiful submissions is new – the Court did not report these arguments in the Opinion.

In the subsections that follow, each argument made by the intervening institutions and Member States is recounted. After providing a brief introductory commentary on the submission, the arguments made are divided into three categories: (i) admissibility, (ii) *existence* of Community competence, and (iii) *exclusivity* of Community competence. The table below provides a preliminary summary overview of the positions the different actors involved in the procedure took on these three key questions.

⁴⁴ Doc 8, Notification of the case to AGs, 259 of the *dossier*.

Table 2: Positions taken by the actors in the proceedings

	Admissibility of the Commission's Request?	Existence of Community competence?	Exclusivity of Community competence?
Commission	Yes	Yes	Yes
Council	No	N/A	N/A
Ireland	Yes	Yes	Unclear
United Kingdom	No	Yes	No
Netherlands	Yes	Yes	Yes
Italy	No	Unclear	Unclear
Opinion 1/75	Yes	Yes	Yes

2.2.1 Submissions

2.2.1.1 Request for an opinion by the Commission

As a way of setting the context⁴⁵ to the Request, the Commission explained that export credits were subjects of 'keen competition' between industrialised countries. In this environment, the role of Article 112 EEC, argued the Commission, was to prevent distortion of competition between Community exporters.⁴⁶ Moreover, it was desirable to prevent distortion of competition not only within the Community, but to harmonise standards in this field with third countries as well.⁴⁷ This was the purpose of the OECD Understanding, which the Commission had been negotiating for more than a decade since 1964⁴⁸ and its content stemmed directly from the proposals made by the Community.⁴⁹ Finally, the Commission explained that the impetus for the Request came from the inability of the Council to come to a uniform position on the matter. The Commission shed light on the fact that in discussing its Recommendation for a Council Decision concerning the OECD Understanding, the Council was split three ways: six delegations held the position that the Community had exclusive competence to conclude the Understanding, two delegations argued that the Community had a non-exclusive competence, whilst one delegation argued that the Community did not have any competence at all to participate in the conclusion of the agreement.⁵⁰ The Commission emphasised its role as the 'honest broker' seeking to resolve these differences by way of the non-contentious Opinion procedure by introducing the Request to the Court of Justice: 'In order that the Council might have information on the legal questions confronting it which would be necessary for it to resume useful discussion, the Commission considered that it should request the Court to give

⁴⁵ Please note that in describing the context in which the case arose, particularly in describing what the procedure relating to export credits within the Community currently was, the Commission referenced twice an article 'Assurance-crédit, garanties et crédits financiers à l'exportation : la modification des procédures de consultation au sein de la C.E.E.' by an unnamed author published in *Revue du Marché Commun*, No. 172 in 1974. See Doc 3 (n 7) p 6, fn 1, p 7 fn 5.

⁴⁶ Ibid 4.

⁴⁷ Ibid 9.

⁴⁸ Ibid.

⁴⁹ Ibid 15.

⁵⁰ Ibid 2. It is fascinating, however, that of the two MS that argued in the Council that the Community did not have exclusive competence to conclude the Understanding, only the UK submitted Observations to the Court to that effect. The identity of the other MS is unclear from the *dossier*. Moreover, the one MS that maintained that the Community did not have any competence whatsoever with relation to the conclusion of the Understanding did not submit any Observations to the Court and it is also unclear which MS held this view.

its opinion regarding these questions'.⁵¹ However, the Commission certainly had a view on the substantive issues and then proceeded to present its substantive arguments to the Court.

a. Admissibility

No arguments pertaining to admissibility were made by the Commission in the Request.

b. Substance

i. Existence of the Community's power to conclude the understanding

In its Request for Opinion, the Commission advanced the following arguments for the existence of the Community's competence to conclude the OECD Understanding:

- Article 113 expressly grants the Community the power to conclude international agreements in the field of commercial policy;⁵²
- Export credits constitute essential element of 'export policy' within the meaning of Article 113 of the EEC Treaty;⁵³
- Even though export credits are not explicitly mentioned in Article 113, the list of commercial policy measures therein is not exhaustive and should be read together with Article 112, which explicitly mentions measures by which Member States grant aid for exports to third countries;⁵⁴
- In any case, export credits constitute 'commercial policy' within the meaning of Article 113, a point agreed on by the Council, as is obvious from the text of previous Directives in this area;⁵⁵
- The argument advanced by some Member States in the Council that should the Community conclude the Understanding, Member States of the Community would be in an unequal position compared with non-Member State parties to the Understanding, because the latter would have the right to unilateral withdrawal whereas Community Member States would not have this flexibility, is contrary to EEC Treaty provisions, especially Article 113, which grants exclusive Treaty-making powers in this field to the Community.⁵⁶
- A contrary interpretation, allowing unilateral action by Member States in the field, would impede the effective achievement of common policies provided for in the Treaties, which is the exact purpose for which power was transferred to the Community;⁵⁷

ii. Exclusivity of the Community's power to conclude the understanding

In the parts of the Request that analysed the exclusivity of the Community's competence,⁵⁸ the Commission (in contrast to the Court) gave more attention to pre-emptively refuting arguments made by some Member States in the Council against exclusive Community competence, than to offering positive arguments for its existence. While never mentioned explicitly in these exact words, the spirit of this section suggests that the Commission considered that the arguments advanced in favour of Community competence also spoke in favour of *exclusive* Community

⁵¹ Ibid 2-3.

⁵² Ibid 18.

⁵³ Ibid 19.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid 20.

⁵⁷ Ibid 20.

⁵⁸ Ibid 1-25.

competence. This reflects the stance the Commission had taken in the *ERTA* case, which was to conflate the existence and the exclusivity of Community external competence. Unless there were specific arguments against it, therefore, the exclusivity of the competence would be established alongside the existence of competence. Deliberate or not, this approach effectively shifted the burden of proof from the Commission onto the Member States that argued against the exclusive Community competence. Unless they provided sound arguments against exclusivity, the default position constructed by the Commission was that the Community had exclusive competence to conclude the OECD Understanding. In this manner, the Commission advanced four arguments:

- That there is precedent in concluding mixed agreements in the field of export credits does not automatically mean that the precedent is in line with the Treaty;⁵⁹
- There is no need for the (*ERTA*-style) prior adoption of common internal rules as competence in this case derives from express Treaty provisions, particularly Article 113;⁶⁰
- That Member States, and not the Community, must carry the administrative and financial burden of the measures is irrelevant for the question of distribution of powers – it is true of many areas that the Community has powers to put into place measures, the implementation and financing of which, is carried out by the Member States;⁶¹
- Mixed participation would only be permissible if the agreement contained some provisions that deal with matters outside ‘the power or the exclusive power’ of the Community – and following paragraph II of the Understanding, which contains an exclusion of certain transactions from the scope of the agreement, such as military transactions, that is not the case.⁶²

2.2.1.2 *Observations by the Council*

The Observations by the Council have the potential to be interesting to any scholar of diplomacy and political negotiations as they are the output of a body that was completely divided on the issue before the Court. To serve as a reminder, six Member States thought the Community had exclusive competence to conclude the Understanding under the Treaty, two thought this competence was not exclusive, and one Member State thought the Community did not have any competence at all. It is fascinating, given the circumstances, that the Council’s legal service was able to craft a single set of observations. Arguably as a result of these divergent views, the Observations are cryptic, unclear, lack a clear line of argumentation, and are somewhat removed from the concrete issues of the case. One needs to read between the lines somewhat to come to a clear understanding of the Council’s position. More importantly, the Council refrained from giving any views on the substantive issues before the Court, that is, on where the competence lies and what its nature is. Instead, the Council focused solely on issues related to admissibility (and the related questions of jurisdiction of the Court in the Opinion procedure). This position reflects the internal Community institutional power struggle between the Council and the Commission, as well as the increasing institutional power of the Court of Justice at that time in the mid-1970’s.

⁵⁹ Ibid 21.

⁶⁰ Ibid 21-22.

⁶¹ Ibid 23.

⁶² Ibid 24.

a. Admissibility

The Council was rather reserved regarding the admissibility of the Commission's Request. It offered three arguments to the Court as to why the Request as presented by the Commission might be inadmissible:

- The expression 'agreement envisaged' in Article 228 EEC, which defined the subject matter of the preliminary opinion procedure before the Court, might require that 'the body responsible for concluding the agreement – in this case the Council – has indicated its intention of concluding the agreement'. Because the Council has not done that in this case the Request might be inadmissible;⁶³
- Related to this, the purpose of the preliminary opinion procedure laid down in Article 228 EEC would be deflected from its true purpose (which is 'to preclude any conflict between international law and Community law') if the Court was to give opinions on 'mere projects' and not agreements that were actually contemplated by the Council to be concluded;⁶⁴
- The wording of Article 228(1) EEC defines the scope of the Opinion to be delivered by the Court as only covering the competence of the Community, and not the competence of Member States.⁶⁵

b. Substance

No arguments pertaining to substance were made by the Council in its Observations.

2.2.1.3 Observations of Ireland

The Observations made by the Republic of Ireland, no more than half a page long, were succinct and do not contain independent arguments. Indeed, they were more a declaration than actual observations. In its letter, it stated: 'the Irish Government supports the view expressed by the Commission that the Community has the necessary power to negotiate and conclude' the Understanding.⁶⁶ Even though, at first sight, this seems like a blanket support for the position of the Commission, the Irish position was less clear than it seems. Whether or not the Community 'has the necessary power to negotiate and conclude' the Understanding was only one of the two questions forwarded by the Commission to the Court, and it was the less contentious of the two. Eight out of nine Member States in the Council were of the opinion that the Community had that power. The significantly more contentious part of the entire case was whether this power was *exclusive*. And the wording of the observations made by Ireland does not unambiguously disclose the Irish position on that matter.

2.2.1.4 Observations of the UK

As one can sense from the Table of Contents alone, the Observations made by the UK are by far the longest and most filled with content and argumentation. Much like the Commission, the UK also spent considerable time trying to establish the factual context in which the case arose. As was already clear from the materials the Commission had annexed to its request, the negotiations on the substance of the Understanding were already complete and the only outstanding issue was the mode of participation of the Community.⁶⁷ The UK disagreed with the characterisation of the Commission that it had been involved in the negotiations of the

⁶³ Doc 63, Observations of the Council, 2.

⁶⁴ Ibid 2-3.

⁶⁵ Ibid 4.

⁶⁶ Doc 67, Observations of Ireland.

⁶⁷ Doc 68 (n 34) 4-5.

Understanding for more than ten years, arguing instead that it was not involved at all in the negotiations before 1974 because it had no mandate, and that even after 1974, the final text of the Understanding was reached with the Commission playing no active role.⁶⁸ In this context, the UK Government submitted to the Court that non-Member State parties to the Understanding were expecting that the Member States would participate in the eventual conclusion of the agreement and not only the Community.⁶⁹

a. Admissibility

The United Kingdom submitted a long list of objections to the admissibility of the Request for an Opinion filed by the Commission, some of them overlapping with those submitted by the Council:

- Article 228(1) (and therefore the possibility of requesting an Opinion prior to concluding an agreement) applies only to agreements for which the Community has been given exclusive treaty-making power, which is not the case here as the Community has not yet adopted uniform principles or common rules on export credits;⁷⁰
- The Understanding cannot be understood as an ‘agreement *envisaged*’ in the sense of Article 228 EEC because the body responsible for its conclusion – the Council – had not yet envisaged its conclusion;⁷¹
- The Understanding cannot be understood as an ‘agreement envisaged’ in the sense of Article 228 EEC because it does not contain any legally binding obligations due to the fact that it had not been registered with the Secretariat of the UN pursuant to Article 102 of the UN Charter;⁷²
- Article 228 of the Treaty permits the Court to rule on whether the Community has the competence to conclude the Understanding, but not on whether the Member States have that competence. The Court can only rule if the Community has the competence but it cannot decide whether it has *exclusive* competence to conclude the agreement. This is based both on the wording of Article 228 and on a teleological understanding of the Opinion procedure;⁷³

⁶⁸ Ibid 5-8. It is worth noting at this point that Jean Groux, who was the Agent of the Commission before the Court of Justice and argued the Opinion 1/75 case, and was also the Chief Counsel of the Legal Service of the Commission at the time, wrote a book chapter in 1983 in which he expressed some views that were diametrically opposed to the position the Commission had taken in this case. Instead, his view of the matter, despite the fact that he had been the Agent of the Commission, sided more with the UK's characterisation of the role the Commission had in negotiating the Understanding in the decade leading up to 1975. Speaking of the OECD Understanding that was at the heart of Opinion 1/75, Groux wrote: 'It has also occurred that the Council has decided to conclude an agreement without having taken any part, beforehand, in the negotiations. Here one may cite the "consensus" of the OECD on export credits. This arrangement was implemented by a decision of the Council of 4 April 1978, and has since been renewed several times. However, it was originally negotiated in 1974 by several MS outside the scope and without the participation of the Community. This subsequently resulted in a disagreement with the Commission which brought this matter before the Court of Justice.' Jean Groux, 'Mixed Negotiations' in David O'Keeffe and Henry G Schermers (eds), *Mixed Agreements* (Kluwer Law and Taxation Publishers 1983) 88.

⁶⁹ Doc 68 (n 34) 5.

⁷⁰ Ibid 9-10.

⁷¹ Ibid 10-11.

⁷² Ibid 9.

⁷³ Ibid 12-14. Note that when discussing the nature of the Opinion procedure – in particular its rationale and functioning – the UK, on page 12 of its Observations, referenced a work written extrajudicially by Pescatore, who was a Judge at the Court of Justice at the time and also, naturally, participated in deciding Opinion 1/75. The work referenced by the UK was: P. Pescatore, 'Relations Extérieures des Communautés', *Hague Recueil* 1961 II, 126-129.

- Connected to this, and contrary to the claims made by the Commission, Article 107 of the Rules of Procedure of the Court cannot be used to extend the jurisdiction of the Court beyond what is foreseen in the Treaty. The Court can only rule on the competence of the Community, and not the competences of the Member States;⁷⁴
- The Commission has brought the Request for an Opinion too late, after a long delay;⁷⁵
- The Court giving an Opinion would be detrimental to the legal security as other parties to the OECD Understanding have legitimate expectations for the participation of Member States in the conclusion the Understanding.⁷⁶

b. Substance

While the UK accepted that the Community had competence to participate in the conclusion of the agreement, it provided a long list of reasons why the Community did not have *exclusive* competence to conclude the OECD Understanding.

i. Existence of the Community's power to conclude the understanding

The UK Government conceded that the Community had the power to conclude the Understanding.⁷⁷ At several points the UK reiterated that it had no objection to Community participation, only to the claim of exclusivity.

ii. Exclusivity of the Community's power to conclude the Understanding

The United Kingdom submitted the following list of arguments in favour of a non-exclusive Community competence, some of which are framed as direct refutations of the Commission submission:

- A distinction should be made between, on the one hand, 'the central core of commercial policy', which includes customs and tariffs and is always in the exclusive competence of the Community and, on the other hand, 'matters falling outside the central core', of which export tariffs are 'a clear example' and are therefore not automatically within exclusive Community competence under Article 113(1);⁷⁸
- Therefore, *a fortiori*, there cannot automatically be exclusive Community competence under Article 113(3) to negotiate and conclude international agreements;⁷⁹
- An assertion of exclusive Community competence only at the end of negotiations cannot have the effect of depriving Member States of the competence they had been exercising throughout the negotiations;⁸⁰
- The exercise of exclusive competence to conclude international agreements under Article 113(3) requires, in line with *AETR*, the prior elaboration of uniform principles on the basis of Articles 113(1) and 113(2) of the Treaty. Current Community legislation is limited to provision for consultation and does not contain uniform substantive rules;⁸¹
- The Court should give full weight to the number of adverse practical consequences that the claim to exclusive Community competence carries:

⁷⁴ Ibid 15.

⁷⁵ Ibid 16.

⁷⁶ Ibid.

⁷⁷ Ibid 17.

⁷⁸ Ibid 7-18.

⁷⁹ Ibid 18.

⁸⁰ Ibid 18.

⁸¹ Ibid 18-19.

- As a matter of law, the responsibility for the implementation of the OECD Understanding would lie with the Community, but since it has no institutions in the export credits field, its implementation in practice would rest with the Member States, which would be the ones carrying the institutional burden of implementing export credit policy;⁸²
- The relationship between the Community Member States and other OECD states parties to the Understanding would be impaired, as the Community would be an additional unnecessary intermediary in their relationship;⁸³
- Exclusive participation of the Community in the conclusion of the agreement would create an imbalance of obligations between Community Member States and other OECD member states, as the latter would have the option to withdraw or make exceptions to the Understanding unilaterally whereas Community Member States would not have the same option;⁸⁴
- Not being in a position to withdraw or make exceptions to the Understanding without prior approval could impair the individual interests of Member States as they could not be flexible in an area of commercial policy in which expediency is very important for keeping a competitive edge;⁸⁵
- The Understanding permits later unilateral extension of the agreement into areas which are clearly not within exclusive Community competence, such as bilateral aid transactions for development, or military transactions. In other words, there is a danger of competence creep;⁸⁶
- There is no precedent for exclusive Community competence in concluding other OECD Understandings;⁸⁷
- Recognising an exclusive Community competence would be incompatible with Article 71 of the ECSC Treaty, which provides that powers of Member States regarding commercial policy on products that fall within the scope of the ECSC Treaty are not affected by the Treaty;⁸⁸
- The OECD Understanding is an evolving instrument and potential future changes to the Understanding might be prejudiced, and the development of the regime hindered, due to the limited competence of the Community and the need to change the mode of participation of the Community and the Member States should the regime evolve.⁸⁹

2.2.1.5 Observations of the Netherlands

In its Observations, by way of introduction, the Dutch Government welcomed the initiative by the Commission to invoke Article 228 of the Treaty for the first time and refer a question for an Opinion to the Court of Justice. It expressed its full support for the views advanced by the Commission in the Request as to the exclusive nature of the Community's competence. Albeit somewhat briefly, it also adduced some arguments supporting the Commission's view, both pertaining to admissibility and to the substance.

⁸² Ibid 20-21.

⁸³ Ibid 21.

⁸⁴ Ibid 22.

⁸⁵ Ibid 23.

⁸⁶ Ibid 24-25.

⁸⁷ Ibid 24.

⁸⁸ Ibid 25-26.

⁸⁹ Ibid 26.

a. Admissibility

On the issues of admissibility, the Netherlands offered one argument in support of the views of the Commission:

- Reading Article 228(1) together with Article 106(2) of the Rules of Procedure⁹⁰ of the Court makes it clear that the Court, in this procedure, may rule on the (exclusive) competence of the Community.⁹¹

b. Substance

As with arguments pertaining to admissibility, the Netherlands offered one argument in favour of the existence of Community competence, and one argument in favour of exclusive Community competence to conclude the Understanding.

i. Existence of the Community's power to conclude the understanding

Regarding the existence of Community competence, regardless of its nature, the Netherlands argued that:

- Articles 113 and 114 ECC expressly confer power on the Community to conclude the Understanding, which falls fully within the concept of the common commercial policy, regardless of the fact that the CCP is constantly evolving and hard to define.⁹²

ii. Exclusivity of the Community's power to conclude the understanding

Regarding the exclusivity of Community's powers, the Netherlands advanced an argument identical to the one put forward by the Commission:

- Due to the exclusions contained in paragraph II of the Understanding, which exclude some categories of transactions which would fall within the competence of the Member States from the scope of the Understanding, the Community has a legitimate claim to exclusive competence to conclude the Understanding.⁹³

2.2.1.6 Observations of Italy

While initially welcoming the initiative of the Commission to ensure respect for the law as it stems from the EEC Treaty, Italy presented a very sceptical set of arguments pertaining to the admissibility of the Request of the Commission, arguing that the Court should declare it as inadmissible on various grounds. Like the Council, Italy refrained from providing arguments on the substance.

⁹⁰ The Government of the Netherlands likely had Article 107(2) (and not Article 106(2)) of the Rules of Procedure in mind, the text of which in force at the time read: 'The Opinion may deal not only with the question whether the envisaged agreement is compatible with the provisions of the EEC Treaty but also with the question whether the Community or any Community institution has the power to enter into that agreement.'

⁹¹ Doc 69, Observations of the Netherlands 2.

⁹² Ibid 2-3. The Government of the Netherlands attempted to conceptualise the possible meaning of the CCP by referencing two academic works. First, in attempting to give the Court some guidance as to how the CCP could be interpreted, it referenced Kapteyn and Verloren van Themaat, 'Handboek Voor de Europese Gemeenschappen', 2nd ed. 1974, on page 3 of its Observations. Furthermore, on the same page, it explained the meaning of the CCP under the Benelux Treaty by referencing Maas, 'Enkele aspecten van de handelspolitieke problemen', Universit de Bruxelles, 1963.

⁹³ Ibid 4.

a. Admissibility

Arguments pursued by Italy as to why the Court should declare the Request inadmissible are very similar to the arguments to the same effect forwarded by the Council and other Member States. In particular, Italy argued:

- The OECD Understanding cannot be understood as an 'agreement envisaged' in the sense of Article 228 EEC, as its conclusion has not yet been envisaged by the Council;⁹⁴
- The Understanding also cannot be understood as an 'agreement envisaged' because the assessment of its compatibility with the Treaty is precluded due to the fact that there are no uniform principles of the common commercial policy under Article 113 that had been laid out by the Community;⁹⁵

b. Substance

No (clear) arguments pertaining to substance were made by the government in its Observations.

It should nonetheless be noted that on page 2 of its Observations, Italy signposts a substantive argument, but it is unclear what precisely that argument is and what conclusions Italy attempts to draw from it. First, the Italian Government posits that the term 'agreement envisaged' refers not to any agreement, but only to those for which the Treaty provides for conclusion by the Community. If this is the case, then the Opinion procedure under Article 228 can only be triggered where the subject of the negotiations falls within the competence of the Community. However, where this preliminary assessment is contested, Italy continues, it cannot be resolved through the non-contentious Opinion procedure. The Italian argument thus seems to echo the UK argument that the Opinion procedure can only be used where the envisaged agreement clearly falls within Community powers and thus within the scope of Article 228.

2.2.2 Opinion 1/75 of the Court

Opinion 1/75⁹⁶ is published on the website of the Court in three parts: Summary, Statement of Question, and Discussion (i.e. Opinion). In the *dossier*, the Summary section is not present and only the Statement of Question and Discussion parts can be found. This section aims at merely presenting and dissecting the arguments employed by the Court in its brief, 6-pages Discussion. It does so by using the same tripartite structure that was used in the previous sections to present the arguments in the submissions. It will be the subject of the next section to discuss how those arguments and those of the Court relate to each other.

a. Admissibility

- The OECD Understanding can be considered as an '*agreement envisaged*' in the sense of Article 228 EEC – for this, the designation of the agreement is irrelevant. It is crucial, however, that the Understanding will be entered into by entities subject to international law and that it is legally binding as it contains specific rules of conduct and provides that derogations shall only take place in exceptional cases under strict conditions;⁹⁷

⁹⁴ Doc 70, Observations of Italy 2.

⁹⁵ Ibid 3. The Italian Government goes even one step further, arguing that until uniform principles of the CCP are established by the Community, no agreements whatsoever that aim at materialising CCP may be subject to compatibility review with the Treaty by the Court as it does not have the competence to do so.

⁹⁶ Opinion 1/75 (n 1) 1355.

⁹⁷ Ibid 1360.

- The Understanding can also be considered as an ‘agreement *envisaged*’ because the substantive negotiations had already been finished. The only outstanding matter was the form of Community participation, and the conclusion of the Understanding in the form of a resolution of the OECD Council is now envisaged;⁹⁸
- The fact that the Commission had raised the issue of compatibility of the Understanding with the Treaty for the purpose of obtaining an opinion of the Court cannot in and of itself render the Understanding as not being an ‘agreement envisaged’ for the purposes of Article 228(1) EEC;⁹⁹
- As part of the preliminary opinion procedure, the Court must assess the compatibility of an envisaged agreement with the Treaty in light of all the rules of the Treaty, meaning both substantive rules and rules laying down the competences of the Community. Not deciding on both potential substantive and procedural incompatibility with the Treaty would deprive this procedure of its fundamental purpose of avoiding complications that would result from the Community being bound in international law by an agreement that is incompatible with the Treaty;¹⁰⁰
- That negotiations are already concluded does not constitute a valid argument that the Request had been brought out of time as Article 228(1) of the EEC Treaty does not lay down a time limit for the submission of such a request.¹⁰¹

b. Substance

Like the Commission in its Request, the Court also structured the substantive part of its Opinion into two separate sections, one dealing with the *existence* of a Community’s competence, and the other with the *exclusivity* of Community competence. What is striking about this division are not the categories the Court chose to use, but the amount of time and space dedicated to each of the categories. As we have seen in the earlier parts of this section, when the submissions were presented, what was especially contentious was not whether or not the Community had the competence to participate in the conclusion of the agreement. With eight out of nine Member States sharing this view, the Council almost unanimously agreed that this was the case. Moreover, none of those making submissions advanced any arguments whatsoever to the effect that the Community had no competence to participate in the conclusion of the Understanding. What was significantly more contentious, as evidenced not only by the three to six division in the Council on the issue, but also by the arguments pursued in the submissions, especially by the UK, was whether the competence of the Community to conclude the Understanding was exclusive. In spite of this discrepancy in the level of contestation, the Court did not respond to it and, rather interestingly, dedicated an equal amount of space to both issues – about two pages each. This gave it the opportunity to make some general statements about the scope of the CCP in this first case on international commercial policy agreements.

i. Existence of the Community’s power to conclude the understanding

The Court answered the Commission’s first question in the affirmative. It justified the existence of a Community competence to conclude the Understanding as follows, basing it primarily on a literal interpretation of the text of the EEC Treaty, especially Articles 112 and 113:

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid 1360-61.

¹⁰¹ Ibid 1361.

- Article 112 of the EEC Treaty, in referring to 'aid for exports' gives the Community competence to regulate export credits, which are the subject of the Understanding;¹⁰²
- Export credits also fall under both the terms 'common commercial policy' and 'export policy' in Article 113 – indeed, export credits form an important part of the CCP which has the same meaning in context of the Community as it does in the context of a state and some of the existing Community directives from early 1970s already recognise export credits as an important part of international trade and commercial policy;¹⁰³
- External competence, i.e. competence to conclude international agreements in the field of CCP, is conferred upon the Community by Articles 113(2)¹⁰⁴ and Article 114 of the EEC Treaty. CCP is thus composed not only of internal measures but also external measures, neither having inherent precedence over the other;¹⁰⁵
- There is no need for a pre-existing body of Community rules that would predefine the content of a common commercial policy, which is a result of a progressive development in which international agreements can either define the content of a CCP or execute a policy that had already been fixed by other internal measures.¹⁰⁶

ii. Exclusivity of the Community's power to conclude the understanding

The Court answered the Commission's second question in the affirmative as well. As a general contextual remark, before delving deeper into arguments pertaining to the exclusivity of the Community's competence, the Court noted that the exclusivity of the competence depended on the objective of the Understanding and on the manner in which the common commercial policy is conceived in the Treaty.¹⁰⁷ In this context, the Court proceeded to offer a number of arguments in favour of the exclusive nature of the Community's competence, some of them positive, some of them negative, some of them reiterated. Notably, all these arguments were based on the teleology of the CCP and the Treaty. The Court refrained from establishing any specific conditions that would have needed to be met in order for the Community's competence to be exclusive:

- The subject of the agreement, considering also the exclusions in paragraph II of the Understanding, falls under the concept of CCP in Article 113 of the Treaty, which is conceived in the context of the operation of the Common Market that is created for the defence of the common interests of the Community:
 - Member States invoking concurrent powers to pursue their individual interests would be incompatible with this notion, as it would compromise the effective defence of the common interest of the Community;

¹⁰² Ibid 1362.

¹⁰³ Ibid. Note that here the Court, while still basing its reasoning in the literal interpretation of Treaty clauses, went beyond just literal interpretation and added a strong statement of principle, which does not directly follow from the wording of the Treaty. As mentioned and explained above, this did not go missed in the academic literature. See Holdgaard (n 18) 28–38.

¹⁰⁴ Similar to the Government of the Netherlands in its Observations, also the Court seems to have made a mistake in referring to Article 113(2) and much more likely had Article 113(3) in mind.

¹⁰⁵ Opinion 1/75 (n 1) 1363.

¹⁰⁶ Ibid. It is interesting that even though the UK forwarded this position to argue against the exclusive nature of the Community competence, the Court opted to address it in the first substantive section of the Opinion which dealt with the sheer existence of a Community competence and not also its exclusive nature.

¹⁰⁷ Ibid.

- Any unilateral action by a Member State is thus impossible as, *in concreto*, it would distort competition and lead to disparities in the conditions for the granting of export credits;¹⁰⁸
- Exercise of concurrent competences might lead to diverging positions being taken vis-à-vis third countries and thus distort the institutional framework and undermine mutual trust between Member States;¹⁰⁹
- That the implementation of the Understanding (obligations and financial burdens of the policy) is to be borne by the Member States is irrelevant to the question of competence because the CCP does not require a transfer of financial burdens to the Community; it is concerned rather with the adoption of common action based on uniform principles;¹¹⁰
- Article 71 of the ECSC Treaty is irrelevant for the purposes of this procedure as it was initiated under the provisions of the EEC Treaty and requires the Court to determine the compatibility of the Understanding with the EEC Treaty and the scope of Community powers under that Treaty;¹¹¹
 - In any case, the provision of Article 71 of the ECSC Treaty cannot render the provisions of Articles 113 and 114 of the EEC Treaty inoperative.¹¹²

One may say plenty about the arguments that were employed by the Court. But as the Opinion was, obviously, in the public domain already before the *dossiers* were opened, there is already ample literature on the methods of interpretation that were employed by the Court. Suffice it to say at this point that the selection of arguments the Court put together in Opinion 1/75 confirms what is generally held to be true for the argumentative style of the Court of Justice: it is brief, non-discursive, and relies predominantly on the literal and purposive methods of interpretation. For the purposes of this project, it is the section below that is more interesting as it examines the relationship between the arguments that were advanced in the submissions (none of which were previously available) and the arguments that eventually found their way into the decision of the Court.

3. The Court's treatment of arguments: taking the easy paths and cutting the hardest ones?

This section looks deeper into the relationship between the arguments that were submitted in the written procedure and the arguments the Court of Justice used when justifying its answers to the Commission in the Opinion. In particular, we look at which arguments the Court engages with, which ones it ignores, and what the level and the nature of engagement with the arguments are. Because the Court took up and accepted, either implicitly or explicitly, all of the arguments that were offered in favour of the eventual outcome, we shall only analyse how the Court dealt with arguments it disagreed with. Because there were no arguments submitted against the *existence* of a Community competence, this part of the Opinion will not be discussed here.¹¹³ Thus, we shall focus on the arguments that were advanced in favour of

¹⁰⁸ Ibid 1363-64.

¹⁰⁹ Ibid 1364.

¹¹⁰ Ibid.

¹¹¹ Ibid 1365.

¹¹² Ibid.

¹¹³ Note, however, that the submissions were arguing against the exclusive nature of the Community competence, *inter alia*, on the basis the Community should have had previously established uniform principles of the CCP, which it had not done. The Court, however, 'transferred' this argument and dealt with it under the heading of the existence of Community competence.

finding the Request of the Commission inadmissible, and on those that argued that the Community did not have *exclusive* competence to conclude the Understanding.

3.1 *Paths not taken and paths ignored on the way to admissibility: a hidden Kompetenz-Kompetenz struggle*

Eight different arguments were submitted against finding the Request of the Commission admissible. One of these arguments was submitted three times in three different submissions, two of them were submitted twice in two different submissions, and the remaining five were submitted only once in a single submission. Of the eight arguments submitted, the Court responded, either explicitly or implicitly, to three. Three of the arguments remained partially responded to, and two arguments were ignored by the Court. It is interesting that out of the three arguments that were advanced more than once, only one argument was responded to fully, one argument was responded to partially, and one argument was not responded to at all.¹¹⁴

Any attempts to find a common denominator of the arguments that were responded to or of the arguments ignored by the Court seem to lead nowhere. To the best of my knowledge, they cannot be sensibly and discretely categorised. While all of the arguments that were responded to were somewhat literal and legalistic in nature, the same can be said of an argument that was partially responded to and an argument that was ignored. The two arguments that the Court ignored do not have any common denominator.

However, analysing the arguments from a more qualitative angle, there are two arguments that were submitted and either ignored or partially responded to by the Court that merit closer attention.

First, three different submissions argued that the Request of the Commission should be declared inadmissible because the expression 'agreement envisaged' in Article 228 of the EEC Treaty required that the Council, as the body responsible for concluding agreements, had indicated an intention to conclude the Understanding, which it had not done in this case. It is remarkable that across all the submissions, no other argument was included in three different submissions. Yet, the Court only responded partially to it. It opined that the Understanding may be considered as envisaged in the sense of Article 228 due to the following set of facts: the substantive negotiations on the Understanding in the OECD had already been finished, the only outstanding matter to be determined was the form of Community participation, the conclusion of the Understanding in the form of a resolution of the OECD Council is now envisaged, and the Commission has decided on the form in which the Community would participate.¹¹⁵

All of these factors are of course true and, in hindsight, certainly present strong arguments that foreshadow later developments in the case law. However, this does not change the fact that at the time when there was no body of case law on what it means for an agreement to be *envisaged*, merely listing them evaded fully responding to the original concern: within the framework of the Community, it is the Council that needs to envisage the conclusion of an agreement and not the Commission. Until the Council communicates such an intention, any work done by the Commission is still a 'mere project', in the words of the Council. This seems to be, at least *prima facie*, a valid argument. While the Council was certainly not the only actor involved in the procedure of concluding agreements, it was one of the most important, arguably the most important one. In any case, the view that it should be the Council that envisages the

¹¹⁴ Please find the full overview of specific arguments and how the Court dealt with them in Annex 4.

¹¹⁵ Opinion 1/75 (n 1) 1360.

conclusion of an agreement is one that cannot simply be ignored because it would be patently false. The Court could have been a lot clearer in explicating precisely what the meaning of an 'agreement envisaged' is and what is it that is required for an agreement to be considered envisaged. It seems that this would not have been too difficult of a task for the Court in the sense that it would not have to discuss an unreasonable number of eventualities and whether or not in any of those eventualities one could have considered an agreement to be envisaged. Instead, a specific point in the legally pre-defined procedure for the conclusion of international agreements by the Community could have been pinpointed. The Court could have simply said how far down the line in the procedure a proposal for the conclusion of an agreement would have to be. Or alternatively, it could have explained why it was not the Council that needed to envisage the agreement, instead of simply listing factual circumstances, the existence of which rendered the agreement envisaged. But it is interesting that despite the strong insistence in the submissions on pushing this argument forward, the Court decided to brush it aside by not giving it the treatment it merited.

The second argument that requires a more in-depth treatment is the one advanced in two submissions that argued that the wording of Article 228(1) EEC Treaty defines the scope of the Opinion to be delivered by the Court as only covering the competence of the Community, but not the competence of the Member States. In other words, in this procedure, the Court could only rule on whether the Community had the competence to participate in the conclusion of the agreement and could not rule on whether or not this excluded the Member States from participating in its conclusion. Putting this into the language of the Request: the Court could not rule on whether the Community had exclusive competence to conclude the Understanding as this would mean that it was also ruling on the competence of the Member States, which it did not have the authority to do. The Court, in its Opinion, only refuted this argument implicitly. In the relevant passage, the Court wrote:

The question whether the conclusion of a given agreement is within the *power of the Community* and whether, in a given case, such power has been exercised in conformity with the provisions of the Treaty is, in principle, a question which may be submitted to the Court of Justice, either directly, under Article 169 or Article 173 of the Treaty, or in accordance with the preliminary procedure, and it must therefore be admitted that the matter may be referred to the Court in accordance with the preliminary procedure of Article 228.¹¹⁶

Here, the Court says everything about the legal basis for deciding on the 'power of the Community' but says nothing about the legal basis for deciding on the *exclusivity* of the power of the Community and, consequently and by implication, on the competences of the Member States. By treating the question of the power of the Community as including the exclusive nature of that power, the Court defines exclusivity as a question of law, a question which therefore falls within its jurisdiction (under Articles 169, 173, 177 or 228 EEC) rather than remaining a matter of political judgment. This is fascinating for a number of reasons.

Similar to the discussion immediately above, this argument was included in more than one of the submissions and it seems to be a *prima facie* plausible argument, which the Court did not expressly address. Indeed, as the submissions contended, there was no express textual basis in Article 228 EEC permitting the Court to decide on the competences of the Member States, even if it did not do so directly but only by implication. Not even the Rules of Procedure of the Court, to which the Commission made reference in its Request, contain such an explicit textual basis. Article 107(2) of the Rules of Procedure in force at the time provided that 'the Opinion may deal not only with the question whether the envisaged agreement is compatible with the provisions of the EEC Treaty but also with the question whether the Community or

¹¹⁶ Ibid 1361. Emphasis added.

any Community institution has the power to enter into that agreement.’ Again, the Article speaks of ‘whether the Community [...] has the power to enter into that agreement’ but does not expressly refer to exclusive competence of the Community. And even if it had done so, one of the submissions argued that the Rules of Procedure of the Court could not be used to extend the jurisdiction of the Court beyond what was foreseen by the Treaty, another argument that remained ignored by the Court.

Once again, we are faced with a *prima facie* plausible argument of fundamental importance, not only to this specific case, but to the development of EU law in general, that was ignored. And while it could be argued that the Court implicitly rejected the argument by considering that having the jurisdiction to decide on the *existence* of the competence of the Community means automatically also having the jurisdiction to rule on the *exclusive* nature of the competence, a more explicit rebuttal of an argument that is so fundamental to the nature of the procedure might have been called for. This omission is especially notable given that this was the very first time this procedure had been used, and its purpose and nature were still being established. The strong opposition to the idea that the Court could rule on the exclusivity of Community competence, and by implication on the competences of Member States, from the Observations of some of the Member States would have also merited a more explicit response, if for no other reason to enhance the Court’s legitimacy in the eyes of the Member States.

But the story here is bigger than just ‘the Court ignored an important argument’. What we can learn from this exchange, or a lack thereof, is one of the biggest added values of this *dossier* because it elucidates the limited nature of the narratives that have been created thus far in the literature about Opinion 1/75. For the most part, as explained above, the narratives around it were built on its contribution to defining the meaning of, on the one hand, the CPP and, on the other hand, exclusive competence of the Community (in external relations). In other words, it was considered as a trade law case, and a very important powers case in many senses – primarily in defining the competences the Community had in relation to Member States (in external relations), but also it contributed to internal (and eternal) Council-Commission power struggles.

What is missing in this narrative, however, is that this was not only a *kompetenz* case from many perspectives, but it was also a *kompetenz-kompetenz* case. It established the competence of the Court of Justice to rule on the exclusivity of Community competences and, consequently and by implication, on the competences of Member States in the opinion procedure under Article 228 of the EEC Treaty. It thus also established that the determination of exclusivity is a matter of (Community) law to be decided by the Court and not by political actors. It was because the Court ignored, or only implicitly refuted the arguments to the effect that it does not have that power that this aspect of the case cannot be found in the academic narratives surrounding it. There was nothing in the Opinion itself that would hint at there being a strong *kompetenz-kompetenz* struggle behind the scenes. It was only through consulting the Archives and the submissions that we were able to discover that the *kompetenz-kompetenz* issue was very much on the minds of the Member States and that they fought against, unsuccessfully, the Court being able to rule on their powers in this procedure.

3.2 Some arguments are more persuasive than others: the path to exclusive competence

Only one of the submissions, that of the United Kingdom, argued against the Community having an exclusive competence to conclude the Understanding. The UK submitted 12 different arguments to that effect: five of them the Court responded to, six it ignored, and one

argument the Court partially responded to.¹¹⁷ What can one learn from the Court's treatment of arguments? Unlike the arguments pertaining to admissibility, there is not much new that we can discover here from a qualitative angle. No one specific argument (or two, for that matter) and its treatment by the Court provides a notable new insight that would add to or change the ways the case has been understood from reading the Opinion alone. It is nevertheless interesting to note the way in which the Court positioned itself between the arguments of the Commission and the UK (the two main protagonists on this issue). On the one hand it clearly rejected the UK's position that the exclusivity of CCP competence to conclude international agreements was conditional upon the adoption of internal rules, as well as its attempt to differentiate between a core and peripheral elements of the CCP, asserting that the CCP as a whole is exclusive by its nature. On the other hand, whereas the Commission (as we have seen) concentrated on rebutting arguments against exclusivity, the Court marshalled arguments justifying CCP exclusivity based on the teleology of the policy field and its relation to the objectives of the Treaty as a whole. These particular arguments were the Court's own; they are not found in the submissions.

Further, when considering the arguments pertaining to the exclusive nature of Community's competence, the common denominators of arguments that were either responded to or ignored can be identified more easily. This might give us a better idea of what arguments the Court of Justice considers important for its decisions (in the preliminary opinion procedure) and what arguments it finds so unpersuasive that they are left ignored.¹¹⁸ But regardless of the motivation behind a particular treatment of the Court, it gives us an idea of the types of arguments the Court seeks to engage with, and what types of arguments it ignores.

On the one hand, the arguments the Court engaged with and rejected in one way or the other were the arguments that had some literal textual basis in the Treaty; these were legalistic arguments. For instance, the Court took up and rejected the argument that Article 71 of the ECSC Treaty precluded an exclusive Community competence. It also rejected the *ERTA*-style claim that the exclusivity of Community powers depended on the prior definition and adoption of measures of commercial policy, by differentiating *ERTA* -style competence from competence derived expressly from Treaty provisions. The Court furthermore engaged in the discussion that export credits should not be considered to be at 'the central core of commercial policy' by deciding that they definitely do fall within this concept and therefore Article 113 of the EEC Treaty.

On the other hand, the arguments the Court ignored were mostly factual in nature or related to practical and policy-related consequences of a particular outcome. The Court ignored all of the arguments pertaining to the consequences of exclusive Community participation for the relationships between Community Member States and other OECD Member States.¹¹⁹ It also

¹¹⁷ For further specifics, see Annex 4.

¹¹⁸ Naturally, there is a presumption here that (i) the Court responds to arguments that it finds *prima facie* plausible or persuasive and that (ii) the Court refuses to respond to arguments that it finds as *prima facie* unpersuasive or implausible. While the validity of this assumption is, in the words used above, sheer guesswork, there are good reasons why making this assumption here is more valid than making this assumption would have been with the arguments pertaining to admissibility. There, the arguments could not have been classified according to types – some practical arguments were responded, some were ignored; some textual arguments were responded, some were ignored. The Court's treatment of arguments seemed random. Here, however, the arguments that the Court responded to are overwhelmingly of one type. The arguments the Court ignored are overwhelmingly of another type. The treatment does not seem random but fits a particular pattern. Thus, it seems more legitimate to make the leap of faith and assume the reasons behind a particular treatment here than it did with the treatment of arguments pertaining to admissibility.

¹¹⁹ While the Court ignored these arguments, Pescatore, one of the Judges that decided the case, wrote years later, in one of his extrajudicial writings, that the Court had 'to be cautious in using arguments based on Third

ignored all arguments relating to the future of cooperation surrounding the Understanding: that exclusive Community participation would create an imbalance of obligations between the Community Member States and other OECD member states, that there is a danger of a competence creep in favour of the Community in future, and that potential future negotiations might be prejudiced if only the Community exclusively concluded the agreement. It also ignored the argument that there was no precedent for exclusive Community participation in OECD Understandings.

It is also interesting to note briefly that the positive arguments the Court advanced in favour of an exclusive Community competence were teleological ones. Its firm embeddedness in *effet utile* was demonstrated by the Court when it ruled that the Member States invoking concurrent powers to pursue their individual interests would compromise the effective defence of the common interest of the Community that are pursued by the operations of the Common Market.

4. Conclusion

Opinion 1/75 can be considered a special case in terms of the value added by the *dossier* due to the very limited information we had had before the Court opened its archives. Because of the nature of the Opinion procedure in those early years, there was nothing that was publicly available that could give insight into the life of the case except for the Opinion itself – there was no Report of the oral hearing, nor was there an Opinion of the AG. Even the text of the Opinion itself was rather devoid of information as arguments that were submitted were not reported by the Court, as they would be in later cases. Thus, it was unclear what positions were taken by the Community institutions and the Member States, what arguments were employed to advance those positions, how they influenced the Court and where the arguments the Court was dealing with in the Opinion came from, and finally how the Court treated those arguments.

With the *dossier*, we were able to find answers to all of those questions. Most interestingly, we learned that even though the Court spent an equal amount of time in its Opinion on discussing the existence of Community competence and the exclusivity of Community competence, all of those who submitted observations were unanimous that the Community had the competence to conclude the OECD Understanding, and only a minority argued that competence was not exclusive. We also learned that some parts of the Opinion that one might have thought represented the Court's autonomous independent reasoning, particularly those regarding the function of the Opinion procedure, were actually prompted by arguments in some of the submissions. On the other hand, we learned which arguments actually were the Court's own and how some parts of the Opinion that were obviously responses to a concrete argument, such as the time limit for bringing the Request for an Opinion, made their way into the case.

New findings from the *dossier* also allow us to enrich the pre-existing narratives about the case. In particular, the *dossier* elucidated that Opinion 1/75 was not only a case about the competence of the Community as we have thought so far on the basis of the text of the Opinion, but was also a *kompetenz-kompetenz* case in which the jurisdiction of the Court was contested. Some of the submissions argued forcefully that the Court did not have the competence to rule on the exclusivity of Community competence as this would inevitably mean also ruling on the competence of Member States. This struggle was by no means apparent from the Opinion itself. Nor was it apparent how the Court handled particular types of arguments. Being able to track and map every argument made in the case revealed that the Court was most responsive and likely to engage in legalistic arguments relating to the text and the purposes of the Treaty,

States' attitudes, the more so as these might amount to an outright intervention in internal affairs of the Community.' See Pescatore (n 18) 626.

while it was generally dismissive of and ignored arguments pertaining to factual consequences and policy-related arguments.

Finally, through the procedure-related documents, the *dossier* also gives an insight into how the case was managed from within the Court. We get a very concrete view of how specific individuals, President Lecourt especially, felt about the importance of the case and how that affected their actions in managing it. And more generally, even though it is only through the written interactions between the people from within the Court, we can get a sense of the general atmosphere that was surrounding the case at the time. Coupling these findings with those of other *dossiers* will surely provide an even more intricate and interesting picture of how the Court operated from the inside in its formative years.

Annex 1: List of documents in the *dossier*

Designation	Document	Institution	Date	Num. of pages
Doc 1	Request for an Opinion JUR/1973/75-FR	Commission	14.07.1975	43
Doc 1, Annex I	Draft Understanding on an OECD Local Cost Standard			7
Doc 1, Annex II	Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard			4
Doc 1, Annex III	Technical Data on Export Credits			3
Doc 1, Annex IV	Numerical Example of the Application of the Various "Local Costs Standard"			1
Doc 2	Request for an Opinion JUR/1973/75-DK	Commission	14.07.1975	43
Doc 2, Annex I	Draft Understanding on an OECD Local Cost Standard			7
Doc 2, Annex II	Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard			4
Doc 2, Annex III	Technical Data on Export Credits			3
Doc 2, Annex IV	Numerical Example of the Application of the Various "Local Costs Standard"			1
Doc 3	Request for an Opinion JUR/1973/75-EN	Commission	14.07.1975	43
Doc 3, Annex I	Draft Understanding on an OECD Local Cost Standard			7
Doc 3, Annex II	Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard			4
Doc 3, Annex III	Technical Data on Export Credits			3
Doc 3, Annex IV	Numerical Example of the Application of the Various "Local Costs Standard"			1
Doc 4	Request for an Opinion JUR/1973/75-I	Commission	14.07.1975	43
Doc 4, Annex I	Draft Understanding on an OECD Local Cost Standard			7
Doc 4, Annex II	Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard			4
Doc 4, Annex III	Technical Data on Export Credits			3
Doc 4, Annex IV	Numerical Example of the Application of the Various "Local Costs Standard"			1
Doc 5	Request for an Opinion JUR/1973/75-NL	Commission	14.07.1975	43
Doc 5, Annex I	Draft Understanding on an OECD Local Cost Standard			7

Doc 5, Annex II	Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard			4
Doc 5, Annex III	Technical Data on Export Credits			3
Doc 5, Annex IV	Numerical Example of the Application of the Various "Local Costs Standard"			1
Doc 6	Request for an Opinion JUR/1973/75-D	Commission	14.07.1975	43
Doc 6, Annex I	Draft Understanding on an OECD Local Cost Standard			7
Doc 6, Annex II	Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard			4
Doc 6, Annex III	Technical Data on Export Credits			3
Doc 6, Annex IV	Numerical Example of the Application of the Various "Local Costs Standard"			1
Doc 7	Power of Attorney for Commission Representative (FR)	Commission	15.07.1975	4
Doc 8	Notification of the case to AGs (FR)	Attaché of the Court	16.07.1975	1
Doc 9	Letter of the Attaché informing the Registrar of the instructions given by the President (FR)	Attaché of the Court	16.07.1975	1
Doc 10	Follow-up letter of the Attaché to the Registrar (FR)	Attaché of the Court	23.07.1975	2
Doc 11	Cover letter of the Request for an Opinion (FR)	Commission (Legal Service)	11.07.1975	1
Doc 12	Commission Approval of the Text of the Request for an Opinion (FR)	Commission	10.07.1975	2
Doc 13	Power of Attorney for Commission Representative (FR)	Commission	15.07.1975	1
Doc 14	Request of the President of ECJ to Judge Monaco to act as Rapporteur (FR)	President of the Court	16.07.1975	1
Doc 15	Decision of the President on the deadline for the submission of observations of the Council and Member States (FR)	President of the Court	23.07.1975	1
Doc 16	Communications of the case to France (F)	Registry of the Court	23.07.1975	1
Doc 17	Communications of the case to Luxembourg (F)	Registry of the Court	23.07.1975	1
Doc 18	Communications of the case to Belgium (F)	Registry of the Court	23.07.1975	1
Doc 19	Communications of the case to the Council (F)	Registry of the Court	23.07.1975	1
Doc 20	Communications of the case to Germany (D)	Registry of the Court	23.07.1975	1
Doc 21	Communications of the case to Denmark (DK)	Registry of the Court	23.07.1975	1
Doc 22	Communications of the case to the UK (EN)	Registry of the Court	23.07.1975	1

Doc 23	Communications of the case to Ireland (EN)	Registry of the Court	23.07.1975	1
Doc 24	Communications of the case to Italy (I)	Registry of the Court	24.07.1975	1
Doc 25	Communications of the case to the Netherlands (NL)	Registry of the Court	25.07.1975	1
Doc 26	Request for deadline extension and procedural questions from the UK (EN)	UK Treasury Solicitor	04.08.1975	1
Doc 27	President's Decision extending the deadline for the submission of observations (FR)	President of the Court	07.08.1975	1
Doc 28	Notification to the Commission of the extension and request to provide translations of the Request (FR)	Registry of the Court	07.08.1975	1
Doc 29	Notification of the extension to the Council (FR)	Registry of the Court	07.08.1975	1
Doc 30	Notification of the extension to France (FR)	Registry of the Court	07.08.1975	1
Doc 31	Notification of the extension to Belgium (FR)	Registry of the Court	07.08.1975	1
Doc 32	Notification of the extension to Luxembourg (FR)	Registry of the Court	07.08.1975	1
Doc 33	Notification of the extension to Italy (I)	Registry of the Court	07.08.1975	1
Doc 34	Notification of the extension to the Netherlands (NL)	Registry of the Court	07.08.1975	1
Doc 35	Notification of the extension to Germany (D)	Registry of the Court	07.08.1975	1
Doc 36	Notification of the extension to the UK (EN)	Registry of the Court	07.08.1975	1
Doc 37	Notification of the extension to Ireland (EN)	Registry of the Court	07.08.1975	1
Doc 38	Notification of the extension to Denmark (DK)	Registry of the Court	07.08.1975	1
Doc 39	Cover letter of the Italian language versions of the Request sent to Italy (I)	Registry of the Court	12.08.1975	1
Doc 40	Cover letter of the English and Italian language versions of the Request sent to the UK (EN)	Registry of the Court	12.08.1975	1
Doc 41	Cover letter of the English and Italian language versions of the Request sent to Ireland (EN)	Registry of the Court	12.08.1975	1
Doc 42	Cover letter of the English and Italian language versions of the Request sent to Denmark (DK)	Registry of the Court	12.08.1975	1
Doc 43	Cover letter of the English and Italian language versions of the Request sent to the Council (FR)	Registry of the Court	13.08.1975	1
Doc 44	Cover letter of the English, Italian, and Danish language versions of the Request sent to the Council (FR)	Registry of the Court	14.08.1975	1
Doc 45	Cover letter of the English, Italian, and Danish language versions of the Request sent to France (FR)	Registry of the Court	14.08.1975	1

Analysis of the Opinion of the Court of 11 November 1975 (1/75)

Doc 46	Cover letter of the English, Italian, and Danish language versions of the Request sent to Belgium (FR)	Registry of the Court	14.08.1975	1
Doc 47	Cover letter of the English, Italian, and Danish language versions of the Request sent to Luxembourg (FR)	Registry of the Court	14.08.1975	1
Doc 48	Cover letter of the English and German language versions of the Request sent to Italy (I)	Registry of the Court	14.08.1975	1
Doc 49	Cover letter of the Danish, English, Italian, and Dutch language versions of the Request sent to Germany (D)	Registry of the Court	14.08.1975	1
Doc 50	Cover letter of the English, Italian, and Danish language versions of the Request sent to the Netherlands (NL)	Registry of the Court	14.08.1975	1
Doc 51	Cover letter of the Danish language versions of the Request sent to the UK (EN)	Registry of the Court	14.08.1975	1
Doc 52	Cover letter of the Danish language versions of the Request sent to Ireland (EN)	Registry of the Court	14.08.1975	1
Doc 53	Cover letter of the Danish language versions of the Request sent to Denmark (DK)	Registry of the Court	14.08.1975	1
Doc 54	Corrigendum of the German language version of the Request (D)	Registry of the Court	19.08.1975	1
Doc 55	Corrigendum of the Dutch language version of the Request (NL)	Registry of the Court	19.08.1975	1
Doc 56	Cover letter of the Corrigendum of the Dutch language version of the Request sent to the Netherlands (NL)	Registry of the Court	19.08.1975	1
Doc 57	Cover letter of the Corrigendum of the Dutch and German language version of the Request sent to the Council (FR)	Registry of the Court	19.08.1975	1
Doc 58	Cover letter of the Corrigendum of the Dutch and German language version of the Request sent to Germany (D)	Registry of the Court	19.08.1975	1
Doc 59	Cover letter of the Corrigendum sent to Belgium (NL)	Registry of the Court	19.08.1975	1
Doc 60	Power of Attorney for Council (DE)	Council	09.09.1975	1
Doc 61	Observations of the Council (DK)	Council	16.09.1975	5
Doc 62	Observations of the Council (IT)	Council	16.09.1975	4
Doc 63	Observations of the Council (EN)	Council	16.09.1975	5
Doc 64	Observations of the Council (GER)	Council	16.09.1975	4
Doc 65	Observations of the Council (NL)	Council	16.09.1975	5
Doc 66	Observations of the Council (FR)	Council	16.09.1975	6
Doc 67	Observations of Ireland (FR+EN)	Ireland	unknown	2
Doc 68	Observations of the UK (EN)	United Kingdom	18.09.1975	89
Doc 68, Annex I	Annex A to the Written observations of the UK			16

Doc 68, Annex II	Annex B to the Written observations of the UK			2
Doc 68, Annex III	Annex C to the Written observations of the UK			18
Doc 68, Annex IV	Annex D to the Written observations of the UK			6
Doc 68, Annex V	Annex E to the Written observations of the UK			19
Doc 69	Observations of the Netherlands (NL)	the Netherlands	18.09.1975	4
Doc 70	Observations of Italy (IT)	Italy	unknown	3
Doc 71	Cover letter to the Certified Copy of the Opinion of the Court sent to the Commission (FR)	Registry of the Court	11.11.1975	1
Doc 72	Cover letter to the Certified Copy of the Opinion of the Court sent to the Council (FR)	Registry of the Court	11.11.1975	1
Doc 73	Cover letter to the Certified Copy of the Opinion of the Court sent to France (FR)	Registry of the Court	11.11.1975	1
Doc 74	Cover letter to the Certified Copy of the Opinion of the Court sent to the Belgium (FR)	Registry of the Court	11.11.1975	1
Doc 75	Cover letter to the Certified Copy of the Opinion of the Court sent to Luxembourg (FR)	Registry of the Court	11.11.1975	1
Doc 76	Cover letter to the Certified Copy of the Opinion of the Court sent to the Netherlands (NL)	Registry of the Court	11.11.1975	1
Doc 77	Cover letter to the Certified Copy of the Opinion of the Court sent to Italy (I)	Registry of the Court	11.11.1975	1
Doc 78	Cover letter to the Certified Copy of the Opinion of the Court sent to Germany (D)	Registry of the Court	11.11.1975	1
Doc 79	Cover letter to the Certified Copy of the Opinion of the Court sent to the UK (EN)	Registry of the Court	11.11.1975	1
Doc 80	Cover letter to the Certified Copy of the Opinion of the Court sent to Ireland (EN)	Registry of the Court	11.11.1975	1
Doc 81	Cover letter to the Certified Copy of the Opinion of the Court sent to Denmark (DK)	Registry of the Court	11.11.1975	1
Doc 82	Cover letter to the Certified Copy of the Opinion of the Court in German, Dutch, Italian, English, and Danish sent to the Commission (FR)	Registry of the Court	19.11.1975	1
Doc 83	Cover letter to the Certified Copy of the Opinion of the Court in German, Dutch, Italian, English, and Danish sent to the Council (FR)	Registry of the Court	19.11.1975	1
Doc 84	Cover letter to the Certified Copy of the Opinion of the Court in German, Dutch, Italian, English, and Danish sent to Belgium (FR)	Registry of the Court	19.11.1975	1
Doc 85	Cover letter to the Certified Copy of the Opinion of the Court in German, Dutch, Italian, English, and Danish sent to France (FR)	Registry of the Court	19.11.1975	1

Analysis of the Opinion of the Court of 11 November 1975 (1/75)

Doc 86	Cover letter to the Certified Copy of the Opinion of the Court in German, Dutch, Italian, English, and Danish sent to Luxembourg (FR)	Registry of the Court	19.11.1975	1
Doc 87	Cover letter to the Certified Copy of the Opinion of the Court in German, Dutch, Italian, English, and Danish sent to the Netherlands (NL)	Registry of the Court	19.11.1975	1
Doc 88	Cover letter to the Certified Copy of the Opinion of the Court in German, Dutch, Italian, English, and Danish sent to Italy (I)	Registry of the Court	19.11.1975	1
Doc 89	Cover letter to the Certified Copy of the Opinion of the Court in German, Dutch, Italian, English, and Danish sent to Germany (D)	Registry of the Court	19.11.1975	1
Doc 90	Cover letter to the Certified Copy of the Opinion of the Court in German, Dutch, Italian, English, and Danish sent to the UK (EN)	Registry of the Court	19.11.1975	1
Doc 91	Cover letter to the Certified Copy of the Opinion of the Court in German, Dutch, Italian, English, and Danish sent to Ireland (EN)	Registry of the Court	19.11.1975	1
Doc 92	Cover letter to the Certified Copy of the Opinion of the Court in German, Dutch, Italian, English, and Danish sent to Denmark (DK)	Registry of the Court	19.11.1975	1
Doc 93	Opinion 1/75 of the Court (FR)	Court	11.11.1975	16
Doc 94	Opinion 1/75 of the Court (DE)	Court	11.11.1975	14
Doc 95	Opinion 1/75 of the Court (NL)	Court	11.11.1975	14
Doc 96	Opinion 1/75 of the Court (IT)	Court	11.11.1975	14
Doc 97	Opinion 1/75 of the Court (EN)	Court	11.11.1975	15
Doc 98	Opinion 1/75 of the Court (DK)	Court	11.11.1975	15

Annex 2: Table of contents of the dossier**Dossier Avis 1/75 – Table of Contents**

<i>Request for an Opinion JUR/1973/75-FR</i>	2-44
<i>Request for an Opinion</i>	2-29
<i>Annex I: Draft Understanding on an OECD Local Cost Standard</i>	30-36
<i>Annex II: Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard</i>	37-40
<i>Annex III: Technical Data on Export Credits</i>	41-43
<i>Annex IV: Numerical Example of the Application of the Various "Local Costs Standard"</i>	44
<i>Request for an Opinion JUR/1973/75-DK</i>	45-86
<i>Request for an Opinion</i>	45-71
<i>Annex I: Draft Understanding on an OECD Local Cost Standard</i>	72-78
<i>Annex II: Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard</i>	79-82
<i>Annex III: Technical Data on Export Credits</i>	83-85
<i>Annex IV: Numerical Example of the Application of the Various "Local Costs Standard"</i>	86
<i>Request for an Opinion JUR/1973/75-EN</i>	87-128
<i>Request for an Opinion</i>	87-113
<i>Annex I: Draft Understanding on an OECD Local Cost Standard</i>	114-120
<i>Annex II: Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard</i>	121-124
<i>Annex III: Technical Data on Export Credits</i>	125-127
<i>Annex IV: Numerical Example of the Application of the Various "Local Costs Standard"</i>	126
<i>Request for an Opinion JUR/1973/75-I</i>	129-170
<i>Request for an Opinion</i>	129-155
<i>Annex I: Draft Understanding on an OECD Local Cost Standard</i>	156-162
<i>Annex II: Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard</i>	163-166
<i>Annex III: Technical Data on Export Credits</i>	167-169
<i>Annex IV: Numerical Example of the Application of the Various "Local Costs Standard"</i>	170
<i>Request for an Opinion JUR/1973/75-NL</i>	171-212
<i>Request for an Opinion</i>	171-197
<i>Annex I: Draft Understanding on an OECD Local Cost Standard</i>	198-204
<i>Annex II: Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard</i>	205-208
<i>Annex III: Technical Data on Export Credits</i>	209-211
<i>Annex IV: Numerical Example of the Application of the Various "Local Costs Standard"</i>	212
<i>Request for an Opinion JUR/1973/75-D</i>	213-254
<i>Request for an Opinion</i>	213-239
<i>Annex I: Draft Understanding on an OECD Local Cost Standard</i>	240-246
<i>Annex II: Recommendation for a Council Decision Concerning the Community's Position within the OECD in the Matter of a Local Costs Standard</i>	247-250
<i>Annex III: Technical Data on Export Credits</i>	251-253
<i>Annex IV: Numerical Example of the Application of the Various "Local Costs Standard"</i>	254
<i>Power of Attorney for Commission Representative (FR) (4 copies of the document)</i>	255-258
<i>Notification to AGs of the Case (FR)</i>	259
<i>Letter Chevallier – Greffier + Eversen (FR)</i>	260
<i>Follow-up letter Chevallier – Greffier + Eversen (FR) (2 copies of the document)</i>	261-262
<i>Cover Letter of the Request for an Opinion (FR)</i>	263

<i>EC Approval of the Text of the Request for an Opinion (FR)</i>	264-265
<i>Power of Attorney for Commission Representative (FR)</i>	266
<i>Request of the President of ECJ to Judge Monaco to act as Rapporteur (FR)</i>	267
<i>Decision of the President on the deadline for the submission of observations of the Council and Member States (FR)</i>	268
<i>Communications of the case to the Council and Member States (V) (10 documents)</i>	269-278
<i>Request for deadline extension from the UK (EN)</i>	279
<i>President's Decision extending the deadline for the submission of observations (FR)</i>	280
<i>Notification to the EC of the extension and request to provide translations of the Request (FR)</i>	281
<i>Notification of the extension to the Council (FR)</i>	282
<i>Notification of the extension to the MS (V) (UK at 289) (9 documents)</i>	283-291
<i>Cover Letters of different language versions of the Request sent to the MS (V) (15 documents)</i>	292-306
<i>Corrections of the language versions sent to the MS (V) (6 documents)</i>	307-312
<i>Power of Attorney for Council (DE)</i>	313
<i>Observations of the Council (DK)</i>	314-318
<i>Observations of the Council (IT)</i>	319-323
<i>Observations of the Council (EN)</i>	324-328
<i>Observations of the Council (GER)</i>	329-333
<i>Observations of the Council (NL)</i>	334-338
<i>Observations of the Council (FR)</i>	339-344
<i>Observations of Ireland (FR+EN)</i>	345-346
<i>Observations of the UK (EN)</i>	347-435
<i>Written observations of the UK</i>	347-374
<i>Annex A to the Written observations of the UK</i>	375-390
<i>Annex B to the Written observations of the UK</i>	391-392
<i>Annex C to the Written observations of the UK</i>	393-410
<i>Annex D to the Written observations of the UK</i>	411-416
<i>Annex E to the Written observations of the UK</i>	417-435
<i>Observations of the Netherlands (NL)</i>	436-439
<i>Observations of Italy (IT)</i>	440-442
<i>Cover letters to Certified Copies of the Opinion (22 documents)</i>	443-464
<i>Opinion 1/75 of the Court (FR)</i>	465-480
<i>Opinion 1/75 of the Court (DE)</i>	481-494
<i>Opinion 1/75 of the Court (NL)</i>	495-508
<i>Opinion 1/75 of the Court (IT)</i>	509-522
<i>Opinion 1/75 of the Court (EN)</i>	523-537
<i>Opinion 1/75 of the Court (DK)</i>	538-552

Annex 3: Actors mentioned in the *dossier*

Name	Position at the Time	Location in the <i>dossier</i>
Archibald, Mrs	Commission Representative at the OECD Trade Committee Group on Export Credits and Credit Guarantees	377, 395
Carpentier, Michel	Director of the Environment and Consumer Protection Service at the European Commission	265
Chevallier, Roger-Michel	Attaché of the Court of Justice	259-62
Coret, Mr	Council Representative at the OECD Trade Committee Group on Export Credits and Credit Guarantees	377, 395
de Boer, W.P.L.G.	Dutch Minister for Foreign Affairs	439
Donner, Andreas Matthias	Judge of the Court of Justice	480, 494, 508, 522, 537, 551
Eversen, H.J.	Deputy Registrar (Greffier-Adjoint) of the Court	3, 260-2, 264-5, 269-79, 281-306, 308-12
Fitzgerald, Garret	Irish Minister for Foreign Affairs	345-6
Godwin, W.H.	UK Agent, Assistant Treasury Solicitor	279, 289, 374
Groux, Jean	Agent of the Commission, Chief Council of the Legal Service	29, 255-8, 260, 263-4, 266, 281, 454
Hommel, Nicolas	Secretary-General of the Council	313
Kutscher, Hans	President of the Chamber	480, 494, 508, 522, 537, 551
Lambers, Hans Jürgen	Director of the Legal Service of the Council	313, 455
Lecourt, Robert	President of the Court of Justice	259-62, 267-8, 280-91, 480, 494, 508, 522, 537, 551
Loeff, Josephus	Deputy Director-General of DG III Industrial and Technological Affairs at the European Commission	265
Mackenzie Stuart, Alexander John	Judge of the Court of Justice	268 (?), 480, 494, 508, 522, 537, 551
Marcora, Giovanni	Italian Minister of Agriculture and Forestry (acting on behalf of Mr Moro)	313
Maresca, Adolfo	Italian Ambassador to Luxembourg	460
Mayras, Henri	AG at the Court of Justice	259
Mertens de Wilmars, Josse	Judge of the Court of Justice	480, 494, 508, 522, 537, 551
Monaco, Riccardo	Judge of the Court of Justice, Judge Rapporteur in Opinion 1/75	260, 267, 480, 494, 508, 522, 537, 551
Moro, Aldo	President of the Council	313

Nicoletti, Antonio	Director-General of DG XVIII - Credit and Investments at the European Commission	265
Noël, Emile	Secretary-General of the European Commission	255-8, 264
Nuttall, M.	European Commission Employee	264
O'Keeffe, Andreas	Judge of the Court of Justice	480, 494, 508, 522, 537, 551
Olmi, Giancarlo	Deputy Director-General of the Legal Service of the Commission	264-5
Ortoli, Francois-Xavier	President of the European Commission	255-8, 264, 266
Palmerini, Mr	European Commission Representative at the OECD Trade Committee Group on Export Credits and Credit Guarantees	395
Parker, Matthew	UK Treasury Solicitor	374
Pescatore, Pierre	Judge of the Court of Justice	480, 494, 508, 522, 537, 551
Reischl, G.	AG at the Court of Justice	259
Ruggiero, Renato	Director-General of DG XV - Regional Policy at the European Commission	265
Schlieder, Willy	Director-General of DG IV - Competition at the European Commission	265
Shanks, Michael	Director-General for Social Affairs at the European Commission	265
Soames, Christopher	European Commissioner for External Relations, Vice President of the Commission	264
Sørensen, Max	Judge of the Court of Justice	480, 494, 508, 522, 537, 551
Trabucchi, Alberto	Premier AG at the Court of Justice	259
Van Gronsveld, Jozef	Director-General of DG XIX - Budgets at the European Commission	265
Van Houtte, Albert	Registrar (Greffier) of the Court of Justice	255-63, 266-7, 269-79, 281-307, 313-4, 319, 324, 329, 334, 339, 345-7, 436, 440, 443-464, 480
Warner, Jean-Pierre	AG at the Court of Justice	259
Wehrens, M.	European Commission Employee	264
Wellenstein, Edmund Peter (Mom)	Director-General Responsible for the External Relations Portfolio at the European Commission	264-5

Annex 4: A consolidated list of arguments made in the submissions and the court's treatment thereof

Below is a consolidated list of all arguments made in the submissions in the proceedings and an indication of how the Court treated each of the arguments. The arguments are divided, like in the Opinion and the text above, into three sections: admissibility, existence of competence, and exclusivity of competence. Within each section, they are divided into arguments that were made in favour of a particular outcome and against a particular outcome. They are listed in a descending order from those made most often in the highest number of submissions, to those made least frequently - in only one submission. A Roman numeral at the end of each argument denotes the number of times an argument was made. The arguments are also colour-coded. Those in green have been responded to or taken up by the Court. Those in grey were responded to partially. Those in red were not responded to and were ignored by the Court.

Admissibility

Arguments in favour:

- Reading **Article 228(1) together with Article 107(2) of the Rules** of Procedure of the Court makes it clear that the Court, in this procedure, may rule on the (exclusive) competence of the Community. (I)

Arguments against:

- The expression “agreement envisaged” in Article 228 EEC requires that “the body responsible for concluding the agreement – in this case the Council – has indicated its intention of concluding the agreement” – **the Council has not done** that in this case. (III)
- Contrary to the wording of Article 228(1), the Treaty does not provide anywhere for the conclusion of this Undertaking – the only potential provision that could provide for such conclusion, Article 113(3), is not applicable as **no uniform principles of common commercial policy have previously** been laid out in Community law. (II)
- The **wording of Article 228(1)** EEC defines the scope of the Opinion to be delivered by the Court as only covering the competence of the Community, and not the competence of MS. (II)
- Related to this, the **purpose of the preliminary opinion procedure** laid down in Article 228 EEC would be deflected from its true purpose (which is “to preclude any conflict between international law and Community law”) if the Court was to give opinions on “mere projects” and not agreements that were actually contemplated by the Council to be concluded. (I)
- The Understanding cannot be understood as an “*agreement envisaged*” in the sense of Article 228 EEC because it does **not contain any legally binding obligations** due to the fact that it had not been registered with the Secretariat of the UN pursuant to Article 102 of the UN Charter. (I)
- The Commission has brought the Request for an Opinion **too late**, after a long delay. (I)

- The Court giving an Opinion would be detrimental to the legal security as other parties to the OECD Understanding have **legitimate expectations for the participation of MS** in the conclusion the Understanding. (I)
- Article 107 of the **Rules of Procedure of the Court cannot be used to extend the jurisdiction** of the Court beyond what is foreseen in the Treaty, i.e. beyond that the Court can only rule on the competence of the Community, and not the competences of MS. (I)

Substance: existence of Community competence

Arguments in favour:

- In any case, export credits constitute “**commercial policy**” within the meaning of Article 113, a point agreed on by the Council, as obvious from the text of previous Directives in this area. (II)
- Export credits constitute essential element of “**export policy**” within the meaning of Article 113 of the EEC Treaty. (I)
- Even though export credits are not explicitly mentioned in Article 113, the list of commercial policy measures therein is not exhaustive and should be read together with Article 112, which explicitly mentions measures by which MS grant **aid for exports** to third countries. (I)
- A contrary interpretation would impede the **effective achievement of common policies** provided for in the Treaties, which is the exact purpose for which power was transferred to the Community. (I)
- Argument advanced by some MS in the Council, that, should the Community conclude the Understanding, MS of the Community would be in an unequal position to non-MS that are parties to the Understanding because the latter would have the right to unilateral withdrawal whereas Community MS would not have this flexibility, is contrary to EEC Treaty provisions, especially **Article 113**. (I)
- Articles 113 and **114 EEC** expressly confer power on the Community to conclude the Understanding, which falls fully within the concept of the common commercial policy, regardless of the fact that the CCP is constantly evolving and hard to define. (I)

Arguments against:

No arguments were made against the existence of Community competence.

Substance: exclusivity of Community competence

Arguments in favour:

- Dual participation could happen only if the agreement contained some provisions that deal with matters outside Community's exclusive competence – due to paragraph II of the Understanding, which contains **exclusion** of certain transactions from the scope of the agreement, such as military transactions, that is not the case. (II)
- That there is precedent in concluding mixed agreements in the field of export credits does not automatically mean that the precedent is in line with the Treaty. (I)
- There is no need for AETR-style previous implementing measures as competence in this case derives from express Treaty provisions, particularly Article 113. (I)
- That MS, and not the Community, must carry the administrative and financial burden of the measures is irrelevant for the question of powers – it is true of many areas that the Community has powers to put into place measures, the financing of which is carried out by the MS. (I)

Arguments against:¹²⁰

- A distinction should be made between, on the one hand, “the **central core of commercial policy**,” which includes customs and tariffs and is always in the exclusive competence of the Community and, on the other hand, “matters falling outside the central core,” of which export tariffs are “a clear example” and are therefore not automatically within exclusive Community competence under Article 113(1). (I)
- Therefore, *a fortiori*, there cannot automatically be exclusive Community competence under Article 113(3) to negotiate and conclude international agreements. (I)
- **Assertion of exclusive Community competence only at the end of negotiations** cannot deprive MS of the competence they had been exercising throughout the negotiations. (I)
- Until the Community **elaborates its commercial policy** in Articles 113(1) and 113(2) of the Treaty with previous concrete AETR-style measures, there are no grounds in Article 113(3) to conclude an international agreement as 113(3) has nothing to attach itself to. (I)
- The Court should give full weight to the number of adverse **practical consequences** that the claim to exclusive Community competence carries:
 - As a matter of law, the **responsibility for the implementation** of the OECD Understanding would lie with the Community, which has no institutions in the export credits field as their implementation currently rests with MS – it light of the Community's lack of preparation for this, the MS would still have to be the one carrying the institutional burden of implementing export credit policy. (I)
 - **Relationship between the Community MS and other OECD states** parties to the Understanding would be impaired as the Community would be an additional unnecessary in-between step in their relationship. (I)
 - Exclusive participation of the Community in the conclusion of the agreement would create an **imbalance of obligations between Community MS and other OECD member states** as the latter would have the option to withdraw or

¹²⁰ Please note that all of the arguments against the exclusivity of Community competence were made by the UK.

make exceptions to the Understanding unilaterally whereas Community MS would not have the same option. (I)

- **Not being in a position to withdraw or make exceptions** to the Understanding could impair the individual interests of MS as they could not be flexible in an area of commercial policy in which expediency is very important for keeping the competitive edge. (I)
- Understanding permits later unilateral extension of the agreement into areas which are clearly not in the exclusive Community competence, such as bilateral aid transaction for development or military transactions, i.e. there is a **danger for a competence creep**. (I)
- There is **no precedent** for exclusive Community competence in concluding other OECD Understandings. (I)
- Recognising an exclusive Community competence would be **incompatible with Article 71 of the ECSC Treaty**, which provides that powers of MS regarding commercial policy on products that fall within the scope of the ECSC Treaty are not affected by the Treaty. (I)
- The OECD Understanding is an evolving instrument and **potential future changes to the Understanding might be prejudiced against** and the development of the regime might be hindered due to the limited competence of the Community and the need to change the mode of participation of the Community and the MS should the regime evolve. (I)