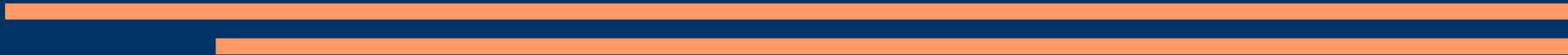


External action of the EU (II)

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(some)
Substantive aspects
of EU external action



1. Common Commercial Policy

- Article 3(1)(e) TFEU (exclusive competence)
 - Article 206 TFEU (CCP principles)
 - Article 207 TFEU (scope and procedure)
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Aims of CCP

Article 206 TFEU

By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.

Art 207 TFEU (post-Lisbon)

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

(...)

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. ...

Art 207 TFEU (cont'd)

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(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.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

Broad judicial interpretation (pre-Lisbon)

e.g. *Opinion 1/75 Local Cost Standard*

The concept of commercial policy has:

‘the same content whether it is applied in the context of the international action of a state or to that of the Community’

e.g. *Opinion 1/78 Natural Rubber*

... Article 113 [now 217 TFEU] empowers the Community to formulate a commercial ‘policy’, based on ‘uniform principles’ thus showing that the question of external trade must be governed from a wide point of view and not only having regard to the administration of precise systems such as customs and quantitative restrictions.

But Court's clarification (pre-Lisbon)

Opinion 1/94 *WTO* : a limited CCP?

- trade in ECSC, Euratom and agricultural products (paras 24-29) falls within the field of the CCP

BUT:

- ONLY some aspects of trade in services (paras 41-53)
 - ONLY some trade-related aspects of intellectual property (paras 56-71)
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Post-Lisbon CCP

Case C-414/11 *Daiichi Sankyo Co. Ltd* (18 July 2013)

46. That provision [i.e. Art 207(1) TFEU] which entered into force on 1 December 2009, differs noticeably from the provisions it essentially replaced, in particular those in Article 133(1), (5), first subparagraph, (6), second subparagraph, and (7) EC.

47. It differs even more from the provision that was in force when the TRIPs Agreement was concluded, namely Article 113 of the EC Treaty (subsequently, after amendment, Article 133 EC). Paragraph 1 of that article stated that '[t]he common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade'. Commercial aspects of intellectual property were mentioned neither in that paragraph nor in any other paragraph of Article 113.

48. In view of that significant development of primary law, the question of the distribution of the competences of the European Union and the Member States must be examined on the basis of the Treaty now in force (see, by analogy, Opinion 1/08 (...), paragraph 116). Consequently, neither Opinion 1/94 (...), in which the Court established in relation to Article 113 of the EC Treaty which provisions of the TRIPs Agreement fell within the common commercial policy and hence the exclusive competence of the Community, nor the judgment in *Merck Généricos – Produtos Farmacêuticos*, defining, at a date when Article 133 EC was in force, the dividing line between the obligations under the TRIPs Agreement assumed by the European Union and those remaining the responsibility of the Member States, is material for determining to what extent the TRIPs Agreement, as from the entry into force of the FEU Treaty, falls within the exclusive competence of the European Union in matters of the common commercial policy.

Post-Lisbon CCP

Case C-414/11 *Daiichi Sankyo Co. Ltd*

51. (...) the mere fact that an act of the European Union, such as an agreement concluded by it, is liable to have implications for international trade is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, 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 (...).

52 It follows that, of the rules adopted by the European Union in the field of intellectual property, only those with a specific link to international trade are capable of falling within the concept of 'commercial aspects of intellectual property' in Article 207(1) TFEU and hence the field of the common commercial policy.

> Application of the test in e.g.
Opinion 2/15 *Singapore Agreement*

2. EU relations with European neighbours

Article 8 TEU

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.
 2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.
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Association agreements

Article 217 TFEU

The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Aims of association

e.g. Case 12/86 *Demirel*
(re. EC-Turkey association agreement)

9. (...) the agreement in question is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system, Article [217] must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty

Scope of association

e.g. Opinion 1/91
(re. EEA agreement)

71. (...) Article 238 of the EEC Treaty [now Art 217 TFEU] does not provide any basis for setting up a system of courts which conflicts with Article 164 of the EEC Treaty [now Art 19 TEU] and, more generally, with the very foundations of the Community.

