

Guidance JUR 1441 and JUR 5441

JUR1441

Question 1

Critically analyse the role of the European Court of Justice in the development and good functioning of the legal framework of the EU external action.

Points that could be discussed:

Case law

- EC/EU Legal personality (as per *AETR* ruling)
- Existence, distribution and delimitation of EU external competence, e.g. implied powers doctrine (*AETR*), scope of CCP (as per e.g. Opinion 1/75 to Opinion 2/15), distinction TFEU/CFSP (e.g. *Mauritius* case law)
- Nature of EU external competence, e.g. exclusivity (as per *AETR* ruling, Opinion 1/76, Opinion 1/03)
- Principle of sincere cooperation /duty of cooperation in mixed agreements (Opinion 2/91 to *COTIF II* ruling)
- Application of principles to the whole of EU external action, including in CFSP: (case law on rule of law in CFSP, e.g. *Rosneft*)
- Functioning of the institutional framework of the EU external action (e.g. case law regarding Art 218 TFEU)
- Effects of EU external agreements within EU legal order, e.g. direct effect (e.g. *Simutenkov*)
- Eventual codification of case law: e.g. Art 216 TFEU, Art 3(2) TFEU.

Question 2

The Council has approved a mandate for the EU negotiation of a Partnership Agreement with the Nice Federation (NF). According to the mandate, the Agreement should contain the following elements:

- i. A free trade area between the two parties involving the liberalization of trade in goods and services including transport;
- ii. the progressive establishment of a customs union between the EU and NF
- iii. Each EU Member State shall grant a treatment no less favourable than that accorded to its own companies for the establishment of Nicean companies on its territory
- iv. Cooperation in the field of environmental protection, in the form of regular consultations to exchange information, and to establish on good practices

A. You are a member of the legal service of the EU Council. You are asked to advise the Council on the following questions:

- i. What should be the legal bases and the procedural arrangements for the conclusion of the partnership agreement?

Points that could be discussed:

- Is Art 207 TFEU the correct legal basis here considering CJEU case law on comprehensive trade agreements, or is there a need for additional legal basis/es for e.g. transport considering Art 207(5) TFEU, as interpreted by the Court in e.g. Opinion 2/15?
 - Could other aspects of the agreement (e.g. iii. and iv. of the question) be considered as ancillary to the latter's main trade purpose? Application of the centre of gravity test as per e.g. *Philippines* ruling of CJEU (re environmental protection and movement of people), and opinion 2/15 regarding e.g. sustainable development aims to be integrated in all EU external actions?
 - Or does the agreement establish specific obligations in those areas (i.e. non-discrimination provisions and environment) which involve the exercise of specific EU competence in the field (e.g. environment), justifying the use of distinct legal bases establishing that competence? This would arguably be the most likely position of the Council
 - Re. procedural arrangements: discussion around voting arrangements in the Council (QMV v unanimity e.g. in services?), and powers of the EP in consideration of the substantive legal basis/es: at least right to being informed throughout the negotiation-conclusion procedure (Art 218(10) TFEU, as per *Tanzania* ruling of the CJEU) and potentially requirement of EP consent if CCP legal basis.
- ii. Could the EU conclude the agreement on its own?

Points that could be discussed:

- Application of Article 3(1) TFEU, re. CCP, Customs Union?
- Application of Article 3(2) TFEU (conditional exclusivity) to transport (as per opinion 2/15 of CJEU) ?
- If transport not yet largely covered by common rules likely to be affected (i.e. no AETR effect yet): participation of MS needed, ie mixed agreement → likely position of the Council

B. For the last three years, the French Republic has been negotiating a multilateral treaty with several states, including the Nice Federation, to establish an 'open and safe Latin sky'. The envisaged agreement foresees the complete liberalisation of air transport, and an ambitious air defence cooperation among the Parties. The Commission considers that the French Government is violating its obligations under EU law, and is envisaging enforcement proceedings against the French government. Advise the Commission on the legal arguments it could use against the French Government.

Points that could be discussed:

- EU does not have exclusive competence in defence matters, so FR can negotiate a treaty in that area, provided it respects other EU obligations, ie provided the agreement does not violates EU law
- Does France have the competence to negotiate and conclude this multilateral treaty given the EU competence in area of transport, which is possibly exclusive based on an

‘AETR effect’ as per Article 3(2) TFEU (i.e. area largely covered by common rules likely to be affected – see Opinion 2/15), as discussed in previous answer?

- Can the Commission invoke the principle of sincere cooperation (art 4(3) TEU) against FR given that it (Commission) has been given a mandate to negotiate the agreement: i.e. FR as a MS should facilitate the EU negotiation of that agreement and refrain from negotiating with the same third state in areas covered by the mandate (support in CJEU decisions in *Commission v Germany (inland waterways)*, *Commission v Sweden (PFOS)*, and *Commission v Germany (Cotif)*)

Question 3

After years of instability following the dissolution of the Arcadian Union, The Council has approved a mandate for the negotiation of an economic and political partnership with the new Republic of North Arcadia (RNA). According to the mandate, the agreement should contain the following elements:

1. A security cooperation to promote peace and security in RNA, including through joint EU-RNA military operations to combat local terrorist militias
2. A cooperation to fight illegal immigration
3. The progressive liberalisation of trade in goods and services to foster the economic development of RNA
4. The application to the Parties’ workers, legally employed on the territory of the other Party, of the principle of non-discrimination with regard to working conditions, wage and dismissal

A. A Member of the European Parliament is asking for your advice on the following questions:

- Who should be in charge of the negotiation of the agreement on behalf of the Union?
- What should be the legal basis (or bases) of the decision to conclude this partnership agreement?
- What role if any should the European Parliament play throughout the procedure?
- Could the EU conclude the agreement on its own?

Points that could be discussed:

- What could be the ‘centre of gravity’ of the envisaged agreement: e.g. trade, development, and/or foreign and security policy? If trade and/or development, then Commission can negotiate on its own (art 17 TEU), if trade and CFSP, the High Rep. could negotiate the latter aspects, while Commission negotiates other parts (given the rule of Art 40 TEU); or HR on his own, if conditions of Article 218(3) TFEU fulfilled (support in the CJEU case law in *Tanzania* and *Kazakhstan* rulings).
- Is the CFSP legal basis necessary (art 37 TEU) in view of the joint military operations? Or can the *Kazakhstan* case law be invoked to limit the legal basis of the agreement to trade and/or development provisions, as in the *Philippines* case?

- Reluctance of the CJEU to accept dual CFSP/TFEU legal basis as per *EP v Council (Smart Sanctions)* could also be mentioned
- Discussion of the powers of the EP in the context of Art 218 TFEU: from right to information throughout the procedure (art 218 (10) TFEU as per e.g. *Tanzania* case law) to right to consent if agreement is predominantly about trade (and development). Possible to mention art 36 TEU, as specific right in relation to CFSP initiatives
- Discussion as to whether the liberalisation of trade in services encompasses transports, in which case a specific transport legal basis might be necessary (Art 207(5) TFEU, as considered by CJEU in Opinion 2/15)

B. Mr Bee has also approached you for guidance. Mr Bee is a national of RNA. He is a professional badminton player employed by the French club of Marseille, where he resides. In accordance with the rules of the French Badminton Federation, he is entitled to play on the basis of a special licence that limits the number of games in which he can take part, on the ground that he does not hold the nationality of an EU Member State. He asks you whether the entry into force of the partnership agreement would improve his professional situation.

Points that could be discussed:

- EU agreements binding on MS (Article 216(2) TFEU)
- Can the provisions of the agreement be invoked before a judge in France? i.e. question of direct effect of EU external agreements
- What are the conditions for direct effect? Reference to e.g. *Demirel*, *Simutenkov* case law of CJEU

JUR 5441

Question 1

A member of the European Court of Justice once observed that “despite the formal disappearance of the ‘pillars’, the entry into force of the Treaty of Lisbon has not obviated the need to delimit the respective scopes of the Union’s different policies”. Please discuss this observation, and explain how this delimitation is legally done?

Points that could be discussed:

- The meaning of post-Maastricht “EU pillars”
- The remaining post-Lisbon distinction between CFSP/TFEU competences in the EU external action
- The terms of that distinction: art 24(1) TEU, and its references to “rules and procedures”
- Article 40 TEU entrenches the distinction and empowers the CJEU to guarantee it
- Indeed case law preserving the distinction: *C-130/10 Smart sanctions* case; *Mauritius* and *Tanzania* rulings

- But limits to the distinction:
 - deeper integration of CFSP into EU constitutional order,
 - eg application of *principles* (as opposed to distinct “rules and procedures”) as per Article 21(1) TEU, significance of Art 23 TEU; application of principles of Art 21(1) to the whole of EU external action, including in CFSP: (case law on rule of law in CFSP, e.g. *Rosneft*)
 - relevance of general objectives for both CFSP and TFEU competence as per Art 21(2) TEU

See above for Questions 2 and 3 of JUR 5441