

ON THE SCOPE OF EU'S EXCLUSIVE
COMPETENCE AFTER THE LISBON TREATY

Comment of the Opinion 1/13 of the Court (Grand Chamber)
of 14 October 2014 on Convention on the Civil Aspects
of International Child Abduction

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ABSTRACT: This case comment focuses on the scope of the EU's exclusive competence after its codification in article 3 (2) TFEU in light of Opinion 1/13. More precisely, it analyses how the case-law on implied exclusive powers prior to the entry into force of the Lisbon Treaty continues to apply and to what degree in relation to the 1980 Hague Convention on Child abduction. The case comment examines to what extent the declaration of acceptance issued by certain EU Member States in relation the acts of accession of third countries can be considered an international agreement that falls within an EU implied exclusive competence in the sense of the ERTA principle. First, the case comment shows how the CJEU's broad non-formalistic concept of international agreement continues to apply after Lisbon. Secondly, it analyses how the CJEU's continues to embrace a broad view of the ERTA principle as established in Opinion 1/03. Finally, the case comment questions the way the Court conducted its analysis of the ERTA Principle in Opinion 1/13 showing that its unpredictable application continues to persist after its codification.

KEY WORDS: EU External Relations Law; Exclusive Competence; Implied Powers; International Agreements; Private International Law; Civil Judicial Cooperation; Child Abduction.

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DICTAMEN 1/13: SOBRE EL ÁMBITO DE LA COMPETENCIA EXCLUSIVA
DE LA UE DESPUÉS DEL TRATADO DE LISBOA

Comentario sobre el dictamen 1/13 del Tribunal de Justicia (Gran Sala)
de 14 de octubre de 2014 relativo al Convenio sobre los Aspectos Civiles
de la Sustracción Internacional de Menores

RESUMEN: El presente comentario examina a la luz del Dictamen 1/13 el alcance de las competencias exclusivas de carácter implícito tras su codificación en el artículo 3 (2) TFUE. En concreto, este trabajo se centra en comprobar si la jurisprudencia sobre competencias exclusivas implícitas sigue siendo aplicada del mismo modo tras la entrada en vigor del Tratado de Lisboa en relación con la Convención de La Haya de 1980 sobre secuestro internacional de menores. Igualmente, este comentario analiza hasta que punto las declaraciones de aceptación de la adhesión de un Estado a la Convención de La Haya de 1980 son un elemento constitutivo de un acuerdo internacional cubierto por una competencia exclusiva de carácter implícito en el sentido del efecto ERTA. En primer lugar, este trabajo demuestra como el TJ sigue aplicando una concepción amplia y no formalista de qué constituye un acuerdo internacional. En segundo lugar, el comentario analiza cómo el efecto ERTA continua teniendo un alcance amplio en la línea del Dictamen 1/03. Finalmente, este comentario discute como la aplicación del efecto ERTA y su impredecible resultado continúa siendo problemático.

PALABRAS CLAVE: Relaciones Exteriores de la UE; Competencias Exclusivas; Competencias Implícitas; Acuerdos Internacionales; Derecho Internacional Privado; Cooperación Judicial Civil; Secuestro Internacional de Menores

AVIS 1/13 : SUR L'EXTENSION DE LA COMPÉTENCE EXCLUSIVE DE L'UE
APRÈS LE TRAITÉ DE LISBONNE

Commentaire de l'Avis 1/13 de la CJUE du 14 octobre 2014 (Grande Chambre),
Convention sur les aspects civils de l'enlèvement international d'enfants

RÉSUMÉ: Cette étude examine l'Avis 1/13 et ses conséquences dans la portée de la compétence exclusive de caractère implicite après son codification dans l'article 3 (2) du TFUE. Plus précisément, ce travail se concentre sur la vérification si la jurisprudence de la CJUE sur la compétence implicite exclusive est toujours identiquement appliquée dans le cadre de la Convention de La Haye de 1980 sur l'enlèvement international d'enfants après l'entrée en vigueur du Traité de Lisbonne. En outre, cet article analyse sur la qualification de la déclaration d'acceptation d'adhésion en tant qu'élément constitutif d'un «accord» relève de la compétence implicite exclusive de l'Union européenne au sens de l'effet ERTA. Tout d'abord, ce travail montre comme le CJUE continue à poursuivre une conception large et non formaliste du type d'accords internationaux. Deuxièmement, le commentaire explique comment l'effet ERTA continue d'avoir un champ de mise en œuvre large en ligne avec l'Avis 1/03. Enfin, ce commentaire explique comment la mise en œuvre de l'effet ERTA et des ses résultats imprévisibles ont continué à être problématique.

MOTS CLÉS: Relations extérieures de l'UE; Compétences exclusives; Compétences implicites; accords internationales; Droit international privé; coopération judiciaire en matière civile; aspects civils de l'enlèvement international d'enfants.

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I. INTRODUCTION

The changes introduced by the Lisbon Treaty to the EU's external powers, specially the codification of the doctrine of implied powers in articles 3 (2) TFEU,¹ have led the Court of Justice of the European Union (CJEU) to revisit its case-law on the scope of the EU's external powers. More specifically within the span of three months, the CJEU revisited three times the foundations of the EU's exclusive external competences.² In one of those cases, *Opinion 1/13*,³ the Court was asked to rule on the scope of the EU's exclusive competence on issues covered by the 1980 Hague Convention on the Civil Aspects of international child abduction (the Convention).

This case comment focuses on *Opinion 1/13* and examines how the CJEU's approached the question of the EU's implied powers in relation to the Convention. The following note is divided in three parts. The first section lays out the legal background of the Opinion. The second section analyses how the Court defined what constitutes an international agreement in the sense of article 218 (11) TFEU. The third one scrutinises how the Court approached the application of its implied exclusive powers case law. The final section provides some concluding remarks.

¹ For analyses of the theoretical underpinnings of the codification of the division of competences in the EU Treaties see: Theodore KONSTADINIDES, 'EU foreign policy under the doctrine of implied powers: codification drawbacks and constitutional limitations', *European Law Review*, 4, 2014, pp. 511-530; Robert SCHÜTZE, 'Lisbon and the federal order of competences: a prospective analysis', see *id.* at, 5, 2008, pp. 709-722.

² Judgment in C-114/12 Commission v Council (Broadcasting Rights Convention) EU:C:2014:2151. Judgment in Green Network, C-66/13 EU:C:2014:2399.

³ Opinion 1/13 Re: *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, EU:C:2014:2303.

II. THE CONTEXT OF THE OPINION

The partial communitarization of the area of judicial cooperation in civil matters (part of the now disappeared Third Pillar of the EU) entailed the transformation of certain international agreements into EU regulations. This was the case of the Brussels Convention⁴ that was almost identically reproduced in Regulation 44/2001,⁵ or the Brussels II Convention⁶ that was incorporated into the EU *acquis* by virtue of the Brussels II Regulation.⁷ In 2003, the Council replaced this last instrument with the current Brussels IIA Regulation.⁸

The Brussels IIA Regulation (the Regulation) deals with issues of jurisdiction and recognition and enforcement of judgment on matters related to family law. Specifically, it covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.⁹ Among those decisions, the Regulation covers matters concerning child abduction in relation to the jurisdiction of a Court to hear a dispute where the child has been wrongfully removed from her/his habitual residence (art. 10); in relation to the question of the return of the child to his/her habitual residence, the rights of the child prior to that return, the justifications that would allow a court to refuse that return (art. 11); and in relation to the enforcement and recognition of judgments establishing the return of a child.

In establishing how the Regulation interacts with Private International Law agreements concluded by EU Member States, art. 60 establishes, *inter alia*, that the Regulation takes precedence of the over more specific interna-

⁴ Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

⁵ Regulation 44/2001/EC of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ L 12*, p. 1)

⁶ Act of the Council of 28 May 1998 drawing up, on basis of Article K.3 of the Treaty on European Union, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (*OJ C 221*, p. 1)

⁷ Regulation 1347/2000/EC of the Council of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (*OJ L 160*, p. 19).

⁸ Regulation 2201/2003/EC of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (*OJ L 33*, p. 1)

⁹ Recital 5 of the Regulation.

tional instruments such as the Convention in relations between Member States. Moreover, art. 11 of the Regulation builds an explicit link with the Convention, by referring to it in its wording.

In 2011, the Commission took the view, that, pursuant to *Opinion 1/03*,¹⁰ the provisions of the Convention affected the Regulation.¹¹ According to the Commission, since the matters dealt by the Convention fell into the EU's exclusive external competence, Member States could only act in matters covered by the Convention by virtue of EU authorization.¹² Given that the Convention is only open to States, the decision on whether EU Member States should accept new State's accession to it had to be taken by means of a Council Decision.¹³ By contrast, within the Council most of the Member States considered the Council to be under no legal obligation to adopt those proposals, since the EU did not have exclusive competence in the area concerned.¹⁴

Consequently, the Commission requested by virtue of article 218 (11) TFEU an opinion to the Court.¹⁵

«Does the exclusive competence of the [European] Union encompass the acceptance of the accession of a non-Union country to the Convention on the civil aspects of international child abduction [concluded in the Hague on] 25 October 1980 [(«the 1980 Hague Convention» or «the Convention»)]?»¹⁶

III. THE CONCEPT OF INTERNATIONAL AGREEMENT AND THE ADMISSIBILITY OF THE REQUEST FOR AN OPINION

Article 218 (11) TFEU allows the three main EU institutions and the Member States to request an *a priori* constitutional control of international

¹⁰ Opinion 1/03 Re: *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* EU:2006C:81.

¹¹ Proposal for a Council Decision on the declaration of acceptance by the Member States, in the interest of the European Union, of the accession of Seychelles to the 1980 Hague Convention on the Civil Aspects of International Child Abduction, COM (2011) 909 final, 21.12.2011, p. 2.

¹² Ibid.

¹³ Ibid.

¹⁴ Opinion 1/13, op. cit., note 3, para. 27.

¹⁵ Ibid. at para 27.

¹⁶ Ibid. at para 1.

agreements. Consequently, the question of whether the acceptance of a third State's accession to the Convention constitutes an international agreement centres the initial analysis of both the AG and the Court. In other words, the request for an opinion would be admissible inasmuch as the EU Member States' acceptance can be considered an international agreement in the sense of article 218 (11) TFEU.

The Council, and certain EU Member States, argued in favour of formalistic conception of an international agreement. According to them, «*an 'agreement' designates an act of accordance, which requires two corresponding expressions of intent.*»¹⁷ Therefore, since the accession of a third State to the Convention and the acceptance of that accession by a Contracting State «*do not represent two corresponding expressions of intent since they do not form part of a reciprocal contractual relationship,*»¹⁸ the declarations of acceptance cannot be considered an international agreement.¹⁹ Instead, they regarded the declarations of acceptances as acts implementing the Convention and not international agreements in the sense of article 218 (11) TFEU.²⁰

Unsurprisingly the CJEU and the AG took a different approach to the issue. As the AG mentioned, since its first Opinion²¹ «*the Court has consistently opted for a broad, non-formalistic definition of the types of international agreement.*»²² This definition places the binding force of the international instrument at the center of the analysis in detriment of any formal considerations.²³ In *Opinion 1/13*, even though any references to its previous case law on the notion of an international agreement are missing from the CJEU's reasoning, the Court continued nonetheless to apply its broad, non-formalistic view on international agreements.

As mentioned above, the approach taken by the Court is not new, a broad non-formalistic concept of international agreement has been a common fea-

¹⁷ Ibid. at para 32.

¹⁸ Ibid. at para 32.

¹⁹ Ibid. at para 32.

²⁰ Ibid. at para 30.

²¹ *Opinion 1/75 Re: Understanding on a Local Cost Standards*, EU:C:1975:145: «*The formal designation of the agreement envisaged under international law is not of decisive importance in connexion with the admissibility of the request. In its reference to an 'agreement', [article 218 (11) TFEU] uses the expression in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.*»

²² *Opinion 1/13*, op. cit., note 3, AG Opinion para 23.

²³ *Opinion 2/92 re: OECD* EU:C:1995:83, para 8.

ture of the CJEU's case law as well as in International law generally.²⁴ The Court rightly identified that the Vienna Convention on the Law of the Treaties (VCLT)²⁵ shared a similar approach to the concept of international agreement.²⁶ Furthermore, as a way of example, in *France v Commission*,²⁷ the CJEU established from an analysis of its substance the (lack of) legally binding force and by extension settled the question of whether a certain international instrument amounts to an international agreement.²⁸ Otherwise put, for the Court the defining factor is not the name or the form than an international agreement might take, but instead whether the agreement in substance creates legal obligations between the parties, and that can only be achieved by an analysis of the substance of the agreement.

Likewise in *Opinion 1/13*, the Court considered that insofar as art. 38 of the Convention provides that the Convention will be legally binding between the acceding party and the party accepting that accession after the deposit of the declaration of acceptance of accession, the form and the name of the international agreement seem irrelevant.²⁹

Consequently, an act of accession to the Convention summed up to a declaration accepting that accession would constitute an international agreement both internally and internationally according to the CJEU. In other words, the Court's approach to the concept of international agreement is in line with International law and as Klabbbers mentions, *it could be hardly be otherwise; EU law cannot afford to have a different definition of treaty than the one prevailing in international law*.³⁰ The bilateral legal obligations that arise from the declaration show the convergence of intent required by art. 2 (1)(a)

²⁴ Jan KLABBERS, *The Concept of Treaty in International Law*, The Hague, Kluwer Law International 1996, p. 40. Contra. Anthony AUST, 'Alternatives to Treaty-Making: MOUs as Political Commitments', in D. B. HOLLIS (ed), *The Oxford Guide to Treaties*, Oxford, Oxford University Press, 2012, p. 65.

²⁵ Vienna Convention on the Law of Treaties, 23 May 1969 (U.N.T.S., vol. 1155, p. 331).

²⁶ *Opinion 1/13*, op. cit., note 3, para 37. «Under Article 2(1)(a) VCLT, an international agreement may be embodied in a single instrument or in two or more related instruments. Those instruments may thus be the expression of the 'convergence of intent' on the part of two or more subjects of international law, which those instruments establish formally.

²⁷ Judgment in C-233/02 *France v Commission* EU:C:2004:173.

²⁸ *Ibid.* at para 43.

²⁹ *Opinion 1/13*, op. cit., note 3, para 40.

³⁰ Jan KLABBERS, *The European Union in International Law*, Paris, Pedone 2012, p. 39.

VCLT. Moreover, that same provision allows for an international agreement to be concluded by more than one instrument like an act of accession and a declaration of acceptance of that accession.³¹

Moreover, the Court also rejected the argument that given that the EU cannot accede the 1980 Hague Convention, the main requisite for the applicability of article 218 (11) TFEU; i.e. an international agreement between the EU and third States, is not met in this Opinion.³² For the Court, it is irrelevant whether the EU concludes the agreement. An opinion may be obtained on questions relating to the division of competence to conclude an international agreement regardless of whether the EU can accede the agreement.³³ In a situation where the conditions for being a party to such an agreement preclude the EU itself from concluding the agreement, although the latter falls within the EU's external competence, that competence may be exercised through the Member States acting as trustees of the EU's interest.³⁴ Therefore, an Opinion might be nevertheless necessary on agreements that the EU itself is not concluding as to establish their compatibility with EU law.

The Court had already recognized this possibility in *Opinion 2/91*. The CJEU held that in situations in which the EU has competence over an area covered by an international agreement but yet it cannot accede the agreement «*cooperation between the Community and the Member States is all the more necessary in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO convention and must do so through the medium of the Member States.*»³⁵ Usually, this cooperation, especially in relation to areas covered by exclusive competence, takes the form of regulations authorizing EU Member States to act, and even requiring them to conclude international agreements.³⁶

³¹ Opinion 1/13, op. cit. note. 3, para 41.

³² Ibid. at para 33.

³³ Ibid. at para 43.

³⁴ Ibid. at para 44.

³⁵ Opinion 2/91 Re: *Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work*, EU:C:1993:106, para 37.

³⁶ Marise CREMONA, 'Member States as Trustees of the Community interest: Participating in international agreements on behalf of the European Community', EUI Working Paper Law, 2009/17, 2009, pp. 20, p. 5. For examples in the field of Private International Law see: Steve PEERS, *EU Justice and Home Affairs*, Oxford, OUP 2011, p. 650.

IV. IMPLIED EXTERNAL POWERS AND BRUSSELS IIA REGULATION

1. ARTICLE 3 (2) TFEU A NEW ERA FOR THE CASE LAW ON EXCLUSIVE IMPLIED COMPETENCES?

Article 3 (2) TFEU identifies three principles that trigger an exclusive implied power. The first, the WTO Principle provides for the exclusive nature of an implied power in relation to an international agreement, when its conclusion is provided for in a legislative act of the Union.³⁷ Secondly, the Necessity Principle that establishes the exclusive nature of an external implied competence whenever is necessary to enable the Union to exercise its internal competence.³⁸ And thirdly, the ERTA Principle that provides that insofar as the conclusion of an international agreement may affect common rules or alter their scope the competence to conclude that agreement will be exclusive.

When laying down these three principles, art. 3 (2) TFEU codified the case law of the CJEU on exclusive implied external powers in a rather puzzling way.³⁹ In particular, the codification of the ERTA Principle seems to be the most problematic of the three since it fails to capture the complexity of the case law.⁴⁰ For instance, the CJEU had identified, in the *Open Skies* cases, that under the ERTA Principle an exclusive implied power might also arise not only where the international agreement falls within the scope of common rules (rule pre-emption)⁴¹ but also when an area is already covered to a large extent by EU rules (field pre-emption).⁴² Yet this second possibility was missing in the codification effort of art. 3 (2) TFEU. While most authors,⁴³ as well as the Commission, the European Parliament and certain Member

³⁷ SCHÜTZE, op. cit., note 1, p. 714.

³⁸ Opinion 1/76 Re: *Inland Waterways* EU:C:1977:63

³⁹ Piet EECKHOUT, *EU External Relations Law*, Oxford, Oxford University Press 2011, p. 113.

⁴⁰ Bart VAN VOOREN & Ramses A. WESSEL, *EU External Relations Law. Text, Cases and Materials*, Cambridge, Cambridge University Press 2014, p. 106.

⁴¹ Ibid. at 114.

⁴² Judgment in C-467/98, *Commission v Denmark (Open Skies)* EU:C:2002:625 para 80. Cf. Opinion 1/03, op. cit. note 10, para 126; Opinion 2/91, op. cit., note 34, para 25-26.

⁴³ VAN VOOREN & WESSEL, op. cit., note 40, p. 106. EECKHOUT, op. cit., note 39, p. 113. KONSTADINIDES, op. cit., note 1, p. 529. Marise CREMONA, 'The Draft Constitutional Treaty: External Relations and External Action', *Common Market Law Review*, 4, 2003, pp. 1347-1366, p. 1351.

States share the view that the case law pre-Lisbon applies to its fullest extent,⁴⁴ the Council and a majority of EU Member States argued otherwise. According to them, an exclusive external competence cannot arise because the area is covered to a large extent by equivalent rules of EU law since that criterion is irrelevant as it was not included in art. 3(2) TFEU.⁴⁵

The CJEU rejected the view. For the Court, *the scope of EU rules may be affected or altered by international commitments where such commitments are concerned with an area which is already covered to a large extent by such rules*⁴⁶ even in the context of art. 3(2) TFEU. In other words, the conditions for the «ERTA Principle» to apply continue to be the same post-Lisbon.

2. THE APPLICATION OF THE ERTA PRINCIPLE TO THE 1980 HAGUE CONVENTION

Consequently, how did the Court apply the ERTA principle to determine whether the Convention is covered by an exclusive implied power? The analysis of the CJEU in that regard was succinct, proceeded in two stages, and followed a similar methodology to the one argued by the AG.⁴⁷ First, the CJEU focused on the extent to which the areas concerned coincide, then moved to examine the risk that EU rules may be affected by the Convention.

Concerning the first step, the Court conducted a comprehensive and detailed analysis between the Convention and the Regulation. The CJEU identified that the Convention provides for two procedures: on the one hand, the procedure for returning wrongfully removed children, on the other, the procedure for securing the exercise of rights of access.⁴⁸ In relation to the first procedure, the comparison conducted by the Court found that the Regulation complemented and clarified the 1980 Hague Convention.⁴⁹ More specifically, the Court rightly observed that the rules laid down in art. 11 of the Regulation are either based on the rules of the Convention or establish the consequences that are to follow when those rules are applied.⁵⁰ As regard, the sec-

⁴⁴ Opinion 1/13, op. cit., note 3, para 58.

⁴⁵ Ibid. at para 63.

⁴⁶ Ibid. at para 73. Cf. C-114/12, op. cit, note 2 para 70-73.

⁴⁷ Opinion 1/13, op. cit., note 3 para. 79-105 of the AG Opinion.

⁴⁸ Ibid. at para 75.

⁴⁹ Ibid. at para 76.

⁵⁰ Ibid. at para 78.

and procedure enshrined in the Convention the Court held that the Regulation also envisages similar basic rules so far as the exercise of rights of access is concerned.⁵¹ Consequently, the Court concluded that the provisions of the Regulation cover to a large extent the two procedures governed by the 1980 Hague Convention.⁵²

Moving to the second stage of the CJEU's application of the ERTA Principle to the 1980 Hague Convention. This second analytical step entails the examination of the risk that the Convention might affect EU rules that cover to a large extent that same area, particularly undermining the uniform and consistent application of EU rules and the proper functioning of the system which they establish.⁵³ In particular the CJEU understands that even when there is no contradiction between EU rules and the Convention, the former may be affected nevertheless.⁵⁴ The overlap and the close connection between the provisions of the Regulation and those of the Convention, in particular between Article 11 of the Regulation and Chapter III of the Convention, the provisions of the Convention may have an effect on the meaning, scope and effectiveness of the rules laid down in the Regulation.⁵⁵

Therefore, the Court concludes that by virtue of the ERTA principles the EU's exclusive competence encompasses the 1980 Hague Convention and any declaration of acceptance of an accession to it. As the Court puts it, «*if the Member States, rather than the EU, had competence to decide whether or not to accept the accession of a new third State to the 1980 Hague Convention, there would be a risk of undermining the uniform and consistent application of the [the Regulation],*»⁵⁶ in particular, its rules on cooperation in cases of child abduction.

The analysis carried out by the CJEU regarding the ERTA Principle in *Opinion I/13* does not significantly depart from previous case law. First, while the Court especially after *Opinion I/03*⁵⁷ differentiates between the existence of a competence and its nature,⁵⁸ the identification of the nature of the competence continues to be uncertain.⁵⁹ This is due to the constant change

⁵¹ Ibid. at para 80.

⁵² Ibid. at para 83.

⁵³ Ibid. at para 74.

⁵⁴ Ibid. at para 86.

⁵⁵ Ibid. at para 85.

⁵⁶ Ibid. at para 89.

⁵⁷ Opinion I/03, op. cit., note 10, para 118.

⁵⁸ Ibid.

⁵⁹ On the unpredictability of the ERTA Principle pre-Lisbon see: Raas HOLDGARD, *External Relations Law of the European Community. Legal Reasoning and Legal Discourses*, The Netherlands, Wolter Kluwer 2008, p. 111.

of how the analysis is carried out. For instance in *Opinion 1/03*, which summarized the previous case law,⁶⁰ the Court would after asserting the existence of a competence,⁶¹ and consequently identifying the relevant common rules,⁶² establish how EU rules are affected by the international agreement.⁶³

The examination of whether EU rules are affected would be usually done by a two-tier test.⁶⁴ The first part of the test examines whether there is a material overlap between the rules and the international rule (rule pre-emption),⁶⁵ and if there is rule pre-emption there is no need to examine whether there is conflict between the provisions:⁶⁶ the EU's competence is exclusive.⁶⁷ Rule pre-emption would normally happen when an area has been completely harmonized by the EU.⁶⁸ If there was only a partial material overlap between the EU common rules and the international agreement, the CJEU would move to the second part of the test in which it would examine whether the field is covered by a large extent by EU rules (field pre-emption).⁶⁹ This examination would be carried out by looking at both the nature and content of the EU rules and the international agreement.⁷⁰

By contrast, in *Opinion 1/13* the Court started by examining whether there was field pre-emption. The Court does not engage first with the question of whether there is a complete material overlap, even though there is undoubtedly an overlap between the two rules.⁷¹ The CJEU seems to be de-

⁶⁰ Pieter Jan KUIJPER, et al., *The Law of EU External Relations. Case, Materials and Commentary on the EU as an International Legal Actor*, Oxford, Oxford University Press 2013, p. 15.

⁶¹ Opinion 1/03, op. cit., note 10, para 114.

⁶² VAN VOOREN & WESSEL, op. cit., note 40 p. 113.

⁶³ Opinion 1/03, op. cit., note 10, para 120.

⁶⁴ Marise CREMONA, 'Who Can Make Treaties? The European Union', in D. B. HOLLIS (ed), *Oxford Guide to Treaties*, Oxford, Oxford University Press, 2012, p. 115; HOLDGARD, op. cit., note 59 p. 111.

⁶⁵ Opinion 1/03, op.cit., note 10, para 125. Holdgard refers to it as «the specific AETR test.» HOLDGARD, op. cit., note 59, p. 115.

⁶⁶ VAN VOOREN & WESSEL, op. cit., note 40 p. 117. cf. Judgment in C-466/98, *Commission v United Kingdom (Open Skies)* EU:C:2002:624, para 76 of the AG's Opinion.

⁶⁷ VAN VOOREN & WESSEL, op. cit., note 10, p. 113. Robert SCHÜTZE, 'Supremacy Without Pre-Emption? The Very Slowly Emergent Doctrine Of Community Pre-Emp-tion', *Common Market Law Review*, 3, 2006, pp. 1023–1048, p. 1023.

⁶⁸ Robert SCHÜTZE, *Foreign Affairs and the EU Constitution*, Cambridge, Cambridge University Press 2014, p. 291.

⁶⁹ Opinion 1/03, op. cit., note 10 para 126.

⁷⁰ CREMONA, op. cit. note 64, p. 116.

⁷¹ Everybody agrees on the fact that there is an overlap but they disagree on its extent. Opinion 1/13, op. cit., note 3 para 56 and 63.

parting from its rule pre-emption test that guided its more restrictive view of the ERTA Principle and embracing a broad approach to implied exclusivity.⁷² This is further confirmed by examination of the risk that the Convention might affect EU rules. While this examination was already present in earlier case law, it only came to the forefront of the analysis in *Opinion 1/03*.⁷³ Now that broad assessment⁷⁴ of how the Convention affects EU rules without the need of a contradiction or conflict seems to increase the scope of the ERTA Principle even more.

Interestingly, the examination of the risk was so broadly construed that it seems to render the test almost redundant. Insofar as the field is largely covered by EU rules, these rules would almost automatically be affected by an international commitment. While this risk assessment could be seen as a counterbalance to the other tests carried out inasmuch as although there might be a material overlap, nevertheless there might not be a risk. The succinct paragraph in which the actual risk assessment is carried out does not shed any light on which situation in which an international convention might partially overlap with EU rules but nonetheless affect them. It appears that only when there is minimum harmonization EU rules would not be affected by an international commitment.⁷⁵ This is a very broad construction of implied exclusivity which does makes it difficult to apply. This is specially the case when put in the overall context of the realignment of EU competences after Lisbon. Whereas *Opinion 1/03* was heralded as a bold confirmation of a broad understanding of the ERTA principle,⁷⁶ *Opinion 1/13* shows that the ERTA principle continues to be characterized the methodological quandaries that have informed the principle since its inception.

V. CONCLUSION

In *Opinion 1/13*, the CJEU revisited its case law on the concept of an international agreement. This is especially interesting not only in terms of EU

⁷² SCHÜTZE, op. cit., note 69, p. 298.

⁷³ Ibid.

⁷⁴ Panos KOUTRAKOS, *EU International Relations Law*, Oxford, Hart 2015, p. 123.

⁷⁵ Ibid. at 99.

⁷⁶ Piet ECKHOUT, 'The EU and its Member States in the WTO - Issues of Responsibility', in L. BARTELS & F. ORTINO (eds), *Regional trade agreements and the WTO legal system*, Oxford; New York Oxford University Press, 2006, p. 3.

law but also in International law terms since, the Court seems to further advance its non-formalistic conception of an international agreement.

Yet, the most interesting part of the Opinion concerns the application of the ERTA principle. *Opinion 1/13* was the second judgment after the *Broadcasters' rights*⁷⁷ case in which the Court revisited its case law concerning article 3 (2) TFEU. More importantly, it was the first opinion on the topic since the entry into force of the Lisbon Treaty and confirmed the broad view of the ERTA principle which the Court had hinted at in *Opinion 1/03*. Some authors qualified the impact of that opinion to its specific context.⁷⁸ Within the same policy field (civil judicial cooperation) the broad view of ERTA continues to apply after the Lisbon reform. However, when put in the context of the recent realignment of the case law on exclusivity in which the Court seems to be favouring a broad construction of both a prior exclusivity⁷⁹ and implied exclusivity,⁸⁰ it seems difficult to argue that the broad view of *Opinion 1/03* and by extension *Opinion 1/13* must be circumscribed to the field of Private International Law.

Undoubtedly, this is not the end of the discussions on the EU's implied exclusivity. After the announcement that the Commission would be requesting an Opinion in relation to the competence to conclude its Free Trade Agreement (FTA) with Singapore,⁸¹ it is quite likely that the Court will be revisiting once again all its case-law on exclusive powers any time soon. It will be interesting to witness how the broad conception of exclusivity applies to an FTA similar to CETA or TTIP.⁸²

⁷⁷ C-114/12, op.cit., note 2.

⁷⁸ Marise CREMONA, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', in *FIDE 2006*. KOUTRAKOS, op. cit., note 74 p. 123.

⁷⁹ Joris LARIK, 'No mixed feelings: The post-Lisbon Common Commercial Policy in Daiichi Sankyo and Commission v. Council (Conditional Access Convention)', *Common Market Law Review*, 3, 2015, pp. 779-800,

⁸⁰ See note 2.

⁸¹ Commission Decision requesting an opinion of the Court of Justice pursuant to article 218(11)TFEU on the competence of the Union to sign and conclude a Free Trade Agreement with Singapore. C(2014) 8218 final, 30.10.2014

⁸² Andrés DELGADO CASTELEIRO, «Four cases for 2015 (iv) – Opinion 1/15 concerning the scope of the new exclusive competence on foreign direct investment,» disponible en <https://delilawblog.wordpress.com/2015/03/16/andres-delgado-casteleiro-opinion-115-concerning-the-scope-of-the-new-exclusive-competence-on-foreign-direct-investment/> (consultado por última vez el 27.5.2015)

Moreover, *Opinion 1/13* concerns the EU's external competence as regards issues covered by the Convention, which we must not forget is an international agreement to which the EU cannot become a member.⁸³ Even though this is nothing new,⁸⁴ the recognition of a EU exclusive competence over an international agreement to which it cannot become a party highlights «the underlying problem of a discontinuity between the internal legislation and the external obligations of the Union.»⁸⁵ In other words, the EU might have an external competence over an issue and yet it will not be able to ratify the relevant international instrument and consequently be internationally bound by them. Specially in fields corresponding to Private International Law that are now covered by an EU exclusive competence the response to this problem has been the adoption of legislation by which the EU authorizes Member States to conclude an agreement on the EU's behalf. This was, *inter alia*, the case concerning the Hague Convention on Parental responsibility for children,⁸⁶ and of the Convention at least in theory.

It is noteworthy that *Regulation 664/2009*⁸⁷ provided for a procedure for the authorization of Member States agreements falling party or entirely within the scope of Regulation 2201/2003 (the Regulation),⁸⁸ in which a Council decision is not necessary for the Commission to authorize and a Member State to ratify an agreement falling within the scope of the Regulation. Yet, as mentioned above,⁸⁹ the Commission considered that it was necessary a Council decision nevertheless, regardless of the exclusive nature of the field covered by the Convention and what Regulation 664/2009 enshrined. The Commission seems to be aware exclusivity is very difficult to apply in practice and that cooperation with the Member States in quintessen-

⁸³ Article 38 1980 Hague Convention: «Any other State may accede to the Convention.»

⁸⁴ Judgment in 22/70 *Commission v Council (ERTA)* EU:C:1971:32.

⁸⁵ , 'The Union, the Member States and international agreements', *Common Market Law Review*, 1, 2011, pp. 1–7, p. 3.

⁸⁶ VAN VOOREN & WESSEL, op. cit, note 40, p. 509.

⁸⁷ Regulation 664/2009 EC of Council of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations (OJ L 200, p. 46)

⁸⁸ Article 1(2) Regulation 664/2009

⁸⁹ See note 11.

tial, specially when the latter must act on behalf of the EU in fields covered by EU exclusive competence. Therefore, although the authorization procedure might not be that much used in practice,⁹⁰ it cannot be excluded that, after *Opinion 1/13*, the Commission will make a clearer assertion of what exclusivity entails for the Member States, specially in situations in which they are trustees of the Union's interests and might refuse in the Council to act as such.

⁹⁰ Marise CREMONA, 'External Relations and External Competence of the European Union: The emergence of an integrated policy', in P. CRAIG & G. DE BIRCA (eds), *The Evolution of EU Law*, 2nd ed, Oxford, Oxford University Press, 2010, p. 256.