



**Stanford – Vienna  
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# Transatlantic Antitrust and IPR Developments

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## Antitrust

*United States*

# Tenth Circuit holds IPRs defense available to rebut a refusal to deal antitrust claim

*By Valerio Cosimo Romano*

On 31 October 2016, the United States Court of Appeals for the Tenth Circuit (the “Court of Appeals”) [held](#) that the invocation of IPRs is a presumptively valid business justification sufficient to rebut a refusal to deal claim.

The case involved a dispute between a software company and the developer of aviation terminal charts (which provide pilots with the information necessary to navigate and land at a specific airport). The developer holds copyrights for portions of its charts, which use a proprietary format. The parties negotiated and executed a license and cooperation agreement under which the developer would waive its standard licensing fee and grant the software company access to proprietary products that facilitate the integration of the developer’s terminal charts into third-party systems. In exchange, the software

company would create a data management reader that works in conjunction with an e-book viewer. After the execution of the agreement, the software company registered with Apple as a software application developer and requested the necessary toolkit from the developer to develop an app. The developer did not provide the toolkit. Rather, it announced it had created its own app, offered to its customers at no additional cost beyond their terminal chart subscription fee.

The software development company sued the developer. The district court granted summary judgment for developer on the antitrust claims but denied summary judgment on the remaining claims for loss of profits, awarding more than \$43 million in damages. The developer appealed, challenging only the district court’s ruling related to the loss of profits. The software company cross-appealed, challenging the dismissal of its antitrust claims, alleging a single anticompetitive conduct consisting in a refusal to deal, in violation of § 2 of the [Sherman Act](#).

To determine whether a refusal to deal violates § 2, the Court of Appeals first looked at market power in the relevant market, in which the court assumed that the developer enjoyed monopoly power. Second, the Court of Appeals looked at the use of the product, and concluded that the assertion of IPRs is a presumptively rational business justification for a unilateral refusal to deal. In its legal reasoning, the Court of Appeals relied on the approach taken by both the First and

Federal Circuits in *Data General* and *Xerox*, respectively. In *Data General*, the First Circuit held that while exclusionary conduct can be pursued by refusing to license a copyright, an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers. In *Xerox*, a Federal Circuit declined to examine the defendant's motivation in asserting its right to exclude under the copyright laws, absent any evidence that the copyrights were obtained by unlawful means or used to gain monopoly power beyond what provided for by the law. Quoting *Novell* and *Trinko*, the Court of Appeals also recognized the existence of a limited exception, available only where the plaintiff can establish the parties had a preexisting, voluntary, and presumably profitable business relationship, and its discontinuation suggests a willingness to forsake short-term profits to achieve anti-competitive ends. On this last point, the Court of Appeals held that the software developer did not present any evidence.

Therefore, it concluded that the developer did not have an independent antitrust duty to share its intellectual property with the software company. Consequently, it reversed and vacated the jury's award of lost profits, but affirmed the partial summary judgment on software company's antitrust claims.

## Antitrust

*European Union*

# European Commission approves the acquisition of LinkedIn by Microsoft, subject to commitments

*By Valerio Cosimo Romano*

On 6 December 2016 the European Commission (the “Commission”) approved the acquisition of LinkedIn by Microsoft, conditional on compliance with a series of commitments.

Microsoft is an U.S. technology giant. LinkedIn is a company based in the US, operating a social network dedicated to professionals. The parties operate on complementary areas and have limited overlaps. In its investigation, the European Commission focused on professional social network services, customer relationship management software solutions, and online advertising services.

First, the Commission investigated whether, after the merger, Microsoft could have strengthened LinkedIn's position by pre-installing and integrating the social

network on its systems. The European watchdog came to the conclusion that such measures could significantly enhance LinkedIn's visibility to the detriment of competitors. Second, the Commission investigated the area of customer relationship management software solutions and found that the networking service does not appear to be a must-have, and access to its database is not essential to compete on the market. The Commission therefore concluded that the transaction would not enable Microsoft to foreclose this market. Third, the Commission found that after the transaction a large amount of user data would still be available on the market. Thus, it concluded that there were few competition concerns arising from the combination of the parties' online non-search service activities and data to be used for advertising purposes. Lastly, even though privacy concerns do not fall within the scope of EU competition law, the Commission analyzed the potential impact of data concentration on the market as a result of the merger. The European competition watchdog concluded that data privacy is an important parameter of competition between professional social networks, which could have been negatively affected by the transaction.

In order to address the competition concerns identified by the Commission, Microsoft committed to (i) ensuring that manufacturers and distributors would be free not to install the social network on Windows and allowing users to remove it from devices where pre-installed; (ii) allowing competing professional social network service providers to keep intact

their current levels of interoperability with Microsoft's products and (iii) granting them access to Microsoft's proprietary application dedicated to software developers.

In light of these commitments, the Commission gave green light to the acquisition.



## Intellectual property

*European Union*

# CJEU rules that lending an e-book is legal if the first sale right has been exhausted

*By Marie-Andrée Weiss*

The Third Chamber of the Court of Justice of the European Union (CJEU) ruled on 10 November 2016 that it is legal under EU law for a library to lend an electronic copy of a book. However, only one copy of the e-book can be borrowed at the time, the first sale of the e-book must have been exhausted in the EU, and the e-book must have been obtained from a lawful source. The case is [Vereniging Openbare Bibliotheken v. Stichting Leenrecht](#), C-174-15.

### Legal framework

Article 2 of [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 (the InfoSoc Directive) provides authors exclusive rights in their works, including, under its Article 3, the exclusive right to communicate their works to the public by

wire or wireless means. Its Article 4 provides that these exclusive rights are exhausted by the first sale or by other transfers of ownership of the work in the EU.

Article 6(1) of [Directive 2006/115/EC](#) of the European Parliament and of the Council of 12 December 2006 on the rental right and lending right and on certain rights related to copyright in the field of intellectual property, the Rental and Lending Rights Directive (RLR Directive), gives Member States the right to derogate from the exclusive public lending right provided to authors by Article 1 of the RLR Directive, provided that authors are compensated for such lending.

Article 15c(1) of the Dutch law on copyright, the [Auteurswet](#), authorizes lending of a copy of a literary, scientific, or artistic work, provided that the rightsholder consented to the lending and is compensated for it. The Minister of Justice of the Netherlands set up a foundation to that effect, the [Stichting Onderhandelingen Leenvergoedingen](#) (StOL), which collects lending rights payments as a lump sum from lending libraries and then distributes those payments to rightsholders through collective management organizations.

The Dutch government took the view that e-books are not within the scope of the public lending exception of the Auteurswet and drafted a new law on that premise. The Vereniging Openbare Bibliotheken (VOB), which represents the interests of all the public libraries in the Netherlands, challenged this draft legislation and asked the District Court of The Hague to declare

that Auteurswet covers lending of e-books.

The Court stayed the proceedings and requested a preliminary ruling from the CJEU on the question of whether Articles 1(1), 2(1)(b) and 6(1) of the Renting and Lending Rights Directive authorize e-lending, provided that only one library user can borrow the e-book at a time by downloading a digital copy of a book which has been placed on the server of a public library.

If this is indeed authorized by the Directive, the District Court asked the CJUE whether article 6 of the Directive requires that the copy of the e-book which is lent has been brought into circulation by an initial sale or other transfer of ownership within the European Union by the rightsholder, or with her consent within the meaning of Article 4(2) of the InfoSoc Directive.

The District Court also asked whether Article 6 of the RLR Directive requires that the e-book which is lent was obtained from a lawful source.

Finally, the District asked the CJEU to clarify whether e-lending is also authorized (if the copy of the e-book which has been brought into circulation by an initial sale or other transfer of ownership within the European Union by the right holder or with her consent) when the initial sale or transfer was made remotely by downloading.

**First: Is e-lending legal under the renting and lending rights directive?**

The CJEU noted that Article 1(1) of the RLR Directive does not specify whether it also covers copies which are not fixed in a physical medium, such as digital copies (§ 28). The CJEU interpreted “copies” in the light of equivalent concepts of the [WIPO Copyright Treaty of 20 December 1996](#), which was approved by the European Community, now the European Union. Its Article 7 gives authors the exclusive right to authorize “rentals” of computer programs. However, the [Agreed Statements concerning the WIPO Copyright Treaty](#), which is annexed to the WIPO Treaty, explains that Article 7’s right of rental “refer[s] exclusively to fixed copies that can be put into circulation as tangible objects,” thus excluding digital copies from the scope of Article 7.

The Court noted, however, that “rental” and “lending” are separately defined by the RLR Directive. Article 2(1) (a) defines “rental” as “making available for use, for a limited period of time and for direct or indirect economic or commercial advantage,” while Article 2(1) (b) defines “lending” as “making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.” The Court examined preparatory documents preceding the adoption of Directive 92/100, which the RLD Directive codified and reproduced in substantially identical terms, and noted that there was “no decisive ground allowing for the exclusion, in all cases, of the lending of digital copies and intangible objects from the scope of the RLR Directive.” The Court also noted that Recital 4 of the RLR

Directive states that copyright must adapt to new economic developments and that e-lending “indisputably forms part of those new forms of exploitation and, accordingly, makes necessary an adaptation of copyright to new economic developments” (§ 45).

The CJEU noted that borrowing an e-book as described by the District Court in its preliminary question “has essentially similar characteristics to the lending of printed works,” considering that only one e-book can be borrowed at the time (§ 53). The CJEU therefore concluded that “lending” within the meaning of the RLR Directive includes lending of a digital copy of a book.

### **Second: May only e-books first sold in the EU be lent?**

The InfoSoc Directive provides that the exclusive distribution rights of the author are exhausted within the EU after the first sale or other transfer of ownership in the EU of the work by the right holder or with his consent. Article 1(2) of the RLR Directive provides that the right to authorize or prohibit the rental and lending of originals and copies of copyrighted works is not exhausted by the sale or distribution of originals and copies of works protected by copyright.

The CJEU examined Article 6(1) of the RLR Directive in conjunction with its Recital 14, which states it is necessary to protect the rights of the authors with regards to public lending by providing for

specific arrangements. This statement must be interpreted as establishing a minimal threshold of protection, which the Member States can exceed by setting additional conditions in order to protect the rights of the authors (at 61).

In our case, Dutch law required that an e-book made available for lending by a public library had been put into circulation by a first sale, or through another transfer of ownership, by the right holder or with his consent within the meaning of Article 4(2) of the InfoSoc Directive. The Court mentioned that Attorney General Szpunar had pointed out in his [Opinion](#) that if a lending right is acquired with the consent of the author, it may be assumed that the author’s rights are sufficiently protected, which may not be the case if the lending is made under the derogation provided by Article 6(1) (Opinion at 85). AG Szpunar concluded that therefore only e-books which had been made first available to the public by the author should be lent. The CJEU ruled that Member States may subject as condition to e-lending the fact that the first sale of the e-book has been exhausted in the EU by the right holder.

### **Third: May a copy of an e-book obtained from an unlawful source be lent?**

Not surprisingly, the CJEU answered in the negative to this question, noting that one of the objectives of the RLR Directive, as stated by its Recital 2, is to combat piracy and that allowing illegal copies to be lent would “amount to tolerating, or even encouraging, the circulation of counterfeit

or pirated works and would therefore clearly run counter to that objective” (at 68).

The Court did not answer the fourth question as it had been submitted only in the case the Court would rule that it is not necessary that the first sale of the e-books being lent had been exhausted in the EU.

This is a welcome decision since, as noted by AG Szpunar in his Opinion, it is crucial for libraries to be able to adapt to the fact that more and more people, especially younger ones, are now reading e-books instead of printed books.

## Intellectual property

### *European Union*

# After many twists and turns, the CJEU holds that the Rubik's cube trademark is invalid

*By Marie-Andrée Weiss*

The First Chamber of the Court of Justice of the European Union (CJEU) held on 10 November 2016, that the famous Rubik's cube cannot be registered as a three-dimensional mark because its shape performs the technical function of the goods, a three-dimensional puzzle. The case is [Simba Toys GmbH & Co. KG v. EUIPO](#), C-30/15 P.

### **The validity of the Rubik's cube trade mark was challenged by a competitor**

British company Seven Towns Ltd., acting on behalf of Rubik's Brand Ltd., filed in April 1996 an application for registration of a Community trade mark at the Office for Harmonisation in the Internal Market (OHIM), now named the [European Union Intellectual Property Office](#) (EUIPO), for a three-dimensional sign, the famous Rubik's cube. The mark was registered in April 1999 and renewed in November 2006.

A few days later, competitor Simba Toys applied to have the trade mark declared

invalid under [Council Regulation 40/94](#), which has been repealed and was replaced by [Council Regulation 207/2009](#). The CJEU considered the case to be still governed by Council Regulation 40/94. Articles 1 to 36 are the same in both Regulations, and so the case is relevant under current EU trademark law.

Article 7(1)(e)(ii) of Council Regulation 40/94 prevents registration as a trademark of a sign, such as the Rubik's cube product, "which consists exclusively of... the shape of goods which is necessary to obtain a technical result." The CJEU had held in the 2002 [Koninklijke Philips Electronics NV v. Remington Consumer Products Ltd.](#) that a sign consisting exclusively of the shape of a product cannot be registered as a trademark if the essential functional features of the shape are attributable only to a technical result (*Philips* § 79 and § 80).

Simba Toys argued that the Rubik's cube mark should be declared invalid under the grounds [absolute ground for refusal] that the mark is the shape of the goods necessary to achieve a technical result. According to Simba, the Rubik's cube black lines are attributable to technical functions of the three-dimensional puzzle.

The OHIM dismissed Simba's application for a declaration of invalidity and the Second Board of Appeal of OHIM affirmed the dismissal in September 2009, reasoning that the shape of the trade mark does not result from the nature of the Rubik's cube itself. On 25 November 2014, the General Court [dismissed](#) the action for annulment as unfounded. Simba appealed

to the CJEU.

### **What are the essential characteristics of the Rubik's cube trade mark?**

The essential characteristics of three-dimensional signs are the most important elements of the signs, [Lego Juris v. OHIM](#), C-48/09, § 68 and 69. They must be properly identified by the competent trademark registration authority, *Lego Juris v. Ohim* § 68, which must then determine whether the essential characteristics all perform the technical function of the goods (General Court § 41). The General Court identified the essential characteristics of the Rubik's cube trademark as a "cubic grid structure," that is the cube itself and the grid structure appearing on each of its surfaces (General Court § 45). Simba did not challenge this finding on appeal at the CJEU.

### **Do the essential characteristics of Rubik's cube perform the technical function of the goods?**

Under Article 4 of Regulation 40/94 and Regulation 207/2009, any sign capable of being represented graphically can be a trade mark, unless, under article 7(1)(e)(ii) of both Regulations, the sign consists exclusively of the shape of goods which is necessary to obtain a technical result.

Article 7(1) grounds for refusal to register a mark must be interpreted in light of the public interest underlying them. The public interest underlying Article 7(1)(e)(ii) is to

prevent the use of trademark law to obtain a monopoly on technical solutions or the functional characteristics of a product (General Court § 32, citing *Lego Juris v. OHIM*, § 43). Advocate General Szpunar explained further in his [Opinion](#) that allowing such marks to be registered would give the registrant "an unfair competitive advantage" and thus trade mark law cannot be used "in order to perpetuate, indefinitely, exclusive rights relating to technical solutions" (AG Szpunar Opinion § 32 and § 34).

For the General Court, Article 7(1)(e)(ii) applies only if the essential characteristics of the mark perform the technical functions of the goods "and have been chosen to perform that function." It does not apply if these characteristics are the result of that function (General Court § 53). Simba argued in front of the CJEU that the General Court erred in this interpretation of Article 7(1)(e)(ii).

Simba claimed that the black lines of the cube performed a technical function (General Court § 51). But the General Court found that an objective observer is not able to infer by looking at the graphic representation of the Rubik's cube mark that the black lines are rotatable (General Court § 57). The General Court held that Simba's "line of argument... [was] essentially based on knowledge of the rotating capability of the vertical and horizontal lattices of the Rubik's cube. However, it [was] clear that that capability cannot result from the black lines in themselves or, more generally, from the grid structure which appears on each surface of the cube... but at most from [an



invisible] mechanism internal to that cube” (General Court § 58). Therefore, the grid structure on each surface of the cube “d[id] not perform, or are not even suggestive of, any technical function” (General Court § 60). The General Court concluded that registering the Rubik’s cube shape did not create a monopoly on a technical solution and mechanical puzzles competitors could also incorporate movable or rotatable elements (General Court § 65).

But, for AG Szpunar, the General Court erred in its analysis as it should have taken into account the function of the Rubik’s cube, which is a three-dimensional puzzle consisting of movable elements. He noted that in both the *Philips* and the *Lego Juris* cases, the competent authorities had analyzed the shape of the goods using additional information other than the graphic representation (AG Szpunar [Opinion](#) § 86). While the competent authority does not have to concern itself with hidden characteristics, it must nevertheless analyze “the characteristics of the shape arising from the graphic representation from the point of view of the function of the goods concerned” (AG Szpunar Opinion § 88).

The CJEU followed its AG’s Opinion on this point and found that the General Court should have defined the technical function of the actual goods, namely, the three-dimensional puzzle, and it should have taken this into account when assessing the functionality of the essential characteristics of that sign (CJEU § 47). The General Court “interpreted the criteria for assessing Article 7(1)(e)(ii) . . . too narrowly”(CJEU § 51) and should have taken into account

the technical function of the goods represented by the sign when examining the functionality of the essential characteristics of that sign (CJEU § 52). Failing to do so would have allowed the trademark owner to broaden the scope of trademark protection to cover any three dimensional puzzles with elements in the shape of a cube (CJEU § 52).

This case confirms, after [Pi-Design AG v. Bodum](#), that the CJEU takes the view that the essential characteristics of a trade mark must not be assessed solely by the competent authority based on visually analyzing the mark as filed, but that the authority must also identify the essential characteristics of a sign, in addition to the graphic representation and any other descriptions filed at the time of the application for registration. This is necessary to protect the public interest underlying Article 7(1)(e)(ii), which is to ensure that economic operators cannot improperly appropriate for themselves a mark which incorporates a technical solution.

## Other developments

### *European Union*

# The General Data Protection Regulation (GDPR) and the Way Forward

*By Nikolaos Theodorakis*

The General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679) was introduced in April 2016 with the intention of strengthening and unifying data protection for individuals within the European Union (EU). It will enter into force in 2018, replacing the outdated data protection directive of 1995. The GDPR is intended to make citizens masters of their personal data, and to simplify the regulatory environment for international businesses. Personal data may range from a name, to a photo, email address, bank details, or a computer's IP address.

The regulation applies to data controllers, data processors, and data subjects that are based in the EU. It provides for harmonization of data protection regulations throughout the EU and includes a strict data protection compliance regime with severe penalties of up to 4% of global turnover. The proposed EU data protection regime also extends the scope of the EU data protection law to foreign companies that process data of EU residents. The regulation does not extend to the

processing of personal data for national security activities or law enforcement, however.

In implementing the GDPR, each member state will establish an independent Supervisory Authority (SA) to hear and investigate complaints, sanction administrative offences, etc. SAs will cooperate to provide mutual assistance and organize joint operations. For businesses that operate in multiple Member States, a business will have a single SA as its "lead authority" based on the location of its headquarters. The lead authority will act as a "one-stop shop" to supervise all processing activities throughout the EU. A European Data Protection Board will coordinate accordingly.

The notice requirements of the prior directive are expanded by the GDPR. Citizens' automated individual decision-making include profiling, whereas citizens now have the right to question and fight decisions that affect them that have been made on an algorithmic basis. A Data Protection Officer is also given the duty of administering the Regulation.

As for data breaches, the independent Data Protection Officer (DPO) has the legal obligation to notify the Supervisory Authority without undue delay. There is no *de minimis* standard, and it is likely the GDPR will require that such breaches be reported as soon as possible. In the case of a data breach, the following sanctions may be applicable: a warning in writing in cases of first and unintentional non-compliance; a regular periodic data



protection audit; a fine up to 10 million EUR or up to 2% of the annual worldwide turnover of the preceding financial year in case of an enterprise; or a fine up to 20 million EUR or up to 4% of the annual worldwide turnover of the preceding financial year.

The right to erasure replaces the right to be forgotten, and will be somewhat more limited in its scope. Under this right, the data subject has the right to request erasure of personal data related to him on a number of grounds, and if the interests or fundamental rights and freedoms of the data subject override the legitimate interests of the controller.

Data portability recognizes that a person shall be able to transfer their personal data from one electronic processing system to another, without being prevented by the data controller. The data must be provided by the controller in a structured and commonly used electronic format.

### **The way forward**

The proposal has given rise to much discussion and controversy. Thousands of amendments were proposed and GDPR has attracted considerable criticism.

First, the Data Protection Officer is a new concept that several EU countries did not have before. It has been criticized for creating an administrative burden. The GDPR has also been criticised for not sufficiently considering requirements for handling employee data.

Data portability is also not seen as a key aspect for data protection, but rather as a functional requirement for social networks and cloud providers. Language problems may occur here, since there is not a single DPA that can be contacted, but rather the DPA that a company chooses.

In any event, the GDPR must be examined *vis-à-vis* the EU-US Privacy Shield that has aimed to replace the Safe Harbor agreement and has still attracted considerable criticism.

It remains to be seen how the GDPR will be implemented in practice since it requires comprehensive changes of business practices for companies that had not implemented a comparable level of privacy before the regulation entered into force. Naturally, the European Commission and DPAs will have to provide sufficient resources to enforce the implementation and a certain level of data protection must be agreed to by all European DPAs.

## Other developments

*European Union*

# The road to the future of European traffic: European Commission publishes strategy on Cooperative Intelligent Transport Systems

*By Martin Miernicki*

On 30 November 2016, the Commission published the Communication [COM\(2016\) 766](#) on Cooperative Intelligent Transport Systems (C-ITS). C-ITS involve the cooperation, connectivity, and automation of vehicles, and they enable the communication between — and the coordination of — road users and traffic infrastructure. The additional information provided by C-ITS assists drivers and traffic managers in decision-making, especially with regard to road safety and traffic efficiency.

### Background

The promotion and regulation of C-ITS is part of the Commission's larger policy

focus on emerging technologies. Related activities include the [Digital Single Market Strategy](#), the [Digitising European Industry Strategy](#), and the [European Strategy for Low-Emission Mobility](#). In 2014, the Commission created the [C-ITS platform](#) in order to address remaining problems in connection with the application of this technology. The platform published an [expert report](#) in early 2016, which resulted in the C-ITS communication. The need for a common European strategy on C-ITS was further expressed by the European transport ministers in the 2016 [Declaration of Amsterdam](#).

### Core aspects of the communication

The communication highlights multiple advantages associated with the use of C-ITS, like increased road safety, reduced emissions of greenhouse gases and air pollutants, more efficient traffic, and positive effects on the European economy overall through the creation of new jobs in the sector. However, several problems must be addressed before C-ITS can be fully deployed.

#### - Security of C-ITS communication

The use of C-ITS makes transport systems more vulnerable to hacking and cyber-attacks. For this reason, the Commission proposes to develop a common security and certificate policy in order to ensure that C-ITS adequately respond to security threats. This process should involve all relevant stakeholders (e.g. public authorities, vehicle manufacturers, etc.).

- Data protection and privacy

The Commission underscores that the data transmitted by C-ITS can qualify as personal data, which are subject to the European rules on data protection. The Commission believes that the protection of such data is crucial to the acceptance of C-ITS by end-users.

- Communication technologies & interoperability

The strategy focuses on a “hybrid communication approach” which combines different complementary communication technologies, rather than proposing a single technical solution for C-ITS. In the Commission’s opinion, the most promising communication mix is a combination of ETSI ITS-G5 and existing cellular networks. Furthermore, the Commission emphasizes the need to ensure the interoperability of C-ITS by the development of an EU-wide standardization process. In this connection, the [C-Roads platform](#) was launched in 2016.

### **Further action**

The overall aim is to deploy C-ITS in 2019. For this purpose, the Commission announced plans to publish guidance regarding the C-ITS related security and certificate policy in 2017 and regarding data protection in the following year. In order to create the necessary legal framework for C-ITS, the Commission will adopt delegated acts by 2018, especially considering the [ITS Directive](#).

## Other developments

### *European Union*

# Competence of the EU to conclude Free Trade Agreements: AG's opinion in Case 2/15 on the EU-Singapore Free Trade Agreement

*By Gabriel M. Lentner*

On 21 December 2016, Advocate General Sharpston issued her opinion in [Case 2/15](#) based on a request for a ruling pursuant to Article 218(11) TFEU to determine the allocation of competences between the EU and its Member States in case of the [EU-Singapore Free Trade Agreement](#) (EUSFTA).

### Facts/Background

As requested by the European Commission, the Court of Justice of the European Union (CJEU) was asked to clarify the following questions:

1. Does the EU have the requisite competence to sign and conclude the EUSFTA alone, i.e. without the

involvement of the Member States?

2. Which provisions of the EUSFTA fall within the EU's exclusive competence, the Union's shared competence, and the exclusive competence of the Member States?

Before the CJEU delivers its judgment on the issue, the Advocate General issued her opinion on the matter to assist the court. Generally, the CJEU follows the AG's opinion, so it is appropriate to look at the conclusions of the AG in this case.

### The Advocate General's opinion

As to the first question, the AG finds that the Singapore Free Trade Agreement may only be concluded by both the European Union and the Member States, as certain parts of the agreement do not fall within the exclusive competence of the EU.

On the second question, the AG determines the following division of competences.

The EU has exclusive competence of, *inter alia*, the following elements of the EUSFTA:

- trade in goods;
- trade in services and government procurement (excluding those parts applying to transport services and services inherently linked to transport services);

- foreign direct investment (excluding portfolio investments);
- the commercial aspects of intellectual property rights;
- competition and related matters;
- and dispute settlement, mediation, and transparency mechanisms in so far as they relate to the parts of the agreement for which the EU enjoys exclusive external competence.

The EU shares competences with the Member States *inter alia* in the following matters:

- portfolio investments;
- provisions relating to the non-commercial aspects of intellectual property rights;
- and dispute settlement, mediation, and transparency mechanisms relating to the parts of the agreement for which the EU enjoys shared external competence.

The AG also concluded that it is within the exclusive competence of the Member States to terminate bilateral agreements concluded by some Member States and Singapore.

## Conclusions

There has been extensive scholarly debate on the scope of the EU's competence in this area, particularly with regards to [investment policy](#). The findings of the AG are in line with what was generally expected, and it is therefore very probable that the CJEU will arrive at similar conclusions. The judgment will be welcomed for providing legal certainty on these issues. However, from a practical perspective, the outcome (should the CJEU follow the AG on this) is of course lamentable because it will leave the conclusion of such agreements vulnerable to obstructions on the domestic level, and in any case a long ratification process will follow involving not just the EU, but all its Member States.

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