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# All roads lead to Marrakesh: the exclusive external competence of the EU

Ana Ramalho (Maastricht University) · Wednesday, September 28th, 2016

On 8 September 2016, AG Wahl presented his Opinion regarding the nature of the competence of the EU to conclude the Marrakesh Treaty (Opinion procedure 3/15). In the AG's view, [*spoiler alert*] the EU is exclusively competent on this matter – a conclusion that much delighted this blogger and that she had already ventured in May last year.

The AG rightly pointed out that the nature of EU competence is linked to the choice of legal basis for a proposed act. The legal basis determines, inter alia, the powers of the EU and the objectives in light of which the EU can take action, thus having constitutional significance (para. 31 of the Opinion). The choice of legal basis depends on objective factors, namely the aim and content of the measure. It is therefore necessary to identify the main aim of the measure in order to determine its legal basis, although exceptionally – if the measure pursues several goals and none of them takes precedence over the other – multiple bases might be applicable. Only after determining the legal basis, should an analysis of the nature of EU competence – exclusive or shared (with the Member States) – then take place.

**The legal basis**

According to the AG, the decision to conclude the Marrakesh Treaty ought to have a dual legal basis: Articles 19(1) and 207 TFEU. The AG further added that the fact that voting requirements may differ (between qualified majority and unanimity) is not enough to make the provisions incompatible, although the stricter requirement will prevail – which means that the decision to conclude the Marrakesh Treaty ought to be taken by unanimity at the Council (paras. 113-117).

**Article 19(1) TFEU** stipulates that the Council, acting unanimously according to a special procedure and with the consent of the European Parliament, may take action to combat discrimination based on, inter alia, disability. This, according to the AG, is the very *raison d' être* of the Marrakesh Treaty, made clear not only by its preamble but also by its provisions.

**Article 207 TFEU** grants the EU exclusive competence in matters of common commercial policy, which includes the commercial aspects of intellectual property. The AG recalled that, in view of the case law of the CJEU, the common commercial policy must be defined broadly. An EU act will come under that definition if it relates to international trade, in the sense that it is "essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade" (para. 42). It is thus enough that an agreement merely governs trade, for example, by limiting it (i.e., it

does not have to liberalise or promote it – see para. 75 of the Opinion). In the field of intellectual property, the CJEU has ruled that only those aspects with a specific link to international trade come under the notion of common commercial policy. According to the AG, this link is present in a number of provisions of the Marrakesh Treaty, namely Articles 5, 6 and 9 (all dealing with cross-border trade). Said provisions are in turn essential to achieve the objectives of the Treaty.

As a result, the Marrakesh Treaty aims to "promote, facilitate and govern trade in a specific type of goods: accessible format copies" (paras. 48 and 74). The AG added that the Marrakesh Treaty also pursues one of the goals of TRIPS (to facilitate international trade), by standardising certain rules on the availability, scope and use of intellectual property – an argument used by the CJEU in the *Daiichi Sankyo* case when deciding that the TRIPS agreement fell within the scope of Article 207. Moreover, in the opinion of the AG, Article 207 does not exclude from its scope transactions or activities of a non-commercial nature, since goods and services exchanged for reasons other than profit can still be traded. And economic operators that exchange goods and services in a commercial context will be affected by the rules of the Marrakesh Treaty (para. 53). In any case, and even in the context of WTO Agreements, the AG noted, the term "commerce" is interpreted very broadly, encompassing all types of trade regardless of the nature of the transaction. Whether the amount of money paid for the transaction is the full market price or not does not affect the commercial nature of the transaction either (para. 59). It follows that the "non-commercial aspects of intellectual property" – such as moral rights – amount to a residual category. But the AG went further: even where a Treaty includes rules relating to non-commercial uses and activities, such a Treaty as a whole can still fall within the scope of Article 207 (this is the case, notably, for the TRIPS agreement). Moreover, the context in which the international agreement was negotiated – in the case of Marrakesh, WIPO and not WTO – bears little weight on a finding that an agreement relates to the commercial aspects of intellectual property (paras. 64-65).

It is also significant that, in the AG's opinion, the commercial content of an international agreement is not cancelled out by the fact that it also pursues humanitarian, development or other goals. Article 207 must be read in the context of the principles and objectives of the EU, which include both economic and non-economic elements. The fact that a Treaty pursues humanitarian goals, for example, does not mean that the content of the Treaty is non-commercial (paras 68-70).

In sum, the *context* (where the international agreement was negotiated) is not relevant for a finding of the commercial nature of the agreement. The *goals* of the agreement are not that relevant either, in the sense that the commercial character is not affected by the fact that the agreement pursues non-commercial goals in parallel with commercial ones. And the *content* can be comprised of both commercial and non-commercial elements, as the former will absorb the latter for the purposes of qualifying the aspects of intellectual property as commercial; in any event, the commercial elements are given a broad interpretation.

This reading of Article 207 is in line with the extremely broad scope of the provision that was previously advocated by the CJEU in *Daiichi Sankyo* and in case C-114/12 (on which see previous blog post here). The AG seems to confirm that, if a Treaty covers some commercial aspects, then its link to trade is assumed, and the exclusive competence of Article 207 Is triggered (this follows as well from the AG's statement that "in any event, some of the transactions covered by the Marrakesh Treaty certainly do have a commercial nature", at para. 60). The confirmation of the broad scope of Article 207 comes also from the parallel that the AG drew with the broad scope of Article 114 TFEU in the internal sphere (para. 71), which has been the source of much concern among scholars, for its potential to foster a "competence creep" on the part of the EU.

The AG dismissed the possibility of other legal bases being applicable. **Article 114 TFEU** was one of such discarded possibilities, as the parts of the Marrakesh Treaty that could have internal market implications do not, in the AG's view, bear the same weight as the ones concerning (international) trade and non-discrimination. This is because exceptions and limitations favouring people with a disability do not have a significant impact on the internal market, as shown by the fact that they are optional exceptions (i.e., ones that Member States can choose whether to implement or not). In much the same vein, the AG stated that **Article 153 TFEU**, concerning social policy, could not serve as a legal basis, since social policy objectives within the meaning of that provision do not play a central role in the Marrakesh Treaty, and other social components of the Treaty were covered by Article 19 TFEU already. Finally, **Article 209 TFEU**, on development cooperation policy, was deemed by the AG not to be applicable either, on the grounds that development objectives were also secondary in the context of the Marrakesh Treaty.

**The nature of the EU's competence**

Given the dual legal basis, the nature of the EU's competence is both exclusive (in relation to Article 207 TFEU) and shared (in relation to Article 19 TFEU). Importantly, however, this does not mean, in the AG's opinion, that the Marrakesh Treaty is to be concluded as a mixed agreement (in which case the Treaty would have to be concluded by both the EU and its Member States): the choice between a mixed agreement or an EU-only agreement "is generally a matter for the discretion of the EU legislature" (para. 119). Said choice is a political decision, thus subject only to limited judicial review (for instance, in cases where the measure is manifestly inappropriate in relation to the objective sought).

Moreover, in principle, a mixed agreement is necessary when the parts concerning shared and exclusive competence are equally relevant; that is not the case for the Marrakesh Treaty, as the AG pointed out. Even if that weren't the case, since the competence was internally exercised by the EU, it became exclusive externally, as prescribed by the additional source of exclusive competence enshrined in Article 3(2) TFEU. The conclusion of the Marrakesh Treaty may affect or alter the scope of the provisions of the InfoSoc Directive, and for that to happen it is not necessary that the EU has fully harmonised the area of the international agreement – it suffices that it has done so to a large extent (see paras. 128-129 of the Opinion and case law cited therein).

To determine whether the Marrakesh Treaty corresponded to an area covered to a large extent by EU law, the AG analysed the relevant provisions of said Treaty in order to determine whether they could affect the uniform and consistent application or the effectiveness of EU law, and its potential future development (as possible future developments of EU law cannot risk being precluded or signficantly hampered). To the AG's mind, it is undeniable that the exceptions and limitations to copyright are largely covered by the InfoSoc Directive, since they are exhaustive and they must all be applied according to the three-step test. Furthermore, many concepts in Article 5 have been deemed autonomous concepts of EU law by the CJEU, and the Member States' leeway when making use of the exceptions is limited. Concluding the Marrakesh Treaty will imply amending Article 5(3)(b), for example by making the underlying exception mandatory or by changing its wording (which does not currently correspond to that of the Treaty). The scope of Article 6 of the InfoSoc Directive will also, the AG contends, be affected by the Marrakesh Treaty. As a consequence, the Marrakesh Treaty would "inevitably affect common rules or alter their scope" (para. 147). A finding for exclusive competence of the EU is also in line with previous case law of the CJEU, where the Court reasoned that, by adopting the InfoSoc Directive, the EU legislature had "exercised the competence previously devolved on the Member States in the field of

intellectual property" (para. 150 of the Opinion, referring to case C-510/10 *DR and TV2 Danmark*). Finally, the AG pointed out, in May 2015 the Council requested that the Commission submit a legislative proposal so as to give effect to the rules of the Marrakesh Treaty, which means that future developments are in sight through which the EU will definitely have exercised its competence (paras. 151-152).

In other words, Article 3(2) TFEU is applicable, thus triggering the exclusive competence of the EU, but even if it weren't, the EU legislator has a broad discretion as to whether Member States should have a slice of the competence cake.

The EU external competence in copyright (in intellectual property?) seems to be increasingly in EU hands, as every possible avenue is likely to lead to a conclusion of exclusivity.

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