

# A Critical Analysis of the Judicial Activism of the Court of Justice of the European Union in Opinion 1/13

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## 1. Introduction

On 14 October 2014 the Grand Chamber of the Court of Justice of the European Union (CJEU) decided that the EU has exclusive competence to accept the accession of a non-EU State to the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980. The Court's judgment coincides with the views of Advocate General Jääskinen, the Commission, the European Parliament and the Italian Government. The French, Greek and Polish Governments argued before the Court that the EU has no external competence in this matter whilst 16 Governments (Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, Germany, Ireland, Latvia, Lithuania, Portugal, Romania, Slovakia, Spain, Sweden and United Kingdom) and the Council argued that that the EU does not have exclusive external competence in this matter.

Given the weight of advice to the Court against exclusive external competence it is reasonable to expect a carefully reasoned opinion from the Court justifying its "minority" decision. Sadly the Court fails to meet this legitimate expectation. On the question of the existence of EU competence the Court devotes two paragraphs of its Opinion.<sup>1</sup> The Court does not properly set out the criteria for external competence found in Article 216 TFEU and it does not clarify under which aspect of Article 216(1)TFEU the competence arises. It does not have the courtesy to set out, far less address, the arguments of France, Greece and Poland as to why the EU has no external competence. In relation to exclusive external competence the Court does at least set out the three criteria in Article 3(2) TFEU and makes it clear that the case turns on the third criterion: whether the acceptance of third State accessions to the Hague Child Abduction Convention "may affect common rules [of EU law] or alter their scope".<sup>2</sup> However, the Court fails to give reasons as to why its pre-Lisbon case law on "largely covered area" and "foreseeable future developments" is still relevant to determining this third criteria now that the Treaty (since Lisbon) defines exclusive external competence rather than the matter being one that had purely and simply been created by the Court through its case law. The Court merely asserts that its earlier case law is still relevant.<sup>3</sup> The continued relevance of these features of the Court's case law which are not codified in the TFEU is, in a technical sense, "unjustified" by the Court. Likewise in relation to the question of whether the Brussels Ila rules may be affected by the Member States declaring their

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<sup>1</sup> Opinion 1/13, ECLI:EU:C:2014:2303, paras 67-68.

<sup>2</sup> Opinion 1/13, para 70.

<sup>3</sup> Opinion 1/13, paras 73 and 74.

acceptance of the accession of third States to the Child Abduction Convention the Court indulges in mere assertion that this is likely to happen with no evidence presented of how such acceptance of the accession of third States could possibly “affect” the application of Brussels IIa or alter its scope.<sup>4</sup> This is despite the Court’s continued rhetorical flourish (taken over from Opinion 1/03) that “since the EU has only conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the envisaged international agreement and the EU law in force.”<sup>5</sup>

## **2. Background to Opinion 1/13**

The Brussels IIa Regulation entered into force on 1 August 2004. In practice it made it a prerequisite of its application that EU Member States be a party to the Hague Child Abduction Convention and therefore that Convention became part of the EU acquis. However, it did not incorporate the Convention into EU law in any classical sense of the word “incorporate”. Instead it assumed the application of the Convention between EU Member States and added some new interpretations of existing Hague Convention provisions (e.g. in relation to the Article 13 exceptions strengthening the right of a child to be heard and regulating how the grave risk of harm exception should be applied) for such intra-EU cases. The key sense in which it did not incorporate the Convention into EU law is that the Brussels IIa Regulation does not touch at all upon the application of the Convention between EU Member States and Contracting States to the Convention which are not Member States of the EU. The intra-EU territorial scope of Brussels IIa as regards child abduction cases is key to understanding why the vast majority of EU Member States did not think it created exclusive external competence in relation to Hague Convention cases between EU and non-EU States. Even though the Regulation entered into force on 1 August 2004 and the Commission argued before the Court that the EU had exclusive external competence to accept the accession to the Convention of third States from that date on, the Commission allowed the Member States to deposit a total of more than 300 declarations of acceptance of accession before making its proposals on 21 December 2011 for the EU to accept the accession of 8 third States.<sup>6</sup> When the Council failed to adopt the Commission proposals in relation to the 8 third States the Commission, on 21 June 2013, requested an opinion of the Court pursuant to Article 218(11) TFEU on whether the EU has exclusive competence to accept the accession of a non-Union country to the Hague Abduction Convention.<sup>7</sup>

## **3. Background to Judicial Activism**

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<sup>4</sup> Opinion 1/13, paras 85-89.

<sup>5</sup> Opinion 1/13, para 74. See Opinion 1/03, ECLI:EU:C:2006:81, para 124.

<sup>6</sup> See Opinion 1/13, para 52. It is not really a question of accepting the accession of third States to the Hague Convention. Art 38 of the Convention makes it clear that any State that was not a member of the Hague Conference at the time of its Fourteenth Session (October 1980) may accede to the Convention. However, if the Convention is to have any effect between an acceding State and an existing Contracting State then the existing Contracting State must declare their acceptance of the accession (see paras 4 and 5 of Art 38).

<sup>7</sup> For a useful overview of the development of EU external competence by the CJEU and of the significant Treaty changes on external competence made by the Lisbon Treaty see Marise Cremona, “External Relations and External Competence of the European Union: The Emergence of an Integrated Policy” in P Craig and G de Búrca (eds) *The Evolution of EU Law* (2<sup>nd</sup> ed, Oxford University Press, 2011) 217-268.

Judicial activism by the Court has been criticised historically by a number of academics on the basis that the Court sometimes departs from an interpretation of the legal text which is consistent with the intention of the drafters or even with a reasonable purposive interpretation of the text.<sup>8</sup> Recently the literature on this topic has expanded again with critiques of the Court exceeding its role as an institutional actor in the EU in the development of EU law because it does not give sufficient respect to the roles of the other institutional actors in the EU when interpreting the Treaties or EU legislation.<sup>9</sup> Others have highlighted concerns with the extent to which the CJEU is creating case law that may be ignored by national courts and to prevent this have suggested that the Court should pay more attention to young European Union law academics who are pro-European Union but feel the need to critique the Court when it seems to be going too far.<sup>10</sup> One very prominent pro-European Union law academic, Joseph Weiler, has warned the CJEU in surprisingly, but nonetheless welcome, cogent terms about the paucity of the reasoning in a number of important judgments and the tendency to interfere in the EU political process by effectively rewriting legislation.<sup>11</sup>

Some senior judges in the UK Supreme Court are extra-judicially<sup>12</sup> and judicially (albeit obiter)<sup>13</sup> firing very severe warning shots across the bow of the CJEU that the reasoning of the latter is often inadequate and that it does not pay sufficient deference to the intentions of the Treaty makers and of the EU legislature (instead turning Treaty or legislative objectives into overriding principles that abolish the nuances and exceptions built into the Treaties and the EU legislation to limit the achievement of the stated objective in what amounts to a threat to the democratic will). A unanimous UK Supreme Court

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<sup>8</sup> See H Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policy-Making* (Martinus Nijhoff, 1986) and *European Court of Justice* (GadJura, 1998); T Hartley, *Constitutional Problems of the European Union* (Hart, Oxford, 1999); S Weatherill and P Beaumont, *EU Law* (Penguin, 1999), 193-201.

<sup>9</sup> See eg T Horsley, "Reflections of the Role of the Court of Justice as the 'Motor' of European Integration: Legal Limits to Judicial Lawmaking" (2013) 50 *Common Market Law Review* 931.

<sup>10</sup> See M Bobek, "Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts" in M Adams, H de Waele, J Meeusen and G Straetmans (eds) *Judging Europe's Judges* (Hart, 2013) 197.

<sup>11</sup> J H H Weiler, "Epilogue: Judging the Judges – Apology and Critique" in M Adams, H de Waele, J Meeusen and G Straetmans (eds) *Judging Europe's Judges* (Hart, 2013) 235. See the cogent critique he gives, at pp.242-246, of the Court's reasoning, and the Vice President of the CJEU (Koen Lenaerts)'s defence of it in the first chapter of the book, in Case C-236/09 *Test-Achats* [2011] ECR I-773 ECLI:EU:C:2011:100 and in Cases C-402 and 432/07 *Sturgeon* [2009] ECR I-10923 ECLI:EU:C:2009:716. See also Catherine Barnard's suggestion to the Court of Justice to reposition itself "from standard bearer of EU integration to ensuring that the EU is able to function in its new, more fragmented reality... to develop a new kind of doctrine of effectiveness, one that might mean endorsing the devolution of more decision-making power to the Member States or other actors." In "*Van Gend en Loos* to(t) the future" in A Tizzano, J Kokott and S Prechal (eds), *50th Anniversary of the Judgment in Van Gend en Loos* (Court of Justice of the EU, 2013) 117 at 122 see [http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/qd30136442ac\\_002.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/qd30136442ac_002.pdf) (last accessed 13 April 2015).

<sup>12</sup> J Mance, "The Interface Between National and European Law" (2013) *European Law Review* 437.

<sup>13</sup> Lord Mance and Lord Neuberger, on behalf of a UK Supreme Court bench of 7 judges, in *R (Buckinghamshire County Council and Others) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324; paras 158-211. See also Lord Mance (whose views on the issue were concurred with by Lords Neuberger, Hale, Wilson, Reed and Sumption) on the relationship between British citizenship and EU citizenship in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; *The Times* April 9, 2015; at paras 68-92. It is worth noting that Lord Mance is a Europhile, an excellent linguist, with a strong interest in the EU who sits on the Article 255 TFEU panel that reviews nominations by Member States of CJEU judges and Advocates General.

in the HS2 case has recently reminded the CJEU to pay more attention to the text of EU laws,<sup>14</sup> to “respect” the balance of interests inherent in the EU legislative structure which often leads to “objectives” not being fully achieved in legislation in order to reach political agreement.<sup>15</sup> and thus:

“When reading or interpreting legislation, it can never therefore be assumed that particular objectives have been achieved to the fullest possible degree. Limitations on the scope or application of a legislative measure may have been necessary to achieve agreement. There may also have been good reasons for limitations, of which courts are unaware or are not the best to judge. Where the legislature has agreed a clearly expressed measure, reflecting the legislator’s choices and compromises in order to achieve agreement, it is not for courts to rewrite the legislation, to extend or ‘improve’ it in respects which the legislator clearly did not intend.”<sup>16</sup>

The UK Supreme Court warned the CJEU that failure to heed its advice will lead to a “loss of confidence at national level in European Union law”<sup>17</sup> which may impair the dialogue between national courts and the CJEU and risk States being reluctant to reach agreement on new legislation in the EU (or where relevant make it more likely that an EU State will exercise its right not to opt in to EU law – a point relevant for Denmark, Ireland and the UK in some areas, including private international law).<sup>18</sup> In the very recent *Pham* case Lord Mance, in an observation that was concurred in by a majority and not opposed by any of the Justices, reminded the CJEU that if:

“the Court of Justice reaches a decision which oversteps jurisdictional limits which Member States have clearly set at the European Treaty level and which are reflected domestically in their constitutional arrangements... a domestic court must ultimately decide for itself what is consistent with its own domestic constitutional arrangements, including in the case of the 1972 Act [European Communities] what jurisdictional limits exist under the European Treaties and upon the competence conferred on European institutions including the Court of Justice.”<sup>19</sup>

#### **4. Opinion 1/13 - Admissibility**

The Council and some Member States argued that the request for an opinion was inadmissible on a number of grounds. Two of these grounds merit analysis because of the Court’s unclear reasoning or departure from the views of the Advocate General.

##### *a) Misuse of the opinion procedure*

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<sup>14</sup> *R (Buckinghamshire County Council and Others) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324; para 169.

<sup>15</sup> *Ibid*, para 170.

<sup>16</sup> *Ibid*, para 171.

<sup>17</sup> *Ibid*, para 172.

<sup>18</sup> *Ibid*, para 174.

<sup>19</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19, para 90 (his judgment was concurred with by Lord Neuberger, Lady Hale and Lord Wilson; Lord Sumption said at para 111 that he agreed with Lord Mance’s “important reservations... about the relevance of EU law to questions of national citizenship”; and Lord Reed said at para 112 that there was “much” in the judgment of Lord Mance that he agreed with including his “observations about EU law and British nationality.”).

The Council and some Member States argued that it was a misuse of the opinion procedure by the Commission to bring such a procedure after such a long delay when the Commission should instead have been bringing infringement proceedings under Article 258 TFEU against those Member States who had declared their acceptances of third State accessions to the Hague Convention in violation of exclusive EU external competence. The Court of Justice said that it was not presented with any “specific and objective evidence which could lead it to conclude that, in making this request, the Commission has acted exclusively, or at the least primarily, with the aim of circumventing the procedure laid down in Article 258 TFEU.”<sup>20</sup> This quotation gives the impression that a “misuse of the opinion procedure” could be sustained if enough evidence were to be presented to the Court. The next paragraph of the Court’s reasoning seems to refute this impression by saying that: “In any event” the fact that the Commission could bring Treaty infringement proceedings to give the Court the opportunity to address the same questions does not “preclude” the Commission from asking the Court to give an Article 218(11) Opinion.<sup>21</sup> This is very unsatisfactory reasoning. Either a misuse of the opinion procedure is possible (when the requisite amount of evidence is presented to the Court) on the basis that the Commission is evading bringing infringement proceedings or it is not. If it is not, the Court should not make spurious references to the amount of evidence presented before it. It should simply say it can never be a misuse of the opinion procedure when it is used as an alternative to bringing infringement proceedings. The fact that the Court has to act collegially in a single judgment can make it difficult for it to always produce logically coherent judgments, given internal disagreements among the judges as to the reasoning by which the majority decision is reached, but the collective responsibility of the Court is to ensure that it does.

*b) The Agreement with third States is no longer “envisaged” as it has already taken place at least for some Member States*

Article 218(11) TFEU requires that an agreement is “envisaged” when an Opinion from the Court is sought and this is made abundantly clear by the last sentence of the Article which says that: “Where the Opinion of the Court is adverse, the agreement envisaged must not enter into force unless it is amended or the Treaties are revised.” The problem is that in this case a number of EU Member States had already accepted the accession to the Hague Abduction Convention of some or all of the 8 third States referred to in the Commission’s proposals of December 2011. For those States the Hague Abduction Convention was already in force between those States and the relevant third States under public international law. Therefore the Council and some of the Member States argued that at least for those EU States the potential EU “agreement” to accept the accession of the relevant third States was no longer “envisaged” at the time of the request for an Opinion by the Commission and therefore was inadmissible. This was an argument that found favour with Advocate General Jääskinen.<sup>22</sup>

The Court, however, does not “engage” with this argument, or the View of the Advocate General on it, at all. Instead it resorts again to mere unreasoned assertion as follows:

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<sup>20</sup> Opinion 1/03, para 53.

<sup>21</sup> Opinion 1/13, para 54.

<sup>22</sup> AG’s View on Opinion 1/13, paras 42-47.

“Although it follows from the objective of the opinion procedure referred to in paragraph 47 above that the agreement concerned – in order to be classified as ‘envisaged’ – must not be concluded before the Court gives the opinion requested, the abovementioned circumstance [certain Member States have already deposited declarations of acceptance of accession with the depositary of the 1980 Hague Convention] alone is not such as to render the request redundant.”<sup>23</sup>

The Court does not make clear what, if any, effect its Opinion is intended to have on the acceptance by some EU Member States of the third States referred to in the Commission proposals which envisage an EU “agreement” with these third States. One can only assume that the Opinion has no effect on these matters because it has come too late to deal with them and cannot reverse what is already true in public international law (certainly Article 218(11) does not confer any power on the Court to (retrospectively) annul an international agreement that has already entered into force between an EU State and a third State).

The Court’s style gets in the way of a clear understanding of its decision, of the reasons for its decision and of the consequences of its decision. The Court’s reluctance to refer to an Advocate General’s View when the Court is disagreeing with that View makes it very hard to see what the basis for the Court’s Opinion on this point is. Is the Court saying that because the request for an Opinion is still relevant for some EU States (those that have not accepted the accession of the 8 third States) it is admissible and there is no need to rule on the effects of the Opinion in relation to those States that have accepted the accession of the relevant third States? Or is the Court saying that the request is admissible but that it is irrelevant in relation to the EU States that have accepted the accession of the third States? Merely stating the negative proposition that “the abovementioned circumstance alone is not such as to render the request redundant” does not create sufficient clarity.

## 5. Opinion 1/13 – Substance

### *a) Existence of EU competence to declare the acceptance of 3<sup>rd</sup> States acceding to the Hague Child Abduction Convention*

Article 216(1) TFEU sets out the criteria for the EU having external competence. This is a new provision introduced by the Lisbon Treaty that has its origins in the failed Constitutional Treaty.<sup>24</sup> Article 216(1) TFEU says:

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<sup>23</sup> Opinion 1/13, para 51.

<sup>24</sup> See European Convention, “Final Report Working Group VII – External Action” (CONV 459/02) Brussels 16 December 2002, Part A para 4, and Part B para 18, found at <http://www.europarl.europa.eu/meetdocs/committees/deve/20030218/489393EN.pdf> (last accessed 11 February 2015) and the IGC 2007 Mandate POLGEN 74 (26 June 2007), para 18, n 10, found at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011218%202007%20INIT> (last accessed 11 February 2015). For such an important topic (external competence of the EU) these preparatory resources from the failed constitutional convention and from the Lisbon IGC tell us practically nothing about the intentions of the drafters. This suggests a casualness on the part of the drafters that is deeply worrying from the point of view of EU Member States caring about and exercising their sovereign rights properly.

“The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.”

However, in the Court’s Opinion 1/13 the Grand Chamber declines to start with Article 216 TFEU in determining whether the EU has competence to accept the accession of third States to the Hague Child Abduction Convention. In a clear assertion of its own case law transcending the Treaty it sets out the competence of the EU from its own case law.<sup>25</sup> and then dismissively says:

“The last-mentioned possibility is also referred to in Article 216(1) TFEU.”<sup>26</sup>

This is a small but vivid example of the Court thinking it is master of the Treaties rather than it being the servant of the Treaties. In the Court’s view it would seem that the idea of conferred powers encompasses the notion of conferred by earlier case law of the Court of Justice.

So having partially stated the law on external competence based on its own case law in one paragraph the Court then applies the law to the case in the next paragraph saying that the Hague Convention:

“falls within the area of family law with cross-border implications in which the EU has internal competence under Article 81(3) TFEU. Moreover, the EU has exercised that competence by adopting Regulation 2201/2003. In those circumstances, the EU has external competence in the area which forms the subject matter of the Convention.”<sup>27</sup>

So the Court asserts that the EU has external competence without clarifying on which basis of Article 216(1) TFEU the competence arises. The impression is that the Court thinks the EU has external competence whenever a matter falls within an area over which the EU has internal competence to legislate. However, this is not the test in Article 216(1) TFEU. Article 216(1) TFEU requires that the Treaty or a legally binding Union act must confer external competence (clearly not the case here), or that the external agreement is “likely to affect common rules or alter their scope” (not considered by the Court here but only later in relation to exclusive external competence), or that the “conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties” (but the Court does not discuss this either as it does not refer to

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<sup>25</sup> Opinion 1/13, para 67 – “The competence of the EU to conclude international agreements may arise not only from an express conferment by the Treaties but may equally flow implicitly from other provisions of the Treaties and from measures adopted, within the framework of those provisions, by the EU institutions. In particular, whenever EU law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (Opinion 1/03, EU:C:2006:81, paragraph 114 and the case-law cited).”

<sup>26</sup> Opinion 1/13, end of para 67.

<sup>27</sup> Opinion 1/13, para 68.

an “objective” of the Treaty nor to whether declaring the acceptance of the accession of 3<sup>rd</sup> States to the Hague Child Abduction Convention is “necessary” to achieve that objective<sup>28</sup>).

Perhaps the reason that the Court does not allow Article 216(1) TFEU to govern its decision on whether the EU has external competence is that it would have to apply an even higher standard than in determining whether the EU has exclusive external competence under Article 3(2) TFEU. The only possible criterion that justifies, “under the Treaty”, EU external competence to decide on the acceptance of 3<sup>rd</sup> State accessions to the Hague Child Abduction Convention is that such an acceptance “is likely to affect common rules or alter their scope” (Article 216(1) TFEU) and not just that such an acceptance “may affect common rules or alter their scope”.<sup>29</sup> A sensible construction of the Treaty is surely that exclusive external competence cannot arise unless there is external competence. Therefore the higher standard of “is likely to”, rather than the lower standard of “may”, affect should apply to both issues. Instead the Court of Justice runs away from such textual analysis of the Treaty. It does not replace the Treaty standard with a clear standard of its own which could readily be followed in subsequent cases. So the Court’s approach is bad judicial activism in policy terms – a Court not acting within the powers conferred on it – and in process terms – a Court creating the law but not making it clear what the new law is.

The Court’s standard for the existence of EU external competence may be simply that the external agreement falls within an area of internal EU competence whether or not that competence has been exercised internally (a very radical position) or it may be that external competence exists when the external agreement falls within an area of EU internal competence and the EU has already exercised “that competence” internally (less radical but still not what the Treaty requires). The reason for the confusion is that the Court is not clear whether the sentence beginning “Moreover” is a necessary precondition for the creation of external competence in this case or is just a happy fact that the Court can emphasise to reinforce the correctness of awarding external competence to the EU.

*b) Existence of Exclusive External Competence for the EU to declare the acceptance of 3<sup>rd</sup> States acceding to the Hague Child Abduction Convention*

The Court immediately goes to the relevant Treaty provision on exclusive external competence (Article 3(2) TFEU) in its opening paragraph.<sup>30</sup> on the topic of exclusive external competence. However, it sees Article 3(2) as only a partial statement of exclusive external competence. The Grand Chamber says that the TFEU “specifies the circumstances in which the EU has exclusive external competence” and only

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<sup>28</sup> When dealing with exclusive external competence the Court decided that the slightly different test in Art 3(2) TFEU was not met in this case – acceptance of the declaration of accession to the Hague Convention by a third State “is not necessary to enable the EU to exercise its internal competence.” (para 70) The test for external competence is the necessity of achieving a Treaty objective rather than the necessity of exercising its internal competence.

<sup>29</sup> Emphasis added. Advocate General Sharpston has said that the distinction noted in the text “cannot be right”, see para 88 of her Opinion on 3 April 2014 in Case C-114/12 *Commission v Council* ECLI:EU:C:2014:2151. Her Opinion then focuses on how to interpret Art 3(2) TFEU and does not really help with an analysis of the interpretation of Art 216(1) TFEU .

<sup>30</sup> Opinion 1/13, para 69.

adds “in particular in Article 3(2)”. The reader is left wondering as to where else in the TFEU there is material on exclusive external competence.

In the next paragraph the Court recognises that “it is common ground” that the first two possibilities for exclusive external competence in Article 3(2) TFEU are not applicable in this case and focuses on the final condition in that provision – whether the acceptance of a declaration of accession “may affect common rules or alter their scope”.<sup>31</sup>

The Grand Chamber then refers back in the next paragraph to its own case law on affecting common rules or altering their scope as originally developed in the *ERTA* case,<sup>32</sup> elaborated upon in the *Open Skies* case<sup>33</sup> and then, post-Lisbon, discussed by another Grand Chamber in the *Council of Europe Broadcasting* case shortly before Opinion 1/13.<sup>34</sup> The Grand Chamber in Opinion 1/13 does not make any attempt to justify why the Court’s old case law on this topic is still relevant to interpreting the words of the Treaty.<sup>35</sup> The travaux préparatoires are not very helpful on this point.<sup>36</sup> If we go back to the European Convention Working Group on External Action that prepared the text of the failed Constitutional Treaty its Final Report has this rather unclear observation on the Court’s case law on external competence:

“The Group saw merit in making explicit the jurisprudence of the Court to facilitate the action of the Union in a globalised world, in particular when dealing with the external dimension of internal policies and action.”<sup>37</sup>

This leaves open the question of how much of the Court’s jurisprudence should be made explicit and whether some of it should in fact be left behind. Both in this Opinion and in the *Council of Europe Broadcasting* case there is a sharp disagreement between the Commission and the Council of the European Union as to whether some of the developments of the *ERTA* principle (that the EU has exclusive competence when the EU has created common rules internally and the Member States can no longer undertake obligations with third countries which affect those common rules)<sup>38</sup> in the Court’s

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<sup>31</sup> Opinion 1/13, para 70.

<sup>32</sup> Case 22/70 *Commission v Council* (*ERTA*) EU:C:1971:32, para 30.

<sup>33</sup> Case C-467/98 *Commission v Denmark* EU:C:2002:625, para 82.

<sup>34</sup> Case C-114/12 *Commission v Council* EU:C:2014:2151, para 69.

<sup>35</sup> In Case C-114/12, paras 66 and 67 the Grand Chamber does deal with this point by saying that the wording of the Court in para 22 of its judgment in *ERTA* is used in the Lisbon Treaty amendments and therefore should be interpreted in the light of the Court’s explanation of those words in the judgment in *ERTA* “and in the case-law developed as from that judgment.”

<sup>36</sup> See the very brief discussion of them by AG Sharpston in her Opinion in the *Council of Europe Broadcasting* case *ibid* at paras 94-96. She rightly sees the last clause in Art 3(2) TFEU as “evidently taken from *ERTA*” (para 95) and she very reasonably concludes that: “If the negotiating history of Article 3(2) TFEU shows anything, it is that there was no intention to depart from the *ERTA* principle.” (para 96)

<sup>37</sup> See European Convention, “Final Report Working Group VII – External Action” (CONV 459/02) Brussels 16 December 2002, Part B para 18, see <http://www.europarl.europa.eu/meetdocs/committees/deve/20030218/489393EN.pdf> (last accessed 11 February 2015)

<sup>38</sup> Using here the definition of the *ERTA* principle given by AG Sharpston in the *Council of Europe Broadcasting* case at para 95 of her Opinion.

subsequent case law are still relevant. The two controversial concepts are “the largely covered area” and “foreseeable future developments”. The Court of Justice retains both these features of its pre-Lisbon case law without giving any justification for doing so.<sup>39</sup> after the Treaty makers have used wording that solely reflects the *ERTA* principle and not any of its subsequent accretions.

### ***(i) Largely Covered Area***

The Court in Opinion 1/13 reiterates its case law from Opinion 2/91.<sup>40</sup> that “the scope of EU rules may be affected or altered by international commitments where such commitments are concerned with an area which is already covered to a large extent by such rules”.<sup>41</sup> The Court asserts that this concept remains relevant after the Lisbon Treaty in interpreting the last clause of Article 3(2) TFEU contrary to the views of the Council and some Member States. The Grand Chamber does not give any reasons as to why the largely covered area concept is still relevant in an era when the external competence of the EU has been clarified in the Treaty and it is not obvious from the wording of the Treaty that the concept is still relevant. The Court does, however, refer to its very recent judgment in the *Council of Europe Broadcasting* case where further enlightenment may be sought on this issue. However, the decision of the Grand Chamber in the latter case also deals with this question simply by asserting the continued validity of the Court’s case law on the largely covered area with no rationale as to why the case law is still relevant.<sup>42</sup> The Grand Chamber in the *Council of Europe Broadcasting* case dismissed arguments to the contrary:

“The above analysis is not affected by the argument of the Council, the Kingdom of the Netherlands and the United Kingdom that, since the entry into force of the Lisbon Treaty, the exclusive external competence of the European Union is viewed in a more restrictive manner.”<sup>43</sup>

The Grand Chamber seems to believe that it is acceptable to reject the arguments in favour of a narrower construction of the last part of Article 3(2) TFEU – focusing on the actual words of the Treaty derived from the *ERTA* principle and not the additional ideas created by the Court after the *ERTA* case that cannot be comfortably fitted within the words of the Treaty – by refuting a different argument put forward by the Council and some Governments relating to the effect of Protocol (No 25) on the exercise of shared competence under the Lisbon Treaty.<sup>44</sup> The Court should deal with the arguments of the body that represents the interests of all EU Member States properly. An argument by inference from protocol No 25 was not the only argument made by the Council but merely a support of an argument to construe the actual words of Article 3(2) TFEU and not parts of the Court’s pre-Lisbon case law which cannot be reconciled with those words. Protocol No 25 is not a knock-out blow to the Court’s case law on largely covered area in the field of exclusive competence because the protocol does indeed relate to shared competence. However, a more modest Court might pay more attention to Protocol No 25 as a sign of

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<sup>39</sup> Opinion 1/13, paras 73 and 74.

<sup>40</sup> EU:C:1993:106, paras 25 and 26.

<sup>41</sup> Opinion 1/13, para 73.

<sup>42</sup> Case C-114/12, para 70.

<sup>43</sup> *Ibid* at para 72.

<sup>44</sup> *Ibid* at para 73.

the fact that the Member States are anxious to ensure that the exercise of competence in part of an area is not deemed to be the exercise of competence over the whole area. The fact that there is no Protocol on exclusive external competence may be because the Member States felt that it was enough to expressly limit the external competence to cases where the conclusion of an international agreement “may affect common rules or alter their scope”.

This condition seems to require that only aspects of the international agreement which have a direct effect on a binding internal EU instrument create exclusive EU external competence. Therefore in relation to parts of an international agreement that are not covered by a binding EU instrument there can be no effects by the former on the latter and therefore no exclusive external competence in relation to those parts of the international agreement (thus leading to a mixed agreement). Something of this idea is evident in Advocate General Sharpston’s View in the *Council of Europe Broadcasting Case*. She did not reject the largely covered area concept in theory.<sup>45</sup> However, in practice she gave it no weight because she decided that the EU did not have exclusive competence to enter into the proposed Council of Europe Convention because there was at least one area of that Convention which was not covered by the internal EU instrument and therefore that area of the proposed Convention could not have an effect on the EU instrument.<sup>46</sup> The Grand Chamber in *Council of Europe Broadcasting* did not follow Advocate General Sharpston on this point. It did not find any area of the future Convention which might not affect an existing EU instrument.<sup>47</sup> However, the Grand Chamber in the *Council of Europe Broadcasting* case is to be congratulated for its thorough reasoning even if it errs on the side of finding exclusive external competence by putting the onus of proof on those who are asserting that there is not exclusive competence. Given that the Council of the EU – representing a substantial proportion of the Contracting States to the Council of Europe – was arguing that there could well be protection of pre-broadcast signals in the new Council of Europe Convention that would be achieved without affecting EU law it seems rather unreasonable to describe this as a “hypothetical” possibility.

The fact that the Court retained the largely covered area concept had a material bearing on the outcome of Opinion 1/13. It compared the provisions of the Hague Child Abduction Convention with those of the Brussels IIa Regulation and decided that the latter “cover to a large extent the two procedures governed by the 1980 Hague Convention, namely the procedure concerning the return of children who have been wrongfully removed and the procedure for securing the exercise of access rights.”<sup>48</sup> This led the Court to conclude that: “Thus, the whole of the Convention must be regarded as

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<sup>45</sup> *Ibid* at AG View paras 104-110.

<sup>46</sup> *Ibid* at paras 141-145, 153-155 and 166. In particular the protection of pre-broadcast signals is not covered by EU law.

<sup>47</sup> *Ibid* the Court’s judgment at paras 78-103. In particular the Grand Chamber decided that although pre-broadcasting signals are not covered by EU law (para 97) one of the “possible” approaches being considered for the Council of Europe Convention, to extend the term “broadcasts” to pre-broadcast signals, “would undeniably be capable of altering in a horizontal manner, the scope of the common EU rules in the area concerned.” (para 98) and that any of the other suggested ways of handling pre-broadcast signals suggested to the Court (which would not affect EU law) were “hypothetical” and not relevant due to the lack of evidence that they were being considered for the future Council of Europe Convention (para 99).

<sup>48</sup> Opinion 1/13, para 83.

covered by the EU rules.”<sup>49</sup> This is a huge leap given that on one view Brussels IIa does not even largely cover the Hague Convention primarily because Brussels IIa has nothing to say about cases between EU States and non-EU Contracting States to the Hague Convention but also because the whole system of cooperation between Central Authorities in relation to Hague Child Abduction cases is not regulated by the Regulation but rather by the Convention itself. The Brussels IIa Regulation’s provision on cooperation between Central Authorities is confined to the Article 11(6)-(8) procedure permitting the courts of the habitual residence of the child immediately before the abduction of the child to insist on the return of the child to that country when the courts of refuge have issued an order under Article 13 of the Hague Child Abduction Convention refusing to return the child. The Article 11(6)-(8) Brussels IIa procedure is not an implementation of the Convention in EU law but rather a wholly new addition created by EU law.

***(ii) Foreseeable future developments***

This was not a big issue in this case but it is regrettable that the Court continues to argue that it can assess whether or not the EU rules may be affected by the international agreement by considering the “foreseeable future development” of the EU rules. This cannot be consistent with a system of conferred powers. Why should the Court be allowed to restrict the external competence of Member States on the basis of what the Court thinks might be decided in internal EU instruments in the foreseeable future? This can, at best, only be fair where the binding EU instrument has already been agreed and its entry into force is pending. It is amazing to see the kind of speculation resorted to by Advocate General Jääskinen in this case relying on this concept.<sup>50</sup>

***(iii) The risk that common rules may be affected***

The Court’s reasoning on the possible effects on Brussels IIa of declaring the acceptance of the accession of third States to the Hague Convention is given in positive terms in paragraphs 85, 88 and 89 of its judgment. In negative terms the Court asserts that the consistency of many of the provisions of the Regulation and the Convention does not mean that there may be no affect of the latter on the former and the fact that the Regulation gives priority to the Regulation over the Convention in Article 60 does not prevent an affect of the latter on the former.<sup>51</sup>

The Court’s first positive assertion of possible effect of the Convention on the Regulation is stated as follows:

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<sup>49</sup> *Ibid.*

<sup>50</sup> See Opinion 1/13, AG View at para 100. The Advocate General’s very foolish speculation, at para 102, about an adverse effect of accepting third States into the Hague Convention because they will make it harder to agree amendments to the Convention misses the point that the EU cannot prevent third States from acceding to the Convention and from having to consent to amendments to the Convention in a Protocol. In any case no Protocol to the Child Abduction Convention is foreseeable given it was rejected at the last Special Review Commission in 2011 and the Hague only adopts new instruments by consensus of all its members, see Art 8(2) of the Hague Statute as amended in 2005 and entered into force on 1 January 2007.

<sup>51</sup> Opinion 1/13, paras 86-88. But the Court does not say what the “affect” might be.

“because of the overlap and the close connection between the provisions of Regulation 2201/2003 and those of the Convention, in particular between Article 11 of the regulation and Chapter III of the Convention, the provisions of the Convention may have an effect on the meaning, scope and effectiveness of the rules laid down in Regulation No 2201/2003.”<sup>52</sup>

Chapter III of the Convention and Article 11 of the Regulation both contain provisions governing the return of a child who has been abducted but their material scopes are completely different in relation to the issue in hand (whether the declaration of the acceptance of a third State to the Hague Convention can affect the provisions in Brussels IIa or alter their scope). The question is how can the application of the return provisions in the Convention in cases between an EU State and a third State have any bearing on the meaning, scope or effectiveness of the provisions in the Regulation on the return of a child in cases between EU Member States? The Court makes no attempt to address this point and therefore its statement is a mere assertion and not a reasoned opinion.

The next positive statement on the issue of possible affects on the Regulation is as follows:

“Despite the precedence afforded to Regulation No 2201/2003, the scope and effectiveness of the common rules laid down by the regulation are likely to be affected when the Member States individually make separate declarations accepting third-State accessions to the 1980 Hague Convention.”<sup>53</sup>

Once again one is left asking the Court the question “why is the Regulation likely to be affected by the EU Member States making individual declarations of acceptance of the accession of third States?”. The application of the Convention between e.g. France and Russia will have no direct bearing on the application of the Regulation as the latter does not apply to cases between France and any third State. It is for the Court to say what these possible affects might be as they are not inherently obvious.

Finally the Court adds the following paragraph connected to the above point:

“In that regard, as the Parliament and the Commission have submitted, if the Member States, rather than the EU, had competence to decide whether or not to accept the accession of a new third state to the 1980 Hague Convention, there would be a risk of undermining the uniform and consistent application of Regulation No 2201/2003 and, in particular, the rules concerning cooperation between the authorities of the Member States, whenever a situation involving international child abduction involved a third state and two Member States, one of which had accepted the accession of that third State to the Convention whilst the other had not.”<sup>54</sup>

The first problem with this paragraph is that the provisions on cooperation between Central Authorities are found in the Convention (Article 7) and not in the Regulation (apart from one tiny point in Article 55(c) which relates to the override provisions in Article 11 of the Regulation that have no equivalent in the Convention and therefore seem to be irrelevant for present purposes) so it is hard to say that the Convention could “affect” the Regulation in relation to cooperation between the authorities of Member

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<sup>52</sup> Opinion 1/13, para 85.

<sup>53</sup> Opinion 1/13, para 88.

<sup>54</sup> Opinion 1/13, para 89.

States as it is a matter for these purposes which is exclusively governed by the Convention and not the Regulation.

The second problem is that the Court does not set out in its Opinion what are the examples submitted by the Commission and the European Parliament and neither does the Advocate General in his View.<sup>55</sup> This lack of transparency means that the reader is unable to fully test the veracity of the Court's assertion or, to be more positive, is unable to be convinced by the Court's reasoning because the examples are not given but merely referred to in submissions that are not easy for the reader to find.

It is very difficult to imagine how the cooperation between Central Authorities in relation to intra-EU cases might be affected by the fact that one of the EU Central Authorities involved also has responsibilities in relation to cases with a third State and this point is well made by the Council in its observations as reported by the Court at paragraphs 61 and 62. The Court refers to a scenario where two EU Member States are involved in the same case involving a third State but only one of the EU Member States has accepted the accession of the third State. But how might this have any affect on the Regulation? The Member State that has Convention obligations with the third State will carry out those obligations and the Member State that has no such Convention obligations will not be obliged to do anything. If the issue arises because it is not clear whether the child has been abducted to one or the other of the EU Member States this cannot affect the Regulation. Neither EU Member State will act under the Regulation and one EU Member State will act under the Convention.

## **6. Conclusion**

The Court of Justice of the European Union has relied too much on assertions and spent too little time giving cogent reasons for those assertions in Opinion 1/13. The Court does not appear to be concerned to convince its readers of the correctness of its decision but seems to be content to ask its readers to trust in dogmatic assertions. In the area of external competence where the sovereign rights of States are at stake and the practical possibilities of the Hague Child Abduction Convention applying between EU States and third States may be limited (given the requirement of unanimity in the Council) the Court should have been much more thorough and careful. The European Union would be more democratic and gain the trust of its citizens more if the Court were to be much more deferential to the intentions of the Treaty makers and pay much more attention to the wording of the Treaty (consistent with its declared acceptance of the principle of conferred powers) rather than to its own case law when that case law is not clearly supported by the wording of the Treaty.

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<sup>55</sup> The latter merely refers to examples without setting them out, see Opinion 1/13 para 93 and footnote 134 of the AG's View.