

# **EU COMPETENCES ON TRADE POLICY: OPINION 2/15 AND PROSPECTS FOR FUTURE EU TRADE AGREEMENTS**

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## **ABBREVIATIONS**

BIT:	Bilateral Investment Treaty
CCP:	The Common Commercial Policy
CETA:	The Comprehensive Economic and Trade Agreement (EU-Canada)
CJEU:	Court of Justice of the European Union
EC:	European Community
ECJ:	European Court of Justice
EEAS:	European External Action Service
EEC:	European Economic Community
EP:	European Parliament
EU:	European Union
EUSFTA:	EU-Singapore Free Trade Agreement
FDI:	Foreign Direct Investment
FTA:	Free Trade Agreement
GATS:	General Agreement on Trade in Services
ILO:	International Labour Organisation
IMF:	International Monetary Fund
IPRs:	Intellectual Property Rights
ISDS:	Investor-State Dispute Settlement
OECD:	Organisation for Economic Cooperation and Development
TFEU:	Treaty on the Functioning of the European Union
TPC:	Trade Policy Committee
TRIPS:	Trade-Related Aspects of Intellectual Property Rights
UNCTAD:	United Nations Conference on Trade and Development
WTO:	World Trade Organisation

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## **Abstract**

The Commission's request for an Opinion of the Court of Justice on the EU-Singapore Free Trade Agreement (EUSFTA) triggered the very beginning of a process that would further mold and shape the Common Commercial Policy (CCP) and the future EU Trade Policy. The much-awaited Opinion 2/15 was released on 16 May 2017, and it clarified EU exclusive competences under the CCP and implied exclusive powers following the Lisbon Treaty reform.

The Court of Justice concluded that the EUSFTA is a mixed agreement; however it also confirmed that the Agreement falls to a great extent under the EU exclusive competence; thus opening a window of opportunity for EU-only trade agreements excluding investment. Willing to avoid complications similar to that in the ratification process of the EU-Canada Comprehensive Economic and Trade Agreement, the Commission not surprisingly embraced this approach and it has already taken steps to initiate discussions with EU institutions on the future architecture of EU FTAs. These discussions also coincide with the debate on the future of Europe, creating an opportune moment to reconsider the future of the EU Trade Policy. Against this background, the article aims to analyse Opinion 2/15 and its possible implications, in the light of the historical evolution of the CCP and the inter-institutional balance in the decision-making process of trade agreements.

## 1. Introduction

The difficulties that surrounded the approval process of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) cast a cloud over the future of the EU's trade policy. The Agreement, the negotiations for which were initially declared concluded in August 2014, passed through sinuous paths until its ratification by the EU. Though the Agreement started to be provisionally applied for areas within EU competence on 21 September 2017, it still awaits the ratification of the Member States to fully enter into force.

The complexities that came up in the ratification process led the EU's ability to conclude free trade agreements (FTAs) to be called into question (Pelkmans & Van der Loo, 2016). Since then, the resulting frustrations and question marks continue to linger on the future of the EU's trade policy. In fact, the case of CETA was not the first example of political controversy in the history of the EU Common Commercial Policy (CCP) (see Meunier & Kalypso, 2011), nor was it the first time that complexities stemming from mixed agreements came to light. However, it was definitely an unprecedented one.

All these complications came just a decade after the Commission launched the EU's trade strategy, "Global Europe: Competing with the world" (European Commission, 2006), which shifted the EU Trade Policy towards an ambitious bilateral agenda. The Global Europe Strategy set the ground for Deep and Comprehensive FTAs, which cover beyond the border issues, and which aim to remove non-tariff barriers and

to open up services, investment and public procurement markets.

The EU's global leadership aspirations in the area of trade were further reinforced with the expansion of EU competences under the Lisbon Treaty. The Commission was of the opinion that the reading of the Lisbon Treaty provisions matched the EU's trade strategy, and it was willing to make full use of EU competences and to exploit the potential of comprehensive EU-only trade agreements. With this in mind, former Trade Commissioner Karel De Gucht had called for thinking "twice about the appropriate form of future trade agreements under the Lisbon Treaty", claiming that the Treaty clarified the competence debate and "did away with the express call for mixed agreements on certain issues" (De Gucht, 2010, p.4).

However, not surprisingly, shortly after the entry into force of the Lisbon Treaty, it became clear that the Member States did not share the view of the Commission on the EU's exclusive competences, and the difference of opinion between the Commission and the Council did not seem to allow for EU-only comprehensive trade agreements. Very often, investment seemed to be at the forefront of discussions, although this was not the only issue where differences existed between the Commission and the Member States. This led the Commission to request the Opinion of the Court of Justice of the European Union (CJEU) on the competence of the EU to sign and ratify the FTA with Singapore and the division of competences between the EU and the Member States.

The much-awaited Opinion 2/15 was released on 16 May 2017 (CJEU, 2017) and the Court declared that the Agreement is a mixed one, requiring the conclusion of the Agreement by the EU and the Member States acting together. Despite the mixed character of the Agreement, the Court also confirmed that the EU-Singapore FTA (EUSFTA) falls to a great extent under the exclusive competence of the EU, with the exception of provisions on non-direct foreign investment and investor state dispute settlement, leaving the door open for future discussions on prospective EU trade agreements.

Against the background of recent challenges faced by the EU's trade policy, this article aims to analyse Opinion 2/15 and its likely impact on the evolution of the CCP and the future law and practice of EU bilateral trade policy making.

Why is understanding Opinion 2/15 important? Firstly, the Opinion will have implications on the future of the CCP and that of the EU's trade policy as well. The CCP has a dynamic character that evolved considerably throughout the history of the Union through the Court of Justice Opinions and Treaty Revisions. The current Opinion represents a new junction in the history of the CCP.

Secondly, although the Opinion is specific to the EUSFTA, it further developed the CJEU case law on EU exclusive competences under the CCP and EU implied exclusive powers, thus solving the difference of opinion between the Council and the Commission in a number of areas. The Opinion will serve as an important

benchmark in identifying the legal basis of future trade agreements as EU-only or mixed agreements and in determining the legislative procedures that will apply for their ratification. Indeed, on the basis of the Opinion, the Commission recently initiated discussions among EU institutions on the future architecture of EU trade agreements.

Thirdly, understanding the implications of the Opinion is important for EU's trade partners, who are increasingly frustrated by the complexities of EU decision-making processes. The ratification process of the free trade deal with Canada, seen by the EU as a strategic ally and one of the closest and most like-minded partners (see EEAS, 2016), had echoes beyond CETA. Negotiating partners who expect to carry out negotiations with the EU increasingly face a multifaceted structure, and conflicts over competences impose challenges on the very nature of negotiations which, in the end, should reflect the outcome of a balanced and overall compromise across policy areas. In the face of increasing complications in trade policy-making, it is important to understand the possible implications of the Opinion on the future of the EU's trade policy, and what the Decision might provide and what it might not.

With this in mind, to allow a thorough understanding of the Court of Justice Opinion on EUSFTA the second section of the article aims to provide a background of the development of the CCP and discusses some European Court of Justice (ECJ) Opinions which have been a cornerstone of the evolution of the CCP. Then, the third section will analyse the EU processes

for initiating, negotiating and concluding an agreement in order to reflect the inter-institutional balance in this process. The fourth section will link the EU Trade Policy to the CCP, before examining, in the fifth section, the difference of opinion between the Commission and the Council on EU competences, which led the Commission to request the Opinion of the CJEU. The sixth, seventh and final sections will analyse the Opinion on EUSFTA, and its likely implications on future EU trade agreements.

## **2. The development of the Common Commercial Policy**

The CCP, over which the EU enjoys exclusive competence, evolved considerably together with the deepening of the internal market and, also, with changing patterns of global trade. The CCP which basically covered trade in goods for quite a long time after the Rome Treaty, enlarged gradually so as to cover trade in services, trade related aspects of IPRs and foreign direct investment (FDI) in the Lisbon Treaty. Nevertheless, the delegation of competences to the supranational level has not been “without political controversy” (Meunier & Kalypso, 1999). The disagreements over the scope of competences resulted in several Court of Justice Opinions and Treaty revisions that determined the balance of competences and paved the way for shaping the CCP.

### **2.1. The foundations of the CCP in the Treaty of Rome**

The CCP is the natural consequence of the establishment of the Customs Union. From the very beginning, the removal of internal barriers with the

Rome Treaty was accompanied by the desire to contribute “by means of a common commercial policy, to the progressive abolition of restrictions on international trade” (EEC Treaty, Preamble). Recognising that the formation of the Customs Union necessitates concerted action in the Member States’ external trade policies, the Treaty assigned the Commission the responsibility of elaborating proposals for the uniformisation of the commercial policy (EEC Treaty, Article 111). The Commission has been charged with conducting negotiations with third countries in line with the directives of the Council and in consultation with a special Committee appointed by the Council (EEC Treaty, Article 113). It was also specified that these agreements would be concluded by the Council in the name of the Community.

The Rome Treaty assigns the Commission the role of agenda setter, guide, and negotiator. The Treaty granted exclusive competence to the Community in the area of commercial policy, although it did not explicitly define the term “exclusive competence” (Meunier & Kalypso, 2011). The Treaty itself envisaged a far-reaching structure where the Member States effectively delegated their authority to the Community, restricting their sovereignty in that area. However, it should be noted that, throughout the history of the CCP, the actual shift of competence from the Member States to the supranational level has not always been straightforward. The next section will analyse several Court of Justice Opinions that clarified the nature of EU competences and the scope of the CCP.

## 2.2. Major ECJ Decisions on CCP and Community Competence

### Exclusive competence

The Rome Treaty, which basically related the CCP to trade in goods, defined its coverage as the common customs tariff, trade agreements with third countries, export policies and trade defence instruments (EEC, Article 113). After the inception of the CCP, one of the first major rulings to draw a line between the competences of the Member States and of the Community was Opinion 1/75 (ECJ, 1975). The Commission asked the Court of Justice whether the European Community could conclude the “Understanding on a Local Cost Standard”, an international agreement on export credits to be adopted under the Organisation for Economic Cooperation and Development (OECD), and whether the nature of the Community competence was exclusive. The Court concluded, first, that export credits lay within the realm of the CCP and, second, it recognised the exclusive competence of the EEC to conclude the agreement. The Court stated that the exercise of concurrent powers by the Community and Member States in relation to agreements on commercial policy was impossible.

Another important Opinion followed when the Commission asked the Court to rule on the Community’s competence to conclude the International Agreement on Natural Rubber negotiated under the United Nations Conference on Trade and Development. In Opinion 1/78 (ECJ, 1979), while the Court recognised that the Agreement in question differed

from classical commercial agreements, it concluded that the commercial policy, “must be interpreted from a wide point of view” in line with the changing nature of international trade. On the other hand, the Court ruled that, where the agreement covers areas that fall under the competence of the EC and the Member States, it must be concluded by both. This technique was already employed for agreements entailing provisions outside the scope of the CCP, the so-called “mixed-type” agreements, such as Association Agreements.

### Implied competence

Case 22/70, which constitutes an important milestone in the development of EU competences (see Eeckhout, 2011), extended exclusive Community competence to areas for which the Community has not been explicitly conferred such competences in the Treaties (Waibel, 2013). Case 22/70 (ECJ, 1971) on the question of the competence of the Community to negotiate and conclude the European Road Transport Agreement, allowed the development of the “Doctrine of Implied Competences”. The ECJ Decision implies that the EU can enjoy external competences not only in areas where the Treaties exclusively granted the Community such competences but also where “the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules” (ECJ, 1971, para. 17).

Further clarifying its previous Decision, in its Opinion 1/76 on the conclusion of an international agreement on navigation on the Rhine, the Court

concluded that, even when internal competences have not yet been exercised by the Community through the implementation of a common policy, Community competence to enter into international commitments may still exist. In this respect, the Court stated that "whenever community law has created for the institutions of the community powers within its internal system for the purpose of attaining a specific objective, the community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion." (ECJ, 1976, para. 3). The Court recognised that even in cases where common rules have not yet been adopted, Community competence exists "in so far as the participation of the Community in the Agreement is necessary to attain one of the objectives of the Community" (ECJ, 1976, para.4).

Later, Opinion 2/91 concerning the question of competence to conclude the International Labour Organisation (ILO) Convention on safety in the use of chemicals at work, further confirmed and clarified previous principles set by the Court on implied powers. The Opinion provided that exclusive Community competence "does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions" (ECJ, 1993, para. 9).

In such cases, the Court ruled that the Member States could no longer undertake, individually or collectively,

commitments with third countries (ECJ, 1971).

The principles of the "Doctrine of Implied Competences" have also found a place in the EU Treaties with the changes brought by the Lisbon Treaty. Accordingly, the principles of the Doctrine have been incorporated into Article 3(2) of the Treaty on the Functioning of the European Union (TFEU), which stipulates that exclusive competences may also arise where the conclusion of an international agreement is provided for in a legislative act of the Union, or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope (TFEU, Article 3(2)).

### **New issues and the scope of Community Competence**

Although the above-mentioned Court of Justice Decisions have been important in order to clarify the nature of Community competence and to set principles in relation to exclusive competences, determining areas under EU exclusive competences covered in agreements going beyond the scope of classical sectoral agreements has continued to be an area of disagreement in practice.

Together with the changes in the global trade agenda and the emergence of new trade issues in the 80s, the answer to this question became far from evident. The conclusion of the Uruguay Round with the inclusion of the General Agreement on Trade in Services (GATS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS)

under the umbrella of the World Trade Organisation (WTO), brought another legal challenge over the competence question. When the Agreement was to be signed, the Commission sought the opinion of the Court of Justice to resolve the dispute. The Commission, taking the view that all parts of the Agreement establishing the WTO fall under the scope of the CCP or implied competences, asked the Court whether the Community competence to conclude the Agreements in question was exclusive (Meunier & Nicolaidis, 2011).

In Opinion 1/94, the Court confirmed the exclusive competence of the Community in trade in goods in line with its previous case law, while highlighting the mixed character of the GATS and the TRIPS. Accordingly, the Court held that the Community and Member States were jointly competent to conclude both Agreements (ECJ, 1994).

More specifically, the Court acknowledged the exclusive competence of the Community over the Agreement on Agriculture, the Agreement on the Application of Sanitary and Phytosanitary Measures, and the Agreement on Technical Barriers to Trade. However, it concluded that the three modes of services other than cross-border services (Mode 1) covered by the GATS, were not within the scope of the CCP. The Court also underlined that “particular services comprised in transport are the subject of a specific title of the Treaty, distinct from Title VII on CCP” (ECJ, 1994, para. 48). As regards the TRIPS Agreement, the Court held that provisions “other

than those concerning the prohibition of the release into free circulation of counterfeit goods” do not fall under the scope of former Article 113 of the Treaty (ECJ, 1994, para. 71).

Finally, the Court highlighted the importance of ensuring close cooperation between the Member States and Community institutions in the negotiation, conclusion and implementation processes of mixed-type agreements.

The ECJ Opinion was not the end of the discussion over the division of competences on emerging trade issues. This issue continued to be the subject of debate in the framework of the upcoming Treaty revisions.

### **2.3. Treaty revisions and the evolution of the CCP**

#### **From the Treaty of Rome to the Treaty of Nice**

While Court Opinions shed light on the nature and scope of the Community competence under the CCP, the legacy of the Treaty of Rome in this area remained almost unchanged until the Amsterdam Treaty (See Youri, 1992; Meunier & Nicolaidis, 2002).

Following the completion of the Single Market and the resulting extension of Community competence to new areas, which also coincided with the emergence of new issues onto the international trade agenda, debate over the scope of the CCP seemed to be inevitable. Although Opinion 1/94 brought legal clarity to the division of competence between the Community and the Member States, the challenge

over the scope of the CCP remained unresolved.

The Community competence over the CCP was losing ground in the face of a changing world trade agenda and a deepening Community. The following period has been characterised by a dilemma between the desire to equip the Community with the necessary powers to preserve its leverage in international trade and the Member States' willingness to retain control over the policy-making process.

Discussions over competence continued during the 1996 Inter-Governmental Conference, but the resulting compromise brought limited changes to the Amsterdam Treaty, which has never been used in practice. An enabling clause was inserted into the Treaty, which allowed the Council deciding unanimously to extend Community competences to international agreements on services and intellectual property without an amendment of the Treaty (EC Treaty Amsterdam consolidated version, 1997, Article 133).

The Enabling Clause meant that the Member States would decide on an ad-hoc basis where to extend exclusive Community competence on these two issues covered by the WTO Agreements. This required "case-by-case political decisions rather than some uncontrollable spill over" (Meunier & Nicolaïdis, 1999, p.496).

This situation was partially rectified with the Nice Treaty, which extended exclusive Community competence to services and the commercial aspects

of intellectual property rights. However, some services were excluded from the scope of exclusive competence, with cultural and audiovisual services, education, social and human health services falling under shared competence. Transport services continued to remain under a separate legal basis. The Treaty also included an "Enabling Clause" to allow the Council to extend Community competence to non-commercial aspects of intellectual property rights (EC Treaty Nice consolidated version, 2002).

The Nice Treaty revisions of the CCP has been mainly criticised as lacking clarity. Even when the Nice Treaty was signed and implemented, the scope of the CCP, decision-making procedures and the democratic accountability were being discussed under the framework of the preparations of the Constitution, which was later replaced by the Lisbon Treaty.

### **The Lisbon Treaty and the CCP**

The most significant changes to the CCP since the Rome Treaty came with the Lisbon Treaty. The Treaty mainly revised the scope and objectives of the CCP, the role of the European Parliament (EP) and the voting procedures of the Council.

The Lisbon Treaty defined three categories of Union competences: exclusive, shared and those where the role of the Union is limited to carrying out actions to support, coordinate or supplement the actions of the Member States. It was no surprise that the Treaty explicitly included the CCP among the five areas listed under the exclusive competence of the EU (TFEU, Article 3).

The Lisbon Treaty extended the coverage of the CCP to cover foreign direct investment along with trade in goods, services, and the commercial aspects of IPRs (TFEU, Article 207). Sensitive sectors previously excluded from EU exclusive competence have been included under the CCP, bringing all services with the exclusion of transport services under the exclusive competence of the EU. The major change regarding the scope of the CCP has been the inclusion of foreign direct investment (Woolcock, 2010). The negotiation and conclusion of international agreements in the field of transport remained the subject of a separate provision under Title VI of Part Three and Article 218 (TFEU, Article 207).

While qualified majority voting remained as a general-rule, the Treaty envisaged the use of unanimity as an exception in "the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; and (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them." (TFEU, Article 207). The Treaty also specified that the Council would act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union rule. In addition, association agreements and agreements with candidates for accession covering economic, financial and technical cooperation measures, including financial assistance, are subject to

unanimity in the Council (TFEU, Article 218).

With a view to increasing democratic accountability over trade policy making, the Lisbon Treaty extended the role of the Parliament on the CCP in several ways. The EP acquired joint powers with the Council over the CCP through the ordinary legislative procedure. For the conclusion of trade agreements, the Treaty requires the EP's consent by a single majority of its members before the Council can adopt a decision concluding the agreement by qualified majority (TFEU, Article 218). The Treaty also envisaged that the Commission would report regularly on the progress of negotiations to the EP along with the special committee appointed by the Council which is the Trade Policy Committee (TPC) for trade issues (TFEU, Article 207 & 218).

In addition, the Treaty included the CCP under the European External Action along with foreign and security, environment, and development policies and humanitarian assistance (Woolcock, 2010). The Treaty envisaged that "the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action" (TFEU, Article 207). This meant a shift through a value based perspective linking trade policy to broader aims such as support for democracy, rule of law and human rights, sustainable economic, social and environmental development, the progressive improvement of the environment, sustainable management of global resources, and good global governance (Woolcock, 2010).

### **3. The procedure of negotiating and concluding trade agreements after the Lisbon Treaty**

After having analysed the evolution of the CCP, this section will explain the law and practice of initiating, negotiating and concluding bilateral trade agreements. Understanding EU procedures is important not only for a better comprehension of Opinion 2/15, but also of the inter-institutional balance that would define the political implications of the Opinion.

#### **3.1. The Commission to initiate the process**

The process of initiation, negotiation and conclusion of international agreements is defined under Article 218 TFEU, which should be read in conjunction with Article 207 for agreements falling under the scope of the CCP. As an exclusive competence of the EU, agreements related to the CCP can only be negotiated by the EU and, as confirmed by previous CJEU case law, the exercise of concurrent powers by the EU and the Member States in this area is impossible. The Treaty provided for the Commission to be in charge of making recommendations in order to negotiate trade agreements with third countries in the name of the EU (TFEU, Article 207).

To do so, in practice the Commission engages in a scoping exercise with the third country to explore the feasibility of negotiating a future deal, and defines the broad content of the negotiations. The Commission also conducts an impact assessment and holds a public consultation, which together serve to lay the grounds for the Commission's recommendation to

the Council requesting authorisation to initiate negotiations (European Commission, 2013). During this process, regular contact with the Council and the Parliament ensures that they are informed in advance about future plans to negotiate a trade agreement (Ibid, 2013).

#### **3.2. The initiation and conduct of negotiations and the inter-institutional balance**

##### **The role of the Council (The Council of Ministers)**

Based on the Commission's recommendations, the Council is responsible for authorising the launch of negotiations and establishing the negotiating directives which serve as a guideline during the negotiations (TFEU, Articles 207.3 & 218.2). In practice, when requesting authorisation to open negotiations, the Commission submits a draft negotiating mandate to the Council to be initially discussed in the TPC and other Committees if necessary. The mandate upon which a consensus is reached will be submitted to the Committee of Permanent Representatives (Coreper) and then to the approval of the Council. The draft directive may be adopted as proposed by the Commission, but "typically" it will be amended by the Council (Waibel, 2013). The negotiating directives, which are not legally binding (Eeckhout, 2011), can also be amended or updated in the course of negotiations.

The decision-making procedure at the Council for areas related to the CCP and for international agreements under Article 218 of TFEU is qualified majority voting with the exception of

sensitive cases requiring unanimity, association agreements, and also areas where the adoption of internal rules requires unanimity (See TFEU Articles 207.4&218.8). However, in practice, it is well known that for mixed agreements the Council has a preference to act by consensus. The Council itself has declared that "for agreements covering areas of shared competency, decisions are taken together with the Council by common accord (agreement of all Member States)" (Council of the EU, 2017). Although the concept of "consensus" is not defined in the EU Treaties, this requires that no Member State present at the meeting formally objects to the proposal (Devuyt, 2013).

Even if an agreement mainly falls within the scope of qualified majority voting under Articles 207 and 218, it should be emphasised that in the case of a lack of a common understanding between the Commission and the Council over exclusive, shared and national competences in relation to agreements with third countries, it is also politically more desirable to reach consensus among the Member States, taking into account that, in the end, mixed agreements will have to be ratified by every single Member State. This renders qualified majority voting for trade agreements de facto obsolete.

Indeed, the report examining the balance of competences between the EU and the United Kingdom points out that, since the 2012 EU-Japan FTA mandate, the Council and the EU Member States have started using a "double decision" mechanism under which the Council authorises the Commission to negotiate on areas

of exclusive competence, and the Member States authorise, separately, the Commission to negotiate on areas falling under shared competences (HM Government, 2014). The Report expresses that the mechanism allows for a pragmatic approach to the adoption of mandates without prolonged debates over competence and the ambiguous nature of decisions allows for differences of interpretation (Ibid, 2014).

Once the Council authorises the launch of negotiations, the Commission conducts negotiations in consultation with the Council Committee designated for this purpose, as envisaged by the Treaty. The Commission negotiates on the basis of the negotiating directives and in consultation with the TPC, which is composed of the Member State representatives responsible for trade and investment policies. During the negotiation process, the Commission first agrees with the Council on the text proposals of the EU, before submitting text proposals to the negotiating partner (Puccio, 2016). The Council and the Commission are together responsible for ensuring that negotiated agreements are compatible with internal Union policies and rules (TFEU, Article 207.3).

### **The role of the Parliament**

The Treaty provides that the Council authorises the initiation of negotiations, sets negotiating directives, and is consulted during negotiations. In return, the Lisbon Treaty did not attribute any formal role to the EP in the initiation and conduct of negotiations (Puccio, 2016). The Treaty only envisaged that the Commission would regularly report to

the EP as well as the Council Committee on the progress of negotiations (TFEU, Article 207).

However, in reality, the fact that the EP has to give its consent at the end of negotiations has allowed for greater leverage of the Parliament in the negotiating stage (Puccio, 2016). This is why, in the Framework Agreement that governs relations between the Commission and the Parliament, the Commission agreed to "provide early and clear information" to the EP during the preparation phase, including the draft negotiating directives, and during the conduct of international agreements. It was stated that this information would be provided to the Parliament "in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take the Parliament's views as far as possible into account." (Framework Agreement, 2010, para. 24).

In practice, the Commission informs the Parliament about the draft negotiating mandate at the same time that it submits it to the Council and, in the following period, the Parliament is being regularly informed throughout the negotiation process (Puccio, 2016). The EP signals its position through Resolutions that may be adopted at various stages of the negotiations, before or after the negotiating directives are adopted and during the course of negotiations. While the Resolutions are not legally binding and are of an advisory nature, the consent requirement for the adoption of agreements enabled the EP's position to be taken into account by the Commission when drafting the

EU position (Ibid, 2016).

Looking at how the EP's involvement has, so far, been translated into the practice of trade negotiations, the most prominent aspect has been a consistent call for enhancing "human rights and social and environmental standards by incorporating binding clauses" into trade agreements regarding these issues (Devuyst, 2013). The EP has also proved that, in the case that its sensitivities were not taken into account, it would not refrain from vetoing the Agreement, as in the case of the Anti-Counterfeiting Trade Agreement, which was rejected by the EP in 2012 on the basis of concerns related to civil liberties.

### **3.3. Conclusion and ratification**

Once negotiations are completed, the Commission informs the Council and the EP and provide them with the draft text. Before the Agreement can be initialled, the text has to go through legal scrubbing. Following this legal review process, which may take three to nine months, the Agreement will be initialled by the chief negotiators, and then translated to EU official languages (European Commission, 2013).

To further proceed with the signing and provisional application and conclusion of an international agreement, the Council must decide on the legal basis of the Agreement. The Commission will submit a draft Decision to the Council. While doing so, the Commission must propose a legal basis for the Agreement, which will define the nature of the Agreement and will affect the following approval procedure that will apply (Puccio, 2016).

**Table 1: The procedure of negotiating and concluding trade agreements**

Comission to initiate the process	
<p>COM engages in a scoping exercise with the third country</p> <ul style="list-style-type: none"> <li>Impact Assessment</li> <li>Public Consultation</li> </ul>	
Negotiating Directives	
<p>COM to request authorisation from the Council to initiate negotiations</p>	<p>Though EP possesses no formal role in this process, COM informs EP and EP signals its position through Resolutions</p>
Negotiation Process	
<p>COM to negotiate in consultation with the Council Committee designated for the purpose (TPC)</p>	<p>COM to inform EP</p>
Conclusion of negotiations	
<p>COM to inform the Council and EP</p> <p>Agreed text goes through legal scrubbing before being initialled by chief negotiators</p> <p>Translation to EU official languages</p> <p>COM to submit draft proposal on the signing and conclusion of the Agreement to the Council</p>	
Conclusion of the agreement	
<p><u>EU-only agreements of the agreement</u></p> <ul style="list-style-type: none"> <li>Approval of the Council by QMV</li> <li>Consent of EP by simple majority</li> </ul>	<p><u>Mixed agreements</u></p> <p>Provisional implementation possible with the approval of the Council (in practice by consensus) and the consent of EP by simple majority</p> <p>Full entry into force after ratification of MS &amp; EU</p>

In case the legal basis is determined as an EU-only agreement, the agreement can be ratified and put into implementation with the approval of the Council acting by qualified majority, and with the consent of the Parliament.

For mixed agreements, ratification by the Member States is required in addition to that of the EU. Article 218(5) TFEU allows the Council to adopt a decision authorising the signing and the provisional application of the Agreement upon the proposal of the Commission.

While the consent of the EP is not a prerequisite for the Council's decision on the signing and the provisional implementation of the Agreement, in practice former Commissioner De Gucht, upon the request of the Parliament, agreed that the EU-Korea FTA would not be provisionally applied before the Parliament gave its consent (Devuyst, 2013). Later, Commissioner Malmström also supported this approach.

Hence, in practice, Agreements are provisionally applied once the Council and the EP give their green light. Only those parts of the Agreement falling under the exclusive competence of the EU or those that the Council agrees on can be provisionally implemented. The Agreement in its entirety can enter into force once the ratification process of all Member States and the EU is completed, which implies a lengthy approval procedure. The ratification of mixed agreements not only results in lengthy procedures, but also bears the risk of rejection by even a few or a single Member State, and the possible, but unclear, legal consequences of such

a rejection on the overall Agreement constitutes another challenge.

#### **4. Linking EU Trade Policy to the CCP after the Treaty of Lisbon**

While both the evolution of the scope of the EU competence on the CCP and the EU Trade Policy have been affected considerably by changing global trade patterns, this has not resulted in an exact overlap of the EU's Trade Policy and the CCP.

The EU's 2006 "Global Trade" Strategy (European Commission, 2006) attempted to bring the EU's trade strategy in line with the changes in the global trade environment. Together with this Strategy, the EU shifted its focus from multilateralism towards bilateralism, and embraced an ambitious free trade policy agenda. The Strategy highlighted the importance of tackling non-tariff barriers, eliminating restrictions on access to resources such as energy and raw materials, and enabling deeper market opening and stronger rules in new trade areas such as IPRs, services, investment, public procurement, and competition. Albeit rather vaguely, the strategy also referred to strengthening sustainable development through bilateral trade relations. As a result, the EU reoriented its trade policy and started to negotiate Deep and Comprehensive FTAs with partners of priority such as Korea, and ASEAN countries.

This approach was further approved by the EU's "Trade and Growth in World Affairs" Strategy (European Commission, 2010). The 2010 Strategy further confirmed the goal of eliminating non-tariff barriers through enhanced

regulatory cooperation, opening up services and public procurement markets, strengthening rules on IPRs, with an added emphasis on enhancing sustainable development, protecting innovation, supporting the mobility of service providers and stronger enforcement and implementation.

The most recent strategy, "Trade for All", announced in autumn 2015 confirmed the previous framework for trade issues. In addition, mainly as a response to growing concerns and opposition against free trade agreements all over the EU, the strategy placed a strong emphasis on transparency measures and the linkages between European values and trade and investment policies (European Commission, 2015).

In general, all three strategies aimed to adapt the EU's trade policy to the changing patterns of global trade, and to respond to the challenges of the 21st century. This required the EU to pursue a comprehensive bilateral trade agenda covering the WTO-extra and WTO-plus provisions. According to the Commission, the reading of the Lisbon Treaty provisions complemented the EU's trade strategy, "Global Europe: Competing with the world". The Commission's willingness to make full use of the newly acquired EU competences and to exploit the potential of comprehensive EU-only agreements was reflected in the words of former Trade Commissioner Karel De Gucht (De Gucht, 2010) in his speech about the implications of the Lisbon Treaty:

*"I thus conclude that there is still room to think twice about the appropriate*

*form of future trade agreements under the Lisbon Treaty. After all, the Treaty did away with the express call for mixed agreements on certain issues, which was still enshrined in the Nice version of our trade competence. Do we really need 27 additional national ratifications when the European Parliament can now exercise parliamentary scrutiny over these agreements? We will thus further explore how to keep everyone on board for major trade deals, while at the same time not diluting the new possibilities under the Treaty."*

Recognising some challenges imposed by mixed agreements for practitioners (see Hoffmeister, 2010) and taking into account that the Commission's leverage in the case of EU-only agreements is much stronger, it is not surprising that the Commission pushed for exploiting the full potential of EU competences under the Lisbon Treaty. Just after the entry into force of the Lisbon Treaty, the Commission was of the opinion that it might have been possible to design the EU-Korea FTA, the EU's first Deep and Comprehensive FTA with one of its main trading partners, as an EU-only agreement (De Gucht, 2010).

However, it did not take long to see that the debate over the EU's exclusive competences was not resolved. Very often, investment seemed to be at the forefront of discussions, although differences existed in other areas such as services, IPRs and sustainable development. With a view to clarifying the competences provided to the EU by the Lisbon Treaty, the Commission decided to request the Opinion of the CJEU on whether it has the competence to sign and conclude

the EUSFTA. The Commission also requested clarification on the division of competences between the EU and the Member States for areas covered by the EUSFTA (European Commission, 2015). The following section, then, explores the main differences between the Commission and the Council over the division of competences between the EU and Member States.

## **5. Major differences between the Commission and the Council over the division of competences before Opinion 2/15**

### **5.1. Investment**

The major debate over EU competences shifted from "services and IPRs" towards "investment" with the entry into force of the Lisbon Treaty. The Treaty enlarged the scope of the CCP so as to cover "foreign direct investment" (FDI), but did not provide an explicit definition of FDI. Hence, even before the entry into force of the Lisbon Treaty, debate began over the extent of the EU competence to conclude bilateral investment agreements.

Since then, the discussions over investment have focused on four major issues. The first one was whether the EU's exclusive competence covers portfolio and other type of investments, in addition to direct investment. The definition of investment generally accepted in bilateral investment agreements is a broad one, also referred to as an asset-based definition which covers portfolio investments, intellectual property rights and every kind of movable and immovable property as well as direct investment (UNCTAD, 2011). The definition of

direct investment accepted by the OECD and IMF implies that the foreign investor retains control or a significant influence over the management of the enterprises; it is thus differentiated from portfolio investment where investors do not have influence over management (See OECD, 2008; IMF, 2009). Although the distinction between direct investment and portfolio investments has also been recognised by the Court of Justice in several cases (Opinion 2/15; see, inter alia Cases C-171/08, Joined Cases C-282/04 and C-283/04, Cases C464/14), whether the EU may enjoy implied exclusive competence over non-direct foreign investments (and especially portfolio investments) has been a controversial issue between the Commission and Member States. While the Commission claimed implied competence on portfolio investments on the basis of the Treaty provisions on capital and payments (TFEU, Article 63-66), the Member States' and the Council's interpretation leaned towards a narrow definition of investment, attributing exclusive competence to the EU only for direct investment and retaining non-direct foreign investment as either an exclusive Member State competence or a shared one (see Advocate General's Opinion, 2016).

The second controversial issue was whether EU competence only covers the liberalisation of investment or also the protection of investment. The Member States had long addressed investment protection, and hence "post-admission" or "post-entry" treatment of investors, through their bilateral investment treaties (BITs) (European Commission, 2013). These BITs do not cover market access and

investment liberalisation, which has been achieved under the trade in services agreements/chapters of EU FTAs (See OECD, 2008). On this basis, the Council claimed that the protection of investment does not fall within the exclusive competence of the EU in contrast to the Commission's view. In return, the Commission's reasoning was based on its competences over trade in goods, which not only cover market access, but also post-entry issues such as non-discrimination of goods through internal taxes and regulations (Waibel, 2013). Following a similar line of reasoning, the Commission claimed that competence on investment should also cover measures at the post-admission stage to protect investment (Ibid, 2013).

The third issue was whether the investor state dispute settlement (ISDS) mechanism falls within the EU's competence. To some degree this question is also related to the previous ones because, as underlined in the Opinion of Advocate General Sharpston, for the EU to have exclusive competence over ISDS provisions it also needs to have exclusive competence for the whole investment chapter, since the CJEU case-law establishes that dispute settlement provisions fall within the same competence as the substantive provisions which they accompany (Advocate General's Opinion, 2016). For the same reason, the Council claimed that the EU could not enjoy exclusive competence as regards ISDS (Ibid, 2016).

On the other hand, a very controversial issue concerning the ISDS which has frequently been raised by Belgium

regards the compliance of ISDS with EU law. However, the Court did not provide an answer to that question, expressing that its task is to rule on the competence of the EU to conclude the Agreement and not on the compatibility of the Agreement's provisions with the EU law (CJEU, 2017). Finally, the Court was expected to clarify whether the competence to terminate around 1400 Member States BITs belongs to the EU or to the Member States themselves.

## **5.2. Services**

In the period preceding the Lisbon Treaty, the main difference over competences between the Commission and the Council concerned trade in services and IPRs, which have been largely clarified with the Lisbon Treaty. Though different voting procedures may apply for sensitive cases specified in the Treaty (See TFEU, Article 207.4), EU exclusive competence in this area has been extended to all services. The only exclusion from the scope of the CCP that remained was transport, which is listed in Article 4 of TFEU among the areas under shared competences (TFEU, Article 4). For transport services, the Treaty provides that the negotiation and conclusion of international agreements is subject to separate provisions laid down in Title VI of Part Three (Common Transport Policy) and Article 218 (TFEU, Article 207).

The Treaty specifies that provisions on transport apply to road, rail and inland waterways and that, for air and maritime transport, the Council and the EP, acting in accordance with the ordinary legislative procedure, may lay

down appropriate provisions (TFEU, Article 100).

For the case of transport, it could only be possible for the EU to acquire exclusive competence to the extent that the internal rules or the scope of the measures implemented by the EU for the achievement of a common transport market confer implied exclusive powers to the EU. Hence, in this area, the main question was whether the EU acquired implied competences. The Commission view was that it did, in contrast to the Council and Member States which pointed out the special exclusion of transport from the scope of the CCP, as well as the "missing pieces for a comprehensive EU internal legal framework for transport services" (Kleimann & Kübek, 2016).

### **5.3. IPRs**

Despite the fact that, since the Nice Treaty, commercial aspects of intellectual property have been included under the scope of the CCP, differences of opinion between the Commission and the Council on this area mainly related to the scope of the "commercial aspects" and "non-commercial aspects" of IPRs.

Following the entry into force of the Lisbon Treaty, the CJEU was asked to rule on Member States' competences over some TRIPS provisions on patentability in the framework of the Sanofi-Avantis case (C-414/11) (CJEU, 2013). The Court first established the link between IPRs and the CCP. In this regard, it expressed that the rules on intellectual property fall within the exclusive competence of the EU under the CCP as far as they have a specific

link to international trade. The Court concluded that this is the case for the rules covered by the TRIPS Agreement and its provisions on patentability.

By its Decision, the Court established a link between the TRIPS and the CCP; however, the extent to which intellectual property provisions under the TRIPS and other trade agreements have a specific link to international trade and fall within the scope of the CCP remained an area of disagreement. Notably, the Member States have objected to the EU's exclusive competence over areas including TRIPS plus and extra provisions such as those relating to the protection of plant varieties, moral rights, and stronger enforcement measures.

In relation to IP rules, criminal sanctions for infringement of IPRs constitutes another contested area between the Council and the Commission, on which the Commission's efforts to introduce a Directive failed due to the strong opposition of the Member States (Waibel, 2013). Although the TRIPS Agreement covers criminal procedures for wilful trademark counterfeiting or copyright piracy on a commercial scale, the EUSFTA do not include commitments on criminal sanctions.

### **5.4. Sustainable development**

Although EU FTAs included references to the principles of sustainable development as early as the 90s (Puccio & Binder, 2017), the search for a coherent and systematic approach to sustainable development in EU trade agreements appeared much later, by the end of the 2000s. The inclusion of

the CCP within the framework of the principles and objectives of the Union's external action under the Lisbon Treaty pointed to the change in this area and highlighted the need for a value-based perspective within the EU's trade policy. This was further reinforced with the EP's approach (see EP Resolution, 2010) towards bilateral trade negotiations. The EP, in its reports and resolutions concerning bilateral free trade negotiations, systematically called for the incorporation of binding human rights and social and environmental standards clauses (Devuyt, 2013).

The EU-Korea FTA was the first FTA to cover a specific chapter on sustainable development addressing environmental and labour issues, and all bilateral agreements recently concluded by the EU, including that with Singapore, include a chapter/chapters dedicated to sustainable development issues.

However, it was not clear whether this area, which has recently been incorporated in the EU's trade policy and new generation FTAs, falls within the realm of the CCP. Claiming that these provisions are not directly linked to international trade, and on the basis of Article 4 of the TFEU, the Council was of the opinion that environmental and social protection fall within the shared competence of the EU and the Member States. In contrast, the Commission claimed exclusive competence on this area (see Advocate General's Opinion, 2016).

## **6. The CJEU Opinion on the EU-Singapore FTA**

The CJEU, with Opinion 2/15 released on 16 May 2017, clarified that the

EUSFTA is a mixed trade agreement and cannot be concluded solely by the EU. However, the Court also confirmed that the Agreement falls to a great extent under the the exclusive competence of the EU.

In its Opinion, the Court first assessed whether an area/chapter of the EUSFTA falls under the CCP, and hence the exclusive competence of the EU. In determining the extent to which the Agreement's provisions fall within the exclusive competence of the EU relating to the CCP, the Court, following settled case-law, applied the test on whether the commitments of the agreement are intended "to promote, facilitate or govern such trade and have direct and immediate effect on it" (CJEU, 2017, para. 38).

Second, for those areas falling outside the CCP, the Court assessed whether the EU could be attributed implied exclusive competences. Accordingly, the Court confirmed that trade in goods and other areas strongly linked to trade in goods and services such as trade and investment in renewable energy generation, trade facilitation and customs, technical barriers to trade, sanitary and phytosanitary measures, competition and government procurement fall under the CCP.

Similarly, the Court concluded that all four modes of services supply fall under the CCP, and hence the exclusive competence of the EU, including financial services and mutual recognition of professionals. However, as it was not expected to do so, the Court did not provide an interpretation related to the use of unanimity in certain

sensitive services sectors covered by Article 207(4) of TFEU.

As regards transport services, which are excluded from the scope of the CCP, the Court concluded that the commitments regarding international maritime transport, rail transport and road transport covered by the Agreement may affect or alter common rules in those respective areas. Hence, applying the second test, the Court concluded that the EU acquired implied exclusive competences in relation to those commitments. Regarding internal waterways transport, which also falls outside the scope of the CCP, the Court pointed out that there is no need to take into account commitments in this area since they are of extremely limited scope. On the other hand, in the case of aircraft repair and maintenance services during which an aircraft is withdrawn from service, and services for the sale, marketing or reservation of air transport services which are classified as “business services”, the Court confirmed that related commitments fall within the CCP.

As far as commitments on IPRs are concerned, the Court highlighted the key role that the protection of IPRs plays in trade in goods and services in general, and in combatting unlawful trade in particular. The Court held that the commitments under EUSFTA on IPRs, including the protection of plant varieties and moral rights, fall under the CCP since they have direct and immediate effects on trade between the EU and Singapore.

In the context of commitments on trade and sustainable development,

the Court concluded that the objective of sustainable development forms an integral part of the CCP and that the envisaged agreement is intended to make liberalisation of trade between the EU and Singapore “subject to the condition that the parties comply with their international obligations concerning social protection of workers and environmental protection” (CJEU, 2017, para. 166).

Regarding commitments on investment, the Court followed the settled case-law to differentiate between direct investments as investments that are made by natural or legal persons of the third State in the EU and vice versa, which enables effective participation in the management or control of a company carrying out an economic activity (see CJEU, 2017, para.80 & 82). In this respect, the Court concluded that only foreign direct investment, and not non-direct foreign investment, fall under the CCP. The Court also confirmed that investment protection falls under the remit of the CCP, as well as market access in the area of investment.

On the other hand, applying the second test for non-direct foreign investment, the Court held that the EU does not have implied exclusive competences on the basis of the Treaty provisions and that competence in this area is shared with the Member States. In addition, the Court underlined that the dispute settlement regime between investors and States “removes disputes from the jurisdiction of the courts of Member States” and hence these provisions are under the shared competence between the EU and the

Member States (CJEU, 2017, para. 292).

Finally, on another contentious area between the EU and the Member States regarding the competence to terminate Member States' existing BITs, the Court held that "the EU can succeed Member States in their international commitments when the Member States have transferred to it, by one of its founding Treaties,

their competences relating to those commitments and it exercises those competences." (CJEU, 2016, para. 248).

As a result, the Court concluded that only two aspects under the EUSFTA do not come under the EU's exclusive competence, namely non-direct foreign investment and the dispute settlement regime between investors and States..

**Table 2: Summary of Opinion 2/15 – Division of Competences**

EXCLUSIVE COMPETENCES	SHARED COMPETENCES
<p><b>Areas covered by the CCP (Article 3.1, TFEU)</b></p> <ul style="list-style-type: none"> <li>trade in goods</li> <li>trade and investment in renewable energy generation</li> <li>trade in services (except transport services)</li> <li>government procurement</li> <li>intellectual property rights</li> <li>competition</li> <li>foreign direct investment</li> <li>trade and sustainable development</li> <li>state-state dispute settlement</li> <li>the termination of MS BITs for the parts concerning exclusive competence</li> </ul>	<p><b>Areas where the EU gained implied external competences (Article 3.2, TFEU)</b></p> <ul style="list-style-type: none"> <li>trade in maritime, rail and road transport services</li> <li>commitments on government procurement in the field of transport</li> </ul>
<p><b>Areas under shared competence between the EU and Member States</b></p> <ul style="list-style-type: none"> <li>non-direct foreign investment (portfolio investments)</li> <li>dispute settlement between investor and states</li> </ul>	

## **7. The state of play of discussions on the future design of the EU Trade Agreements**

Following the release of Opinion 2/15, discussions within the EU institutions on the implications of the Opinion still continue. While it may take time to achieve a political consensus within the EU institutions, the Opinion in fact has the potential to be a milestone for the EU's future comprehensive FTAs.

First, the Opinion confirmed that, in addition to trade in goods and related areas, EUSFTA commitments on services, including transport services, and on IPRs now fall under the EU exclusive competence.

Second, the Opinion established that commitments on sustainable development form an integral part of the EU's CCP. This clarification reinforced the shift towards a value-based trade policy and was important in bridging the CCP and the EU Trade Policy. Also with the strong support of the EP, we can expect the EU to further develop a coherent and systematic approach towards sustainable development in its FTAs.

Third, the Opinion concluded that commitments on the market access and protection of FDI fall under the exclusive competence of the EU. Besides, the Opinion held that the EU has the competence to terminate Member States' BITs for those parts of the treaties that are under EU's exclusive competence. On the other hand, the fact that portfolio investments and the dispute settlement mechanism between investors and States fall under the shared competence of the Member

States and the EU, necessitates the conclusion of Agreements containing investment provisions by both the Member States and the EU.

Overall, the Opinion provided clarity on many contested areas between the Commission, the Council and the Member States. However, the real question is how the Opinion will affect the practice of EU trade policy making and whether EU-only comprehensive free trade agreements are in sight. Although the answer is political as much as legal, Opinion 2/15 opened a window of opportunity for future EU-only trade agreements. It may be possible for the EU to negotiate and conclude separate trade and investment agreements with third countries. Taking into account that until recently, the Member States negotiated separate BITs, this approach does not seem unfeasible. Such an approach also sounds sensible considering the ongoing efforts to establish a Multilateral Investment Court System and the request for an Opinion from the EU Court of Justice on the compatibility of ISDS with the EU law.

This policy option, supported by the Commission, could have important implications for the policy making process. The ratification of EU-only agreements involving the Council and the EP can allow the lengthy national ratification processes, which have recently proved to be more and more difficult, to be skipped. In addition, this may also have implications for the decision-making process in the Council by encouraging the use of qualified majority voting for trade agreements, though it might still be more feasible

politically to achieve consensus whenever possible.

Such an approach would not only strengthen the EU's policy-making effectiveness, but it would also increase the EU's predictability towards its trade partners. This process may have implications for the future of a number of trade agreements currently in the pipeline, including the Agreement that will shape the future of EU-UK relations.

Undoubtedly, the Commission will continue to push for EU-only trade agreements. The new Trade Package announced by the Commission is already a strong sign of this. During the announcement of the package, Commissioner Malmström expressed the leadership aspirations of the EU and the decisiveness of the Commission to make the best use of EU competences in the following words: "The world need leaders in trade. The EU continues to champion free and fair trade, at the forefront of a group of like-minded countries. Today's package of proposals shows this leadership in action." (European Commission, 2017).

The package includes a number of initiatives including draft mandates to open trade negotiations with Australia and New Zealand for an agreement which does not cover investment, a draft mandate to start negotiations towards the creation of a multilateral court, and a proposal to set up an Advisory Group on EU trade agreements (see European Commission, 2017).

The accompanying Communication further explains that the recommen-

dation to open negotiations with Australia and New Zealand includes issues "fully" covered by the CCP and expresses the Commission's readiness to discuss "the best architecture for EU trade and investment agreements" with the Council and the EP (European Commission, 2017).

In addition, President Jean-Claude Juncker emphasised the EP's role in the proposed package by indicating that "The European Parliament will have the final say on all trade agreements." (Juncker, 2017). However, this certainly requires a consensus between the EU institutions which may not be easy to achieve, especially in the face of increasing politicisation of trade policy throughout the EU and the spread of anti-globalisation movements across the Member States.

Indeed, initial discussions in the Council on the future architecture of EU Trade Agreements show signs of divergence (see Dreyer, 2017). It seems that the Member States would like to avoid "an uncontrollable spillover" (see Meunier & Nicolaïdis, 1999, p.496); rather, there are requests to make decisions on a case-by-case basis. This indicates Member States' longstanding dilemma between the desire to equip the EU with the necessary powers to preserve and even strengthen its leverage in international trade and the Member States' willingness to retain control over the policy-making process.

Regarding the EP on the other hand, it seems that, in general, it will support the Commission's efforts to put EU-only trade agreements in place, while requesting stronger commitments on

sustainable development and greater transparency. Furthermore, the fact that the EP substitutes national parliaments in the ratification process of EU-only trade agreements can be expected to ultimately escalate requests for an increased role for the EP in the initiation and negotiation process of trade agreements.

### **8. Conclusion: Has the time come for EU-only comprehensive trade agreements?**

The EU is once again at a junction in the history of the CCP. The request for an Opinion of the Court of Justice triggered the very beginning of a process which would further mold and shape the CCP and the EU Trade Policy. As history repeats itself, this process coincides with the start of the debate over the future of the EU itself. The White Paper on the Future of Europe envisaged three scenarios for the future of the EU Trade Policy, among which are the EU-27 pursuing progressive trade agreements (Scenario 1-2), the EU struggling to conclude trade agreements (Scenario 3) and trade exclusively dealt with at EU level (Scenario 4-5) (European Commission, 2017). The White Paper does not, however, mention that it may not be easy to draw the line between Scenarios 1-2 and 3.

For the time being, Opinion 2/15 provides a legal background on the division of competences for areas covered by trade agreements, and

has opened a window of opportunity for future EU-only trade agreements. However, the answer is, in reality, much more complicated, and the new gear of EU Trade Policy depends on the political machinery of the Union. In turn, this process seems likely to have an impact on, and to be affected by, the debate on the future of the EU.

Despite these challenges, while looking for an answer, an important point worth taking into account is that raised by the Advocate General during the hearing of Opinion 2/15: "Given the extensive scope of EU exclusive powers under the CCP, could a single member state veto the entire agreement?" (Kleimann & Kübek, 2016).

Though the Advocate General raised this issue at the end of her opinion, the Court did not provide an answer through Opinion 2/15. What, then, may be the consequences of a rejection of a trade agreement by one Member State? Would it mean blocking the ratification of the entire Agreement or would it open the door for an à la carte application of EU FTAs?

Overall, the upcoming consensus among the EU institutions will show if the EU is able to walk away from the increasing complexities posed by mixed agreements and whether the scope of the CCP will be able to catch up with the EU Trade Policy, or if it will fall short of it in the face of a changing global trade environment.

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