GUEST EDITORIAL

Guest Editor's Introduction: Opinion 2/15 of the Court of Justice on the EU–Singapore Free Trade Agreement

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At the heart of the constitutional makeup of the European Union since the Lisbon Treaty lies its *Kompetenzkatalog*. It outlines the division of powers between the Union and its constituent Member States, be they internal or external competences.[1] At the heart of *Opinion 2/15* on the EU–Singapore Free Trade Agreement (EUSFTA) lies a discussion of that division of powers. This Special Issue of the *Global Trade and Customs Journal* has taken on the task of discussing the implications arising therefrom.

A short explanation of the allocation of competences in the European Union may be of assistance to the reader of this issue. Two categories of competence define the Union's legal order. In specific areas, the European Union can act exclusively. The category of competence covering these areas is known as 'exclusive competence'.[2] Here, only the Union may legislate and adopt legally binding acts (including international agreements) unless it empowers Member States to do so or when the latter need to implement the Union's acts.[3] The Common Commercial Policy, under which the European Union defends its commercial interests externally, is one of the most famous of exclusive competences of the Union.[4] Most areas of law-making in the Union, however, do not fall within that first category. They fall in the category of 'shared competences'. In this second category, both the Union and its Member States have the power to act.[5] However, as per the Treaties, Union action pre-empts Member States from exercising their power.[6] Usually, that action takes the form of a directive or a regulation, but may also result from an international agreement, which then binds the Member States in that area, even if no prior common rules existed.[7]

Collectively, these rules boil down to one aim, and one aim only: it has to be clear, from the division of competences on which the whole European Union project is based, who has competence to act in the specific field at hand.[8]

It is that question of 'who' – one that goes to the very distribution of powers in the Union legal order – which the European Commission put before the European Court of Justice in *Opinion 2/15*, with a view to knowing whether the Union alone could conclude the EUSFTA, or whether Member States' involvement would be necessary for its conclusion.

And this leads us to the question of 'why'. The EUSFTA is one of the first 'new generation' free trade agreements, a new breed of deals that cover far more than the odd free trade area for goods and services. The

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1 Naturally, however, any competences not conferred upon the Union remain with its Member States.

2 According to Art. 3(1) of the Treaty on the Functioning of the European Union (TFEU) these encompass rules relating to the Union's Customs Union, European competition rules, the Euro's monetary policy, the Common Fisheries Policy, and the Common Commercial Policy.

3 Art. 2(1) TFEU.

4 As recalled by Advocate General Sharpston,'*{i}n its very first Opinion, delivered on the basis of (what is now) Art. 218(11) TFEU, the Court held that exclusive competence over the common commercial policy was justified because permitting the Member States to exercise concurrent powers in that area "would amount to recognising that, in relations with third countries, Member States may adopt positions which differ from those which the {European Union} intends to adopt, and would thereby distort the institutional framework, call into question mutual trust within the {European Union} and prevent the latter from fulfilling its task in the defence of the common interest"*'.Opinion of Advocate General Sharpston of 21 Dec. 2016, Opinion 2/15, ECLI:EU:C:2016:992, para. 96.

5 Opinion of Advocate General Szpunar of 24 Apr. 2017 in Case 600/14 *Germany v. Council*, ECLI:EU:C:2017:296, para. 76.

6 Art. 2(2) TFEU. By way of exception to that article, *see* however, Arts 4(3) and (4) TFEU. Pre-Lisbon Treaty, the concept of 'shared' competences was not entirely clear. In Opinion 2/91 of 19 Mar. 1993, referred to 'shared' competences as those where the '*negotiation and implementation of the agreement require joint action by the Community and the Member States*'. Opinion 2/91, ECLI:EU:C:1993:106, para. 12. However, the Court famously also recognized the Union's power to act alone even in areas of 'shared' competence in *Portugal v. Council* (judgment of 3 Dec. 1996, ECLI:EU:C:1996:461, para. 68) and *Commission v. Ireland* (judgment of 30 May 20016, ECLI:EU:C:2006:345, paras 94–96).

7 Art. 216(2) TFEU. *See* in support of this, the Opinion of Advocate General Szpunar, Case C-600/15 *Germany v. Council*, ECLI:EU:C:2017:296, paras 76–77). It should be highlighted though, by way of completeness, that it arises from Arts 4(3) and 4(4) TFEU that, by way of exception, in some areas of shared competence, the exercise by the Union of its competences does not result in Member States being prevented from exercising theirs (for instance in the areas of research, technological development, space, development cooperation, and humanitarian aid).

8 Opinion of Advocate General Sharpston of 21 Dec. 2016 in Opinion 2/15, ECLI:EU:C:2016:992, para. 57.

EUSFTA, in this regard, also included provisions on investment protection, government procurement, certain services in the field of transport, and trade-related aspects of intellectual property, as well as horizontal chapters on competition, trade and sustainable development, transparency, dispute settlement and general, final, and institutional provisions. Because initially negotiated as an 'EU-only' agreement, and likely given the political disagreement (such as, on rail transport[9]) and sensitivity (such as on investor-State dispute settlement) of some areas covered therein, the European Commission sought clarification of its competences under the Lisbon Treaty from the European Court of Justice.

And clarification it received: All but areas two of the EUSFTA were deemed to fall within the exclusive competence of the Union, with four areas which the Council and the Member States having previously regarded as falling – in whole or in part – outside the Union's exclusive competence now also deemed covered by the remit of exclusive competences of the Union (that is, sustainable development,[10] certain services in the field of transport,[11] intellectual property,[12] and the substantive provisions on investment protection[13]). Indeed, only two areas were deemed exceptions to that new reality: portfolio investment (also known as 'non-direct foreign investment')[14] and investor-State dispute settlement[15] were deemed shared competences by the Court.

The present Special Issue of the *Global Trade and Customs Journal* seeks to discuss the implications of these findings by the European Court of Justice. The authors that have kindly agreed to contribute look at these implications from different, yet ancillary angles. *Hannes Lenk* discusses potential prior judicial involvement in investor-State dispute settlement of domestic and European courts as one ramification of the Court's reasoning. *Dylan Geraets* looks at a different ramification: the effects on the EU's trade policy and future free trade agreements with the Union. *Giovanni Gruni* then discusses the newest member of the Common Commercial Policy – sustainable development – and its potential role in the Union's post-Opinion 2/15 trade policy. Finally, *Rob Howse* closes the present Special Issue by taking stock of where Opinion 2/15 leaves the current debate on the international investment regime (including the proposal for an Investment Court System) and the European Union's involvement in that regime going forward.

Many thanks go to the authors and all those involved for their time and efforts in contributing to this Special Edition. I am confident that their thoughts will contribute to the scholarly and practical discussion going forward.

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[9] *See* in this regard, the case filed by Germany against the Council vis-à-vis an amendment to the Convention concerning International Carriage by Rail, Case C-600/14 (not yet decided).

[10] Opinion 2/15 of the Court of Justice of 16 May 2017, ECLI:EU:C:2017:376, para. 167.

[11] *Ibid.*, para. 217.

[12] *Ibid.*, para. 130.

[13] *Ibid.*, para. 109.

[14] *Ibid.*, para. 256.

[15] *Ibid.*, para. 244. It should be pointed out that the Court goes to great lengths to highlight again and again that this assessment of competences does not pronounce itself on the *compatibility* of that type of provision. *See* Opinion 2/15 of the Court of Justice of 16 May 2017, ECLI:EU:C:2017:376, para. 224.