OPINION 3/15 ON THE MARRAKESH TREATY: THE ECJ REAFFIRMS 'MINIMUM HARMONISATION' EXCEPTION TO ERTA PRINCIPLE. NOTE UNDER OPINION 3/15 ('MARRAKESH TREATY')

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ABSTRACT: This case note examines the Opinion issued on 14 February 2017 by the Grand Chamber of the European Court of Justice on the nature of the competence of the European Union to conclude the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind. The case note first presents the arguments of the parties involved in the proceedings and subsequently summarises the opinions of AG Wahl and the Grand Chamber. In the commentary section, the case note examines the Court's treatment of the 'minimum harmonisation' exception. It argues that, despite the Court's embrace of a broad reading of the ERTA doctrine, the exception remains good law; it thus allows the Member States to incur international legal commitments, provided that both pre-existing common EU rules and the proposed international legal commitments establish minimum requirements. Other interesting aspects of the ruling - in particular the Court's treatment of the Commission's first line of argument related to the common commercial policy - are not discussed in this case note, and are left to another occasion.

KEYWORDS: EU external relations law, EU constitutional law, EU treaty-making, Marrakesh Treaty, exclusive competence of the EU, common commercial policy, minimum harmonisation.

SUMMARY: I. Introduction II. The arguments of the parties III. The opinion of AG Wahl IV. The opinion of the Grand Chamber V. Commentary: the 'minimum harmonisation' exception remains good law.

DICTAMEN 3/15 SOBRE EL TRATADO DE MARRAKECH: EL TJUE CONFIRMA LA EXCEPCIÓN DE LA "ARMONIZACIÓN MÍNIMA" AL PRINCIPIO AETR. COMENTARIO SOBRE EL DICTAMEN 3/15 (TRATADO DE MARRAKESH)

RESUMEN: En este comentario se analiza el Dictamen emitido por la Gran Sala del Tribunal de Justicia de la UE, el 14 de febrero de 2017, sobre la competencia de la UE para celebrar el Tratado de Marrakech para facilitar el acceso a las obras publicadas a las personas ciegas, con discapacidad visual o con otras dificultades para acceder al texto impreso. En primer término, se

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presentan los argumentos de las partes que intervinieron en el procedimiento y, a continuación, se resumen tanto las conclusiones del Abogado General Wahl como el pronunciamiento de la Gran Sala. En la sección de análisis, el comentario se centra en el tratamiento dispensado por el Tribunal a la excepción de "armonización mínima". Se constata cómo, pese a decantarse por una interpretación amplia de la doctrina AETR, el Tribunal confirma la vigencia de esta excepción que permite a los Estados miembros asumir compromisos internacionales siempre que, tanto estos, como las normas ya existentes en ese campo en el ordenamiento jurídico de la Unión, establezcan requerimientos mínimos. Otros aspectos interesantes del Dictamen, como la reacción del Tribunal frente a la línea argumental de la Comisión en relación con la política comercial común, no son objeto de análisis en este comentario.

PALABRAS CLAVE: relaciones exteriores de la UE, Derecho constitucional de la UE, capacidad de la UE para celebrar tratados internacionales, Acuerdo de Marrakesh, competencia exclusiva de la UE, política comercial común, armonización mínima.

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I. INTRODUCTION

On Valentine's Day 2017, the Grand Chamber of the European Court of Justice (ECJ) issued Opinion 3/15 on the division of competences between the EU and its Member States to conclude the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind.[1]

Worldwide, 285 million people are visually impaired.[2] Only five percent of all publications published annually are made available and accessible to visually impaired people, leading the World Blind Union to speak of a 'book famine.'[3] The Marrakesh Treaty aims to resolve this famine, first, by requiring parties to the agreement to provide for exceptions and limitations to copyright laws which would stimulate the production of copies of published works adapted to the needs of visually impaired people and, second, by providing for rules that aim at facilitating the cross-border exchange of such works. By doing so, more visually impaired people in a greater number of countries would get access to books. This, in turn, would increase their autonomy and contribute to their integration into the wider society. The World Blind Union has praised the Treaty as

[1] The text of the treaty can be found here: http://www.wipo.int/treaties/en/ip/marrakesh/ <accessed 2 April 2017>.

[2] In this sense, see Fact Sheet Nr 282, available at http://www.who.int/mediacentre/factsheets/fs282/en/ <accessed 24 March 2017>. In what follows, the term 'visual impairment' will be used to refer both to blindness and to limited visual abilities.

[3] See e.g. http://www.worldblindunion.org/English/our-work/our-priorities/Pages/On-Track-For-A-Book-Without-Borders.aspx <accessed 20 March 2017>.

perhaps the most important step towards integrating visually impaired individuals into society since the invention of Braille.

A final text was adopted on 27 June 2013 during a diplomatic conference in the city of Marrakesh. The European Commission participated in the negotiations on behalf of the European Union, after being authorised to do so by a Council decision of 26 November 2012.[4] The ratification process has taken quite some time. Three years after the adoption of the text, on 30 June 2016, Canada was the twentieth country to ratify the agreement, allowing it to come into force on 20 September 2016.

By a decision of 14 April 2014, the Council authorised the signing of the agreement on behalf of the EU.[5] The decision was adopted based on Articles 114 TFEU (internal market) and 207 TFEU (common commercial policy). On 21 October of the same year, the Commission submitted to the Council a proposal to conclude the agreement.[6] The proposal relied on the same substantive legal bases as the Council decision adopted a few months earlier, i.e. a combination of Articles 114 and 207 TFEU.

The Commission defended this choice for a double legal basis on two grounds. First, it considered by that 'the cross-border exchange of accessible-format copies with third countries is a predominant element of the Treaty, therefore its relevant articles fall under the common commercial policy (Article 207 TFEU).' Second, it held that 'the articles of the Treaty on mandatory exceptions or limitations fall within the scope of EU law, affect or alter the scope of the common rules, namely those in Directive 2001/29/EC and in any event are within an area which is already largely covered by EU rules (Article 114 TFEU).'[7]

In terms of decision-making procedures, the Commission proposal thus envisaged a procedure in which parliamentary consent would be required and the Council could adopt the decision by means of a qualified majority vote. Furthermore, by calling for a combination of *a priori* exclusivity based on Article 207 TFEU and an ERTA effect (cf. the reference to 'affect or alter the scope of the common rules), the Commission envisaged

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[4] Council Decision on the participation of the European Union in negotiations for an international agreement within the World Intellectual Property Organisation on improved access to books for print impaired persons; 16259/12 EU RESTRICTED.

[5] Council Decision of 14 April 2014 on the signing, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled (2014/221/EU), OJ L 115, 17.4.2014, p. 1-2.

[6] Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled, COM/2014/0638 final.

[7] See the explanatory memorandum attached to the Proposal referred to in footnote 6.

the agreement as an EU-only agreement, to be adopted on the basis of the EU's exclusive competences.

In contrast to the decision to sign the agreement, the proposal to conclude the agreement faced stiff opposition within the Council from several Member States, with Germany and Italy allegedly acting as driving forces behind efforts at garnering sufficient support to form a blocking minority.[8]

Presumably in an effort to break Member State resistance, on 11 August 2015 the Commission requested the ECJ to issue an opinion on the issue of the nature of the competence of the EU to conclude the Marrakesh Treaty.[9] The request to issue an opinion was in itself remarkable, as the legal services of all three EU institutions - not only those of the Commission and European Parliament, but also the legal service of the Council - according to one source agreed that the Marrakesh Treaty fell within the scope of the EU's exclusive competences.[10] Interestingly, and with hindsight perhaps unfortunately, as will become clear below, the Commission did not request the Court to determine the appropriate legal basis or bases for the agreement.

During the course of the proceedings before the ECJ, the dead-lock within the Council did not get resolved, leading the European Parliament in its session of 3 February 2016 to issue a resolution in which it '[n]ote[d] with profound indignation that seven EU Member States have formed a minority block which is impeding the process of ratifying the Treaty' and 'call[ed] on the Council and the Member States to accelerate the ratification process, without making ratification conditional upon revision of the EU legal framework or the decision of the Court of Justice of the European Union.'[11]

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[8] In this sense, see Intellectual Property Watch, 'Brief: Germany, Italy Leading Resistance To EU Ratification Of Marrakesh Treaty, Blind Union Says', 10 December 2015, available at https://www.ip-watch.org/2015/12/10/germany-italy-leading-resistance-to-eu-ratification-of-marrakesh-treaty-blind-union-says/ <accessed 20 March 2017>.

[9] See the answer by Commissioner Oettinger to a question asked by MEP Marc Tarabella, where the Commissioner referred to the disagreement on the nature of the EU's competence as the main reason behind the deadlock within the Council (E-005801/2016, available at http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2016-005801&language=EN <accessed 20 march 2017>.

[10] In this sense, see a blog post by MEP Indrek Tarland, where he held that '[s]urprisingly enough, every lawyer involved in the dispute over competences both at the Commission and at the Council agree that this treaty falls under exclusive European Union competence. Let me repeat: the lawyers agreed.' (available at http://eptoday.com/the-marrakesh-treaty-for-the-blind-a-call-for-action/ <accessed 21 March 2017>).

[11] European Parliament resolution of 3 February 2016 on the ratification of the Marrakesh Treaty, based on petitions received, notably Petition 924/2011 (2016/2542(RSP)), available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0037&language=EN&ring=B8-2016-0168 <accessed 20 March 2017>.

On 8 September 2016, Advocate General Wahl delivered his opinion. The opinion of the Court was issued on Valentine's Day 2017, i.e. nearly five months after the coming into force of the agreement. At the time of writing, the EU has not yet concluded the Treaty.

This case note first presents the arguments of the parties involved in the proceedings - in which the Council did not actively intervene - and subsequently summarises the opinions of AG Wahl and the Grand Chamber. In doing so, it sets out the legal arguments advanced by the different parties and draws attention to the political dynamics at play. In the commentary section, the case note examines the Court's treatment of the 'minimum harmonisation' exception. It argues that, despite the Court's embrace of a broad reading of the ERTA doctrine, the exception remains good law; it thus allows the Member States to incur international legal commitments, provided that both pre-existing common EU rules and the proposed international legal commitments establish minimum requirements. Other interesting aspects of the ruling - in particular the Court's treatment of the Commission's first line of argument related to the common commercial policy - are not discussed in this case note, and are left to another occasion.

II. THE ARGUMENTS OF THE PARTIES

The Commission's arguments in favour of exclusivity

The Commission argued (together with the Parliament and the Lithuanian government) that the Marrakesh Treaty fell within the scope of the exclusive competences of the EU. It presented to the Court two alternative lines of argument, one focussed on bringing the Marrakesh Treaty within the scope of the EU's exclusive competence to conduct a common commercial policy as provided for in Article 207 TFEU *iuncto* Article 3(1) TFEU, the other focussed on convincing the Court that the Marrakesh Treaty has been covered by an ERTA effect, in the sense that the EU has acquired an exclusive external competence to conclude the Marrakesh Treaty because the conclusion of the international agreement 'may affect common rules or alter their scope' in the meaning of Article 3(2) *in fine* TFEU.

The Commission first aimed to fit the Marrakesh Treaty within the definition of the CCP as articulated by the ECJ in its *Daiichi Sankyo* judgment, where it had held that 'a European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade

and has direct and immediate effects on trade.'[12] In the Commission's view, the Marrakesh Treaty intends to do exactly that, i.e. to facilitate, by harmonising the legal regime covering the production and exchange of accessible format copies of published works, the cross-border exchange of such copies. The fact that the accessible format copies are produced and exchanged on a non-profit basis did not affect this conclusion, the Commission held, as Article 207 TFEU also applies when goods or services are supplied on a non-profit basis. Similarly, the fact that the 'ultimate objective' of the Treaty is of a social or humanitarian nature did not undermine its argument, the Commission contended, as the Court has held in the past that the presence of non-trade related specific objectives does not stand in the way of characterising a measure as falling within the scope of the CCP.

Regarding the ERTA principle, the Commission argued that because copyright and related rights have been harmonised at EU level by Directive 2001/29, the area covered by the Marrakesh Treaty is covered by an ERTA effect, which means that Member States are precluded as a matter of EU law from becoming a party to the agreement. Central to the Commission's argument was the point that the exceptions and limitations provided by the Marrakesh Treaty ought to be understood as authorisations by EU law for the Member States to provide such exceptions or limitations. In doing so, the Commission argued, the Member States acted on the basis of EU law, not on the basis of a form of 'retained' competence.

The Member States' arguments against exclusivity

The Member States - in particular the Czech Republic, France, Italy, Hungary, Romania, Finland and the United Kingdom - contested both the CCP and the ERTA arguments advanced by the Commission, and instead were of the view that the Marrakesh Treaty at least in part fell outside of the scope of the EU's exclusive powers. This view implied that the agreement ought to be adopted in the form of a mixed agreement, as the EU would lack sufficient competence to conclude the agreement in its entirety.

Regarding the CCP argument, the Member State governments contended that the Marrakesh Treaty had neither as its subject matter nor as its purpose the liberalisation or promotion of international trade in the meaning of the *Daiichi Sankyo* judgment. As for the purpose, most governments agreed that the agreement aimed to 'promote equal opportunities and social inclusion for persons with disabilities.' The French government

[12] Judgment in *Daiichi Sankyo*, C-414/11, EU:C:2013:520, para. 51.

added that the Treaty could also be understood as having a development aim: by facilitating the production and cross-border exchange of accessible format copies, the Treaty contributes to the development of the nations in which the 'book famine' is most acute, it argued. As for the content of the agreement, most Member States argued that the exchanges covered by the Treaty are non-commercial and thus fall outside of the scope of the CCP, precisely because they take place in the framework of several exceptions and limitations to the ordinary commercial publication and exchange of published works.

Regarding the ERTA argument, the Member States adopted a 'retail' as opposed to a 'wholesale' approach, whereby they argued that individual provisions of the Marrakesh Treaty are not covered by an ERTA effect. They justified this approach with a reference to language used by the ECJ e.g. in Opinion 1/03, where it held that the ERTA analysis must be grounded in a 'comprehensive and detailed' analysis of the agreement and EU law.

This provision-specific approach led several Member State governments to consider that the provisions requiring the Member States to provide for exceptions and limitations to copyright rights ought to be understood as forms of 'retained' Member State competence not affected by an ERTA effect. This would be the case, they argued, because internal EU legislation - particularly Directive 2001/29 - did not regulate the introduction of such exceptions and limitations; it merely provided for the possibility for Member States to introduce such exceptions and limitations, they argued. In this sense, these Member States understood EU law as having provided for a form of 'minimum harmonisation', whereby the Member States could 'go further' than EU law had ventured to go, in this case by rendering the provision of exceptions and limitations to copyright rights obligatory rather than voluntary.

Other provision-specific arguments were advanced, the most notable being the one by the United Kingdom government, which went as far as to suggest that no ERTA effect had arisen as no inconsistencies exist between the Marrakesh Treaty and existing EU law. Clearly, amongst all the parties before the Court the UK government defended the narrowest reading of the ERTA doctrine.

III. THE OPINION OF AG WAHL

Advocate General Wahl advised the Court to recognise the exclusive nature of the competence of the EU to conclude the Marrakesh agreement. As will become clear when comparing the AG's reasoning to that of the Court, the AG and the Court nonetheless took different paths to reach the same conclusion. Furthermore, as will become clear, the AG's opinion contains some elements which, certainly if followed by the Court but

arguably also if left unaddressed by the Court, would make the Commission's victory bittersweet.

In methodological terms, the AG distinguished clearly between the *existence* of competence and its *nature*. He held:

> In its request, the only matter on which the Commission seeks the opinion of the Court is whether the European Union has exclusive competence to conclude the Marrakesh Treaty … However, to answer that question, it is necessary to identify the correct substantive legal basis (or bases) for the decision at issue. In the system created by the EU treaties, which is based on the principle of conferral, the choice of the correct legal basis for a proposed act by the institutions is of constitutional significance. That choice determines whether the Union has the power to act, for what purposes it may act and the procedure that it will have to follow in the event that it may act.13

This led the AG to engage in an assessment of the different specific substantive legal bases proposed by the parties in the proceedings, in particular Article 207 TFEU (common commercial policy), Article 19(1) TFEU (non-discrimination), Article 114 TFEU (internal market), Article 153 TFEU (social policy) and Article 209 TFEU (development policy). After advising the ECJ to identify Articles 207 and 19(1) TFEU as the appropriate legal bases for the decision to conclude the Marrakesh Treaty, in a second part of his opinion the AG examined whether the EU's competence to do so is exclusive in nature. Here, the AG advised the Court to recognise an ERTA effect for those aspects of the Treaty not covered by Article 207 TFEU - a competence which by its very nature is exclusive in kind.

The existence of competence

As will become clear below, the AG and the Court had different views on whether the Marrakesh Treaty ought to be understood as an international agreement falling within the scope of the EU's common commercial policy. For AG Wahl, the agreement was both in terms of its objective and its content specifically related to international trade, and ought thus at least in part to be concluded on the basis of Article 207 TFEU. He argued:

> [F]ar from merely having limited implications for international trade, a large and important component of the Marrakesh Treaty is specifically related thereto. Its provisions are intended to promote, facilitate and govern trade in a specific type of

[13] Opinion of AG Wahl, paras 30-31.

> goods: accessible format copies. In the overall scheme of the Marrakesh Treaty, the opening-up of national markets to accessible format copies from other countries is one of the key means of achieving the objectives pursued by the Contracting Parties.[14]

Some Member State governments had argued before the Court that the content of the Marrakesh Treaty is specifically of a non-commercial in nature, and that the Treaty ought to be understood therefore as falling outside of the scope of the common commercial policy.[15] The AG disagreed with this position and emphasised that the TRIPS agreement itself contained rules on services or goods supplied for non-commercial use - a fact that did not prevent the Court from characterising the entire TRIPS agreement as falling within the scope of the CCP in *Daiichi Sankyo*.[16]

Despite the AG's strong defence of Article 207 TFEU as an appropriate legal basis on which to conclude the Marrakesh Treaty, and despite his acknowledgement at the outset of his analysis that 'the interpreter should strive to identify, where possible, only one or, failing that, the absolute minimum number of legal bases'[17] - an acknowledgement he, moreover, considered 'particularly true for international agreements which cover a specific area and tend to have a single, clearly defined objective'[18] - he nonetheless considered Article 207 TFEU not to be sufficient. Cryptically and rather ambiguously, the AG held that 'the trade-related objectives in the Marrakesh Treaty serve a purpose of a different nature', which is why he took the view that Article 207 TFEU cannot be the sole basis of the decision at issue.[19]

Article 19(1) TFEU provides that

> [w]ithout prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

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[14] Opinion of AG Wahl, para. 48.

[15] See their submission as summarised in the opinion of the Court, at paras 45-46.

[16] Opinion of AG Wahl, para. 54.

[17] Ibid, para. 34.

[18] Ibid, para. 35.

[19] Ibid, para. 76.

The Marrakesh Treaty, the AG argued, also pursues one of the aims referred to in this provision, particularly the aim of combatting discrimination based on disability.[20] Furthermore, he considered that the Treaty's content also has an important anti-discrimination content.[21] It followed that Article 19(1) TFEU also ought to be included as a legal basis for the conclusion of the Marrakesh Treaty.

The other legal bases were not required, the AG held. Article 114 TFEU failed to qualify because no party had shown that there are significant disparities between the national laws of the Member States on the aspects of copyright related to the Marrakesh Treaty.[22] Article 153 TFEU failed to qualify because the elements of social policy which the AG accepted were present in the Marrakesh Treaty nonetheless did not play a central role. A similar argument the AG advanced regarding Article 209 TFEU where he considered that a possible development policy objective is 'purely ancillary, or at least secondary to the other objectives' of the Treaty.[23]

As the AG considered that the decision to conclude the Marrakesh Treaty ought to be adopted on the basis of two legal bases - Articles 207 and 19(1) TFEU - the question arose of the compatibility of the decision-making procedures provided for in both provisions. International agreements adopted based on Article 19(1) TFEU require parliamentary consent and unanimity in the Council. Agreements based on Article 207 TFEU, by contrast, require parliamentary consent and a qualified majority in the Council to be adopted. With a reference to the *International Fund for Ireland* and *European Agricultural Guidance and Guarantee Fund* cases[24], AG Wahl regarded these procedures as compatible, resulting as they would in a requirement of parliamentary consent coupled with unanimous approval in the Council. The AG accordingly advised the Court to recognise both provisions as the required substantive legal bases on which to conclude the Marrakesh Treaty.

The nature of competence

After sketching out the theory behind the ERTA doctrine, AG Wahl applied the doctrine to the Marrakesh Treaty. He advised the Court to recognise an ERTA effect. In

[20] Ibid, para. 80.

[21] Ibid, para. 83.

[22] Ibid, para. 92.

[23] Ibid, para. 108.

[24] Judgment in *Parliament v Council ('International Fund for Ireland')*, C-166/07, EU:C:2009:499 and Judgment in *Commission v Council ('European Agricultural Guidance and Guarantee Fund')*, C-338/01, EU:C:2004:253.

support of this conclusion, the AG relied on the precedent established in the *Neighbouring Rights* case.[25] In this case, he held,

> the Court observed that, as regards the international agreement in question in that case [i.e. the Convention of the Council of Europe on the protection of the rights of broadcasting organisations], the elements concerning, inter alia, the limitations and exceptions to the rights related to copyright were covered by common EU rules, and that the negotiations on those elements were capable of affecting or altering the scope of those common rules.[26]

AG Wahl did not see any reason why that conclusion would not be warranted in the present case.

By relying on the precedent set in *Neighbouring Rights*, it was not necessary for the AG to respond to all of the arguments made by the Member States against recognising an ERTA effect, in particular the arguments that relied on the premise that an ERTA analysis requires the Court to engage in a provision-specific inquiry. Contra this premise, the AG reiterated that it is sufficient for an 'area' to be 'largely covered' by common rules, and that *a contrario* no complete harmonisation is necessary for an ERTA effect to occur.[27]

Relevant, in this regard, is that the AG did not engage with the 'minimum harmonisation' argument advanced by a number of Member States. As will be seen below, the Court did consider it necessary to address this issue. By refusing to engage with the matter, the AG gave the impression that in his view the minimum harmonisation exception to the ERTA effect was no longer good law.

In the remainder of his opinion, the AG limited himself to rebutting specific arguments, as e.g. the argument advanced by the UK government according to which no ERTA effect had occurred as no inconsistencies exist between the Marrakesh Treaty and existing EU law. On this issue, the AG reminded the UK that '[a]s the Court has repeatedly held, EU rules may be affected by international commitments even if there is no possible contradiction between those commitments and the EU rules.'[28]

In summary, then, AG Wahl did advise the Court to recognise the exclusive nature of the EU's competence to conclude the Marrakesh Treaty. This would imply that the

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[25] Judgment in *Commission v Council ('Neighbouring Rights')*, C-114/12, EU:C:2014:2151.

[26] Opinion of AG Wahl, para. 142.

[27] Ibid, para. 140.

[28] Ibid, para. 149.

agreement could not be concluded as a mixed agreement. However, at the same time, firstly by advising the Court to first address the issue of the choice of legal basis, and secondly by advising the Court to identify not only Article 207 TFEU, but also Article 19(1) TFEU (and not Article 114 TFEU, as the Commission had argued), the AG did recommend to the Court a scenario in which unanimity within the Council would remain required. If retained, this arrangement would hand the Commission a bittersweet victory: the agreement would be adopted as an EU-only agreement, but the Member States would retain a veto power within the Council. Consequently, the deadlock amongst the Member States that has thus prevented the EU from concluding the Marrakesh Treaty would not be resolved.

IV. THE OPINION OF THE GRAND CHAMBER

In contrast to AG Wahl, who had argued that an analysis of the nature of EU competence first requires the Court to address the issue of the choice of legal basis, the Grand Chamber immediately turned to the issue of the nature of the competence of the EU to conclude the agreement. The Court first ruled that the EU did not have an *a priori* exclusive competence to conclude the Marrakesh Treaty, as the agreement did not fall within the scope of the EU's competence to conduct a common commercial policy. By ruling in this sense, the Court thus arrived at a different conclusion than did its AG. In a second part of its opinion, the Court concluded in favour of an ERTA effect.

As mentioned, unlike the AG, the Court did not address the issue of the choice of legal basis in a systematic manner. By rejecting the characterisation of the Marrakesh Treaty as an agreement falling within the scope of the CCP, the Court did rule out the possibility of adopting the decision to conclude the agreement on the basis of Article 207 TFEU. Beyond that, however, the Court did not clarify on which legal basis or bases the agreement ought to be concluded. This implies that, unless the ECJ is seized for a second time, the political process - i.e. the Council - will for all intents and purposes have the last word on the choice of legal basis issue. On a speculative note, we can assume this legal basis to provide for decision-making by unanimity, e.g. through an inclusion of Article 19(1) TFEU as recommended by the AG.

No a *priori* exclusive competence

AG Wahl characterised the Marrakesh Treaty as an agreement that specifically relates to international trade and thus falls within the scope of the EU's competence to conduct a common commercial policy. The Grand Chamber disagreed, and instead determined that

neither the purpose nor the content of the Marrakesh Treaty support the proposition that the agreement falls within the scope of the CCP.

Regarding the agreement's purpose, the ECJ held that 'the Marrakesh Treaty is, in essence, intended to improve the position of beneficiary persons by facilitating their access to published works, through various means, including the easier circulation of accessible format copies.'[29] Methodologically speaking, in reaching this conclusion the Court relied on the title of the agreement, the recitals in the preamble and the provisions of the agreement. The Court did not appear to venture beyond the contours of the text of the agreement, e.g. by considering also the broader context in which the agreement came into being. In doing so, the Court here seemed to endorse AG Wahl's view that in determining the objective of an agreement for the purpose of ascertaining whether an agreement falls within the competence of the EU to conduct a common commercial policy, 'what really matters are the aim and content of the agreement, as they emerge from its wording.'[30]

Also in assessing the content of the agreement the ECJ limited its analysis to the text of the agreement itself. Here, the Court examined separately the rules on the exceptions and limitations to the rights of reproduction, distribution and making available to the public on the one hand, and the obligations relating to the cross-border exchange of accessible format copies on the other.

Regarding the former, the Court acknowledged that similar rules on conditional access to works protected by copyright rules have in the past been characterised as having a specific link with international trade. However, the different, non-commercial purpose of the Marrakesh Treaty distinguishes these previous cases from the rules at issue in the present case, the Court held.

With regard to the latter, the Court took a similar, purpose-focussed approach and argued that in assessing the content of the rules governing the import and export of accessible format copies, 'the objective of such rules must be taken into consideration for the purpose of assessing their connection with the common commercial policy.'[31] As the Marrakesh Treaty has a non-commercial purpose, the contested articles cannot be understood as being 'specifically intended to promote, facilitate or govern international trade in accessible format copies, but are rather intended to improve the position of

[29] Opinion 3/15, para. 70.

[30] Opinion of AG Wahl, para. 64.

[31] Opinion 3/15, para. 88.

beneficiary persons by facilitating such persons' access to accessible format copies reproduced in other Contracting Parties', the Court held.[32]

The Court further grounded this conclusion in an analysis of the specific characteristics of the of the rules on cross-border exchange of accessible format copies. The Court pointed *inter alia* to the fact that exchanges would take place between authorised entities, that these entities act on a non-profit basis, that only imports intended for beneficiary persons are covered by the Treaty provisions, and that only copies that have been made under a limitation or exception provided for in the Marrakesh Treaty fall within the scope of the rules on cross-border exchange.[33]

As neither the purpose of the Marrakesh Treaty nor its content specifically relate to international trade, the Court concluded that the agreement falls outside of the scope of the common commercial policy. Consequently, Article 207 TFEU could not be withheld as a substantive legal basis for adopting the decision to conclude the Marrakesh Treaty. This holding immediately raises the question: which legal bases do qualify for adopting the decision? The Court does not address this question.

An ERTA effect

If the Marrakesh Treaty does not fall within the scope of the EU's *a priori* exclusive competence, the ERTA principle comes to the forefront as an alternative avenue through which an exclusive EU competence can come into being. On ERTA, the Court did follow the Commission by concluding that the Marrakesh Treaty was covered by an ERTA effect and therefore fell within the scope of the EU's exclusive competence.

In reaching this conclusion, the Court followed the AG's line of argument by relying on the precedent established in *Neighbouring Rights*. Both the exceptions and limitations and the rules governing the cross-border exchange of accessible format copies fell within a field harmonised by Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.[34] Consequently, the Marrakesh Treaty ought to be understood as falling within the scope of an 'area already largely covered to a large extent by common EU rules, in the meaning of previous ERTA cases

[32] Opinion 3/15, para. 89.

[33] Opinion 3/15, paras 91-96.

[34] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ* L 167/10 of 22.06.2001; Opinion 3/15, para. 112.

such as *Neighbouring Rights*, Opinion 1/13 on the Convention on the civil aspects of international child abduction and Opinion 1/03 on the Lugano II Convention.[35]

As the entire Marrakesh Treaty falls within an 'area largely covered', the EU possesses an exclusive competence to conclude the Treaty. Contrary to the submission by the UK government, no inconsistencies between the Treaty and existing EU law are required, the Court clarified once again.[36]

Particularly interesting, and to be discussed further below, is the Court's rebuttal of the argument advanced by a number of Member States that the exceptions and limitations ought to be understood as a form of 'minimum harmonisation', and that therefore with regard to these provisions no ERTA effect had occurred. AG Wahl did not consider it necessary to engage with this argument: as the 'area was largely covered', it was not necessary to engage with provision-specific arguments as the one based on the 'minimum harmonisation' exception, he seemed to suggest. The Court disagreed, and in doing so confirms that the 'minimum harmonisation' exception remains good law, even if the relevant area is largely covered by common EU rules.

As suggested by the Commission, the Grand Chamber distinguished the 'minimum harmonisation' exception introduced in Opinion 2/91 from the exceptions and limitations provided for in Directive 2001/29. The Court held that the latter were authorisations provided for by EU law. This means that the Member States may provide exceptions to the rights established in the Directive, but in doing so must respect EU law, in particular the objective of the Directive and the conditions the Directive attaches to the adoption of limitation and exceptions.

This arrangement differs from the arrangement at issue in Opinion 2/91, the Court continued. In that opinion, the EU wished to conclude an agreement in an area within which the EU itself did not possess a competence to harmonise legislation fully; its competence was limited to setting out minimum requirements (see Article 118a EEC). By contrast, when enacting Directive 2001/29, the EU legislator had enacted a 'harmonised legal framework.'[37] In doing so, the EU legislator had authorised the Member States to provide certain limitations and exceptions. In short, in Opinion 2/91 the Member States acted on the basis of their own competence, whereas in Opinion 3/15 they acted as 'trustees' of the EU, charged with the responsibility of implementing EU law.

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[35] Opinion 3/15, para. 107.

[36] Opinion 3/15, para. 113.

[37] Opinion 3/15, para. 119.

In summary, the Grand Chamber thus, firstly, did not address the issue of the choice of legal basis, secondly, rejected the Commission and the AG's argument that the Marrakesh Treaty falls within the scope of the EU's exclusive competence to conduct a common commercial policy, and, thirdly, endorsed the Commission's alternative line of argument according to which the Marrakesh Treaty, if it falls outside of the scope of the CCP competence, is nonetheless covered by an ERTA effect, through which the EU has acquired an exclusive competence to conclude the Treaty. This implies that the Marrakesh Treaty will not be concluded as a mixed agreement. Fourthly, and finally, the Court rejected the Member States' argument that the Member States had 'retained' a competence, as the EU had only enacted a form of 'minimum harmonisation.'

As the Court did not determine the correct legal basis on which to conclude the Treaty, the question of whether decision-making within the Council ought to proceed by unanimity or qualified majority vote remained unanswered and will thus, most likely, be determined by the Council itself. In this sense, the Commission's victory is indeed bittersweet, as it appears likely that the Council, bolstered by AG Wahl's opinion, will opt to conclude the Marrakesh Treaty at least in part on the basis of Article 19(1) TFEU, which provides for unanimity within the Council. Mixity is thus off the table, but the deadlock within the Council remains unresolved.

V. COMMENTARY: THE 'MINIMUM HARMONISATION' EXCEPTION REMAINS GOOD LAW

The ECJ had introduced the 'minimum harmonisation' exception in Opinion 2/91, issued in 1993.[38] In a fashion reminiscent of its ruling in *Keck & Mithouard*, issued in the same year, where the ECJ in categorical fashion excluded 'certain selling arrangements' from the scope of application of the freedom of movement principles[39], the Court in Opinion 2/91 excluded from the scope of the ERTA principle those Member State international commitments which provided for a higher level of protection than the level provided for in pre-existing common EU rules, provided that both the common EU rules and the international agreement set a floor while allowing both the EU and the Member States to set higher standards.

The rationale of the exception was sensible: if the EU legislator itself authorises Member States to 'lift the bar' further, and if the proposed Member State international agreement in turn does not prevent the EU from lifting the bar further still, the Member

[38] Opinion 2/91 ('ILO Convention No 170'), EU:C:1993:106.

[39] Judgment in *Keck & Mithouard*, Joined Cases C-267/91 and C-268/91, EU:C:1993:905.

State international agreement would most likely not 'affect common rules or alter their scope' in the meaning of the ERTA principle.[40] In other words: the full effectiveness of EU law would not be at risk.[41]

The 'minimum harmonisation' exception was reaffirmed in Opinion 1/03 on the Lugano Convention, where a full court summarised the exception's rationale by stating that 'the Court did not find [in Opinion 2/91] that the Community had exclusive competence where, because both the Community provisions and those of an international convention laid down minimum standards, there was nothing to prevent the full application of Community law by the Member States.'[42]

In the 2014 *Neighbouring Rights* case, AG Sharpston returned to the 'minimum harmonisation' exception.[43] At issue in that case was the nature of the competence of the EU to negotiate and conclude a Council of Europe Convention on the protection of the rights of broadcasting organisations. The Commission considered the agreement covered by an ERTA effect because the proposed international agreement would fall within the scope of the acquis in the area of broadcasting rights.[44]

The Council and a number of Member States disagreed with the Commission. They contested the Commission's 'wholesale' approach under which it would suffice for an area to be 'largely covered' for an ERTA effect to be triggered. In the Member States and the Council's view, 'a conclusion [in favour of an ERTA effect] may be reached only after a precise and specific analysis of the nature and content of the EU rules concerned and of the relationship between those rules and the envisaged agreement which shows that

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[40] DE BAERE, G., "EU External Action" in BARNARD, C. and PEERS, S., *European Union Law*, Oxford, Oxford University Press, 2014, p. 721. This approach fitted well with the formal recognition at Maastricht of different categories of EU competence, allowing the EU to act, but with different degrees of intensity. Thus, the Maastricht Treaty introduced the notion of 'minimum harmonisation', according to which the EU would be empowered to set a common floor, for example in the sphere of environmental protection or labour standards, but whereby the Member States remained able to adopt higher standards. On the significance of 'minimum harmonisation' in the European integration process more generally, see DOUGAN, M., "Minimum Harmonization and the Internal Market" *Common Market Law Review*, n° 37, 2000, pp. 856-863.

[41] On full effectiveness or *effet utile* as the rationale of ERTA, see CREMONA, M., "EU External Relations: Unity and Conferral of Powers" in AZOULAI, L., *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, p. 68: '[T]he approach to both express and implied competence was based on conceptions of effectiveness and unity...'

[42] Opinion 1/03 ('Lugano Convention'), EU:C:2006:81, para. 123.

[43] Opinion of AG Sharpston in *Commission v Council ('Neighbouring Rights')*, C-114/12, EU:C:2014:224.

[44] Judgment in *Commission v Council ('Neighbouring Rights')*, C-114/12, EU:C:2014:2151, para. 45.

that agreement is capable of affecting those rules or of altering their scope.'[45] Against the Commission's wholesale approach, the Member States and the Council thus advanced a 'retail' approach aimed at determining whether or not specific provisions and rules are covered by an ERTA effect.

Following up on a suggestion in this sense by Poland and the United Kingdom, Advocate General Sharpston advanced the argument that with regard to the retransmission of broadcasting signals the EU legislator had only provided for minimum standards. She argued in particular that the legislator had provided for a right of retransmission only with regard to retransmission by *wired* means; retransmission by *wireless* means was not covered.

It followed, the AG suggested, that the Member States had retained a competence to provide for a higher level of protection by extending the scope of the right to retransmission to retransmission by wireless means. Consequently, the inclusion of such a right in the proposed international agreement was not liable to affect the common EU rules on the right to retransmission.

The AG's understanding of the 'minimum harmonisation' exception fitted well with her broader approach to applying the ERTA principle, which aligned more closely to the retail approach advocated by the Council and Member States. By engaging in an analysis at the level of the specific rules most likely to be included in the agreement, the AG put a high value on protecting the limits of the EU's competences.

The ECJ rejected the retail reading of the ERTA doctrine. Instead of engaging in the type of 'precise and specific' analysis advocated for by the Council and the Member States and endorsed by AG Sharpston, the ECJ opted for the wholesale approach supported by the Commission. As many elements of the proposed agreement were already covered by common EU rules, the ECJ concluded that the proposed convention was covered by an ERTA effect.[46]

On the issue of minimum harmonisation, the ECJ did not follow the AG. The Court distinguished *Neighbouring Rights* from Opinion 2/91 by repeating that in that opinion the EU did not have exclusive competence because both the provisions of EU law and those of the international convention in question laid down minimum requirements. This was not the case in *Neighbouring Rights*, as the right to retransmission provided for in common EU rules had a precise material scope.[47]

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[45] Ibid, para. 50.

[46] Ibid, para 85.

[47] Ibid, para. 93.

The Court in *Neighbouring Rights* did not go as far as to overturn Opinion 2/91; the 'minimum harmonisation' exception remained good law. In particular, when both the common EU rules and the proposed international agreement - or part thereof - set out minimum standards, the presumption remained that the proposed agreement, or the relevant part of the agreement, will not affect common EU rules. In such an event, no ERTA effect will be triggered, and the EU does not acquire an exclusive competence. It is significant that this argument applies to parts of agreements, even if the agreement as a whole is 'largely covered' by common EU rules. In this sense, the 'minimum harmonisation' is a 'retail' exception to the 'wholesale' approach.

Despite the ECJ's rejection of the retail approach to ERTA analysis, and the rejection of the application of the 'minimum harmonisation' exception proposed by AG Sharpston in *Neighbouring Rights*, in Opinion 3/15 a number of Member States (but not the Council) advanced an argument similar in some respects to the one advanced in *Neighbouring Rights*.

In Opinion 3/15, as in *Neighbouring Rights*, the argument was made that the provision of exceptions to rights established in Directive 2001/29 ought to be regarded as minimum standards, as these exceptions left a degree of discretion to the Member States. The argument is similar to that by AG Sharpston in *Neighbouring Rights*, in the sense that in both instances the EU legislator was understood as excluding certain aspects from the scope of the rights provided by the common EU rules, the difference being that in *Neighbouring Rights* this exclusion was mandatory, while in Opinion 3/15 it was optional.

The Member States in Opinion 3/15 went further than the AG had gone in *Neighbouring Rights*, however, as they here argued that a permission to lower the level of protection provided for in common EU rules ought to be regarded as a minimum standard. The Member States here pushed the 'minimum harmonisation' exception beyond the limits of its own rationale. As mentioned, the objective of the exception as conceived in Opinion 2/91 was to allow for a 'lifting of the bar'; the level of protection already provided for by common EU rules would not be affected in the meaning of the ERTA principle if a proposed international agreement provides for a higher level of protection while allowing the EU legislator to 'lift the bar' further if it wishes to do so.

This rationale does not apply to the Member States' argument in Opinion 3/15. Directive 2001/29 does not set forth minimum standards. Rather, the permission to provide for exceptions to the rights established in the Directive authorises the Member States to lower the level of protection. If they make use of this possibility, a risk that a proposed international agreement affects the rights set out in Directive 2001/29 arises, and an ERTA effect is warranted.

Unsurprisingly, the ECJ was not persuaded by the Member States' reasoning. The Court again reaffirmed its initial understanding of the 'minimum harmonisation' exception by emphasising that both the provisions of EU law and those of the international convention must lay down minimum requirements for the exception to apply.[48] A permission to establish a lower level of protection does not fall within the scope of the exception.[49]

Opinion 3/15 fits within a broader trend in the ECJ's ERTA case law in the post-Lisbon era. After a period in which the ECJ interpreted the doctrine more narrowly - Opinion 1/94 on the nature of the EU's competence to conclude the WTO agreements being the clearest example[50] - in a string of recent cases the ECJ has returned to a broader reading of the doctrine (see in particular *Neighbouring Rights*, Opinion 1/13[51] and *Green Network*[52]). Having revived the 'area largely covered' test, the ECJ adopts a wholesale approach to its ERTA analysis in which it seeks to determine whether the scope of a proposed international agreement overlaps with the scope of the pre-existing acquis. In doing so, the Court generally does not descend to the retail level; it searches neither for concrete obstacles to the full effectiveness of particular EU rules, nor for actual contradictions between those rules and the terms of a proposed international agreement.

The Court's rejection of the Member States' second attempt at advancing an overly broad reading of the 'minimum harmonisation' exception in Opinion 3/15 fits within this broader tendency to read broadly the scope of the ERTA principle. It does so in the sense that while maintaining the 'retail' exception introduced in Opinion 2/91, the Court is careful to avoid the exception from expanding. By preventing the Member States (or the Council) from transforming the 'minimum harmonisation' exception into a more broadly framed 'retained powers' exception, the Court indirectly protects the integrity of the wholesale-'area largely covered' conception of the ERTA doctrine it has defended in its recent case law.

By opting for this broad reading of the ERTA principle, the ECJ places itself on a collision course with several Member States. For, as two members of the Council legal

[48] Opinion 3/15, para. 120.

[49] Ibid, para. 121.

[50] Opinion 1/94 ('WTO'), EU:C:1994:384. In the literature, Opinion 1/94 was not well received for this reason. See in particular PESCATORE, P., "Opinion 1/94 On 'conclusion' of the WTO Agreement: Is There an Escape from a Programmed Disaster?", *Common Market Law Review*, N° 36, 1999, p. 387.

[51] Opinion 1/13 ('Hague Convention'), EU:C:2014:2303.

[52] Judgment in *'energia elettrica e il gas*, C-66/13, EU:C:2014:2399. For a critical analysis of the post-Lisbon case law, see VERELLEN, T., "The ERTA Doctrine in the Post-Lisbon Era", *Columbia Journal of European Law*, n° 21, 2015, p. 383.

service recently argued: 'It appears doubtful that the Council and its Member States will change their position about mixity, a practice that, reinforced with provisional application, is founded on the fundamental principle of conferral and which in their view has proven to be very useful.'[53]

[53] GOSALBO-BONO, R. and NAERT, F., "The Reluctant (Lisbon) Treaty and its Implementation in the Practice of the Council" in EECKHOUT, P. and LOPEZ-ESCUDERO, M., *The European Union's External Action in Times of Crisis*, Hart, Oxford, 2016, p. 26.