TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

in

Opinion 2/15

WRITTEN OBSERVATIONS OF IRELAND

Pursuant to the third paragraph of Article 196 of the Rules of Procedure of the Court of Justice of the European Union, Ireland, represented by Eileen Creedon, Chief State Solicitor, Osmond House, Little Ship Street, Dublin 8 acting as Agent, with an address for service at the Embassy of Ireland, 28 Route d'Arlon, Luxembourg, assisted by Suzanne Kingston B.L. of the Bar of Ireland, submits the following written observations to the Court of Justice on the Request for an Opinion made by the European Commission pursuant to Article 218(11) TFEU, lodged at the registry of the Court of Justice on 22nd September 2015.

I — Introduction and summary

1. This case concerns the nature and extent of the EU's competence to conclude the Free Trade Agreement with Singapore (EUSFTA), in the form negotiated by the Commission and attached at Annex 1 to the Commission's Request.

2. The Commission's primary submission is that the entirety of EUSFTA falls within the EU's exclusive competence, such that it can be signed and concluded as an EU-only agreement, without Member States' participation.

3. Ireland disagrees with this position, and submits that certain provisions of EUSFTA fall outside the EU's exclusive competence, but within the shared competence of the EU and its Member States, namely:

- Certain provisions of Chapter 8 on Services, specifically in relation to the temporary presence of natural persons and maritime transport; and

- Certain provisions of Chapter 9 on Investment, specifically in relation to portfolio investment, direct taxation, criminal law and procedure, the armed forces and expropriation.

- Article 13.7 EUSFTA insofar as it concerns forestry policy.

II — Background

4. The factual and legal background to EUSFTA is broadly summarised at paragraphs 8 to 53 of the Commission's Request for an Opinion, and will not be repeated here.

5. At the outset, Ireland would emphasise the central importance of the present case, which represents the first time that the Court will have an opportunity to rule on the nature and extent of the EU's competence, following the changes made by the Treaty of Lisbon, to enter into a comprehensive, "new generation" FTA which extends beyond the scope of the EU's Common Commercial Policy to include multiple aspects of transport and all types of investment.

6. As detailed further below, the Commission accepts that the arguments it makes in relation to transport and investment are novel and go beyond the current position set out in the Court's jurisprudence.

7. Given the novelty of these issues, Ireland would underline that this case will have obvious significance for the many similarly comprehensive FTAs which have recently been negotiated, or are currently being negotiated, by the Commission. These include the EU-Canada Comprehensive Economic and Trade Agreement (CETA), negotiations for which were formally concluded on 26 September 2014; the EU Vietnam FTA, negotiations for which were formally concluded on 2 December 2015; and the EU-US Trans-Atlantic Trade and Investment Partnership (TTIP), negotiations for which are still ongoing.

8. If the Commission's position is upheld, Member States will be excluded from signing comprehensive FTAs even where they, as with EUSFTA, include wide-ranging provisions on investment and transport.[1]

[1] Ireland notes that the Council has also authorised the Commission to negotiate a Convention on the application of the rules on transparency for investor-state arbitration under the auspices of UNCITRAL in respect of the provisions falling within the Union' exclusive competence on foreign direct investment and investor-state arbitration against the Union, which negotiations are currently ongoing.

III — Terms of the Request pursuant to Article 218(11) TFEU

9. The terms of the Commission's request for an Opinion pursuant to Article 218(11) TFEU are as follows:

"*Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically,*

- *Which provisions of the agreement fall within the Union's exclusive competence?*
- *Which provisions of the agreement fall within the Union's shared competence? and*
- *Is there any provision of the agreement that falls within the exclusive competence of the Member States?*"

IV — Analysis

10. As indicated above, Ireland's submissions focus on Chapters 8 and 9 of EUSFTA, which deal respectively with Services and Investment.

a) Services (Chapter 8 EUSFTA)

11. In relation to Chapter 8 on Services, Ireland's submits that:

- The provisions of Chapter 8 relating to the temporary presence of natural persons (Section D, Chapter 8) concern an area of shared, not exclusive, competence; and

- Certain provisions of Chapter 8 relating to maritime transport fall within an area of shared, not exclusive, competence.

i) The provisions of Chapter 8 relating to the temporary presence of natural persons (Section D, Chapter 8) concern an area of shared, not exclusive, competence

12. Chapter 8 of the EUSFTA lays down arrangements for the "*progressive reciprocal liberalisation of trade in services, establishment and electronic commerce*" (Article 8.1.1 EUSFTA), including as to market access and national treatment. Article 8.1.4 provides that the Chapter,

> "*shall not apply to measures affecting natural persons seeking access to the employment market of a Party, or to measures regarding citizenship, residence or employment on a permanent basis. Nothing in this Chapter shall prevent a Party from applying measures to regulate the entry of natural persons of the other Party into, or their temporary stay in, its territory, including measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to the other Party under the terms of this Chapter*."

13. Section D of Chapter 8 is entitled "*Temporary presence of Natural Persons for Business Purposes*", *i.e*., relates to Mode 4 within the meaning of GATS. Article 8.14.1 requires, subject to certain conditions, that,

> "*each Party shall allow entrepreneurs of the other Party to temporarily employ in their establishment natural persons of that other Party provided that such employees are key personnel or graduate trainees*".

14. Article 8.14.2 specifies that Parties may not adopt, unless otherwise specified in its Schedule of Specific Commitments, limitations on the total number of natural persons transferred pursuant to Article 8.14.1, or a requirement of an economic needs test as a discriminatory limitation.

15. Ireland acknowledges that, since *Opinion 1/08*, it is clear that Modes 1, 2, 3 and 4 of the GATS fall within the scope of the CCP and therefore within the EU's exclusive competence.[2] As the Commission notes in paragraph 111 of its Request for an Opinion, Section D broadly corresponds to the definition of Mode 4 service supply in the GATS.

16. Nevertheless, the exercise of the EU's competence under the CCP is subject to the condition provided for in Article 207(6) TFEU, which states that,

> "*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*."

17. In Ireland's submission, recognition of exclusive EU competence over the provisions of Chapter 8 EUSFTA on temporary presence of natural persons would affect the delimitation of competences between the Union and the Member States set out in Protocol No 21 of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, and would lead to harmonisation of national legislative and regulatory provisions in a manner that is excluded by such Protocol.

18. Article 2 of Protocol No 21 provides that,

> "*In consequence of Article 1 and subject to Articles 3, 4 and 6, none of the provisions of Title V of Part Three of the Treaty on the Functioning of the*

[2] *Opinion 1/08* ECLI:EU:C:2009:739, paragraphs 118 - 119.

> *European Union, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the Community or Union acquis nor form part of Union law as they apply to the United Kingdom or Ireland*."

19. While it is accepted that the EUSFTA is not a measure adopted pursuant to Title V of Part Three TFEU, Ireland submits that Section D of Chapter 8 EUSFTA certainly affects the delimitation of competences set out in Protocol No 21, and leads to harmonisation of a field which is not permitted, in relation to Ireland and the UK, by the terms of that Protocol.

20. In support of this position, Ireland would refer to the Opinion of Advocate General Kokott in Case C-13/07 *Commission v Council*.[3] That case concerned the previous version of Article 207(6) TFEU, Article 133(6) EC, which provided, insofar as relevant,

> "*An Agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation*."

21. Advocate General Kokott noted that Article 133(6) EC was not an exception to be interpreted narrowly, but rather,

[3] Opinion of AG Kokott in Case C-13/07 *Commission v Council* ECLI:EU:C:2009:190. The case was subsequently removed from the register prior to judgment.

> "*a provision which is designed to clarify the precise scope of and the substantive limits to the Commission's new external trade competence for trade in services*…"

22. The Advocate General further noted that Article 133(6) TFEU "*requires the internal and external powers of the Community to be parallel*", which, in that case, meant that a provision in the TRIPS agreement requiring harmonisation of criminal penalties fell outside the EU's exclusive competence.[4]

23. Ireland notes that the phrasing of Article 207(6) TFEU differs slightly from that of Article 133(6) TFEU, but submits that it does not differ in any material respect for present purposes and that Advocate General Kokott's analysis remains relevant and instructive.

24. For these reasons, Ireland submits that according exclusive competence to the EU over Section D of Chapter 8 would contravene Article 207(6) TFEU. This Section of the EUSFTA falls within the shared competence of the EU and its Member States.

ii) Certain provisions of Chapter 8 relating to maritime transport concern areas of shared, not exclusive, competence

a. The provisions of Chapter 8 on transport fall outside the scope of the CCP

25. Article 207(5) TFEU provides,

> "*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*."

[4] *Ibid*, paragraphs 120 and 156.

26. Article 4(2)(g) provides that competence within the field of transport is shared between the Union and Member States.

27. In *Opinion 1/08*, the Court confirmed that the phrase "*international agreements in the field of transport*" covers, "*inter alia*, the field of trade concerning transport services".[5] In so holding, it affirmed its previous ruling in *Opinion 1/94* that international agreements in transport matters were not covered by what is now Article 207 TFEU.[6]

28. In its Request for an Opinion, the Commission accepts that the transport services covered by the EUSFTA fall outside the CCP as regards cross-border supply of services and temporary presence of natural persons.[7] However, it contends that, as regard establishment (Mode 3), transport services fall within the CCP.

29. In this regard, the Commission accepts that the Court has never examined whether the phrase "*international agreements in the field of transport*" covers all four modes of supply of services, or only some of them.[8] Nevertheless, the Commission argues that, insofar as transport services involve establishment within the meaning of the Treaty, these are excluded from the CCP because (a) Article 207(6) TFEU seeks to maintain a "*fundamental parallelism*" between the EU's internal and external competence, as the Court held in *Opinion 1/08*,[9] and (b) while Chapter 3 of Title IV TFEU, on free movement of services, expressly provides that "*freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport*" (Article 58(1) TFEU), Chapter 2 of Title IV on establishment contains no such provision.

30. In Ireland's submission, the Commission's position is unconvincing and should be rejected.

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[5] *Opinion 1/08* ECLI:EU:C:2009:739, paragraph 158.
[6] *Opinion 1/94* ECLI:EU:C:1994:384.
[7] Request for an Opinion, paragraph 156.
[8] Request for an Opinion, paragraph 172.
[9] *Opinion 1/08*, *op. cit*. paragraph 164.

31. In the first place, the Commission's position runs counter to the natural and ordinary meaning of the term "*international agreements in the field of transport*". The Commission seeks to imply a limitation, *i.e.*, the exclusion of international agreements in the field of transport as concerns establishment, which is nowhere to be found in Article 207(6) TFEU. Similarly, the Commission's argument that the term "*transport*" in Title VI of Part Three TFEU excludes the establishment aspects of transport[10] runs counter to the natural and ordinary meaning of that term.

32. In the second place, the Commission's reasoning is fallacious and does not follow from the scheme of the TFEU. The fact that there is no equivalent of Article 58(1) TFEU in Chapter 2 of Title IV on establishment indicates that there is no barrier, as a matter of primary Treaty law, to applying the TFEU provisions on freedom of establishment to cases of potential restriction of freedom of establishment in the transport field.[11] It does not exclude all transport issues involving establishment from the scope of Title VI of Part Three TFEU on transport, referenced in Article 207(5) TFEU. Rather, the scope of Title VI is governed by the provisions of that Title. By contrast, in the case of transport services, the effect of Article 58(1) TFEU is that only Title VI of Part Three TFEU on transport is applicable to national restrictions on cross-border transport services, to the exclusion of Article 56 TFEU.

33. In the third place, the Commission's argument based on Article 91 TFEU is similarly unconvincing. The examples of EU transport rules to be laid down which are listed at Article 91(1) TFEU are expressly not exhaustive, and allow at (d) for "*any other appropriate provisions*". Further, contrary to the Commission's position,[12] the examples given in Article 91(1) TFEU extend, in their natural and ordinary meaning, to transport providers seeking to establish themselves in another Member State. Such transport providers may, for instance, equally seek to

[10] Request for an Opinion, paragraph 181.
[11] The case cited by the Commission, Case C-338/09 *Yellow Cab* ECLI:EU:C:2010:814, is authority only for this proposition, not for the Commission's present very different contention.
[12] Request for an Opinion, paragraph 179.

rely on common rules applicable to international transport to or from the territory of a Member State promulgated under Article 91(1)(a) TFEU. The fact that the Article 91(1) TFEU examples do not specifically reference the establishment of third country suppliers in the Union (Request for an Opinion, paragraph 179) demonstrates only that the EU does not have express external competence in this field. It does not show that issues of establishment are excluded from the scope of Title VI.

34. For these reasons, Ireland considers that the provisions of the EUSFTA relating to transport fall outside the scope of the CCP.

b. Certain provisions of Chapter 8 in relation to maritime transport fall outside Article 3(2) TFEU

35. Article 3(2) TFEU provides that the EU also enjoys exclusive external competence to conclude an international agreement (so-called "implied" exclusive competence) when,

> "*its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*."

36. In its Request for an Opinion, the Commission argues that the provisions of the EUSFTA on transport are "*narrow and specific*"[13], and that the relevant "area" to be considered for the purposes of the ERTA doctrine is the EUSFTA's transport provisions as a whole which, the Commission argues, is largely covered by

[13] Request for an Opinion, paragraph 160.

common rules and where Member State action may affect common rules or alter their scope within the meaning of that doctrine.[14]

37. In Ireland's view, viewing the entirety of the transport provisions as the relevant "area" for ERTA purposes is unduly broad. Rather, an analysis should be made of each transport sector individually, in accordance with the fact that a different body of rules exists internally within the EU for each transport sector, *i.e.*, the sectors are not covered by a single body of internal EU rules. This is, in Ireland's submission, consistent with the Court's settled case-law requiring a "*comprehensive and detailed analysis of the relationship between the envisaged international agreement and the EU law in force*", which

> "*must take into account the areas covered by the EU rules and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions*."[15]

38. Ireland notes that the EUSFTA contains only narrow commitments in relation to inland waterways, rail and road transport, and therefore focuses in its submissions on maritime transport (Article 8.56 EUSFTA). Nevertheless, in relation to inland waterways, rail and road transport, Ireland would add that it concurs with the submissions of the Council that it is not enough for the Commission to claim exclusive Union competence over these fields simply on the basis that, in the case of Singapore, they are of "*limited practical relevance*".[16] This test is nowhere to be found in the Court's case-law or in the wording of Article 3(2) TFEU.

39. As regards cross-border movement of natural persons, Ireland refers to its submissions in relation to temporary presence of natural persons (Mode 4) in

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[14] Case 11/70 *ERTA* EU:C:1971:32, Request for an Opinion, paragraph 189. See most recently Opinion 1/13 ECLI:EU:C:2014:2303; Case C-66/13 *Green Network* ECLI:EU:C:2014:2399; Case C-114/12 *Commission v Council* (Protection of Neighbouring Rights of Broadcasting Organisations) ECLI:EU:C:2014:2151.

[15] See for instance *Opinion 1/13*, *ibid*, paragraph 74.

[16] Written submissions of the Council, paragraph 89; Request for an Opinion, paragraphs 233, 235, and 240.

section III(a)(ii) below. Specifically, Ireland would emphasise that the EU legislation relied upon by the Commission in support of its contention that this is a field largely covered by EU rules, Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of intra-corporate transfers, is based on Article 79(1) TFEU, which is contained within Title V of Part Three TFEU, to which Protocol No 21 on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice applies. Ireland has not opted in to Directive 2014/66/EU and is not bound by it.

40. In Ireland's submission, it would be inconsistent with Article 2 of Protocol No 21, cited above, for Directive 2014/66/EU, by which Ireland is not bound, to be considered as constituting sufficient "*common rules*" for the purposes of the *ERTA* doctrine.

41. Ireland further submits that Article 8.56.5 EUSFTA falls outside the implied exclusive competence of the EU. That Article requires each Party to permit international maritime transport service suppliers of the other Party to,

> "*have an establishment in its territory under conditions of establishment and operation in accordance with the conditions inscribed in its Schedule of Specific Commitments.*"

42. As the Commission itself notes, Regulation 4055/86 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries[17] does not deal with the principle of freedom of establishment.[18] Establishment remains an area, therefore, in which no common EU rules in relation to the maritime transport sector yet exist.

[17] Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries OJ 1986 L 378/1**.**

[18] Article 7 of Regulation 4055/86 provides for the possibility that the Regulation may be extended to nationals of a third country who provide maritime transport services and are established in the Community. However, the Regulation has not yet been thus extended.

43. As a result, in Ireland's submission, the *ERTA* doctrine does not apply here and Article 8.56.5 concerns a field of shared competence between the EU and its Member States.

44. Ireland further notes that Article 8.56.3(b) EUSFTA obliges each Party to "*grant to ships flying the flag of the other Party treatment no less favourable than that accorded to its own ships or to those of any third country*" with regard to *inter alia* access to ports and port services. Ireland considers that this also goes beyond the scope of Regulation 4055/86, which, as the Court has recently confirmed in its judgment in Case C-83/13 *Fonnship*, does not apply to any vessel flying the flag of a third country.[19]

45. For these reasons, Ireland submits that the EUSFTA provisions on maritime transport fall outside the EU's exclusive competence as regards the temporary presence of natural persons, establishment and port services.

b) Investment (Chapter 9 EUSFTA)

46. Ireland notes the summary description of Chapter 9 contained in paragraphs 260-272 of the Commission's Request and in the interest of avoiding repetition does not include a detailed overview of the Chapter in the present submissions.

47. In Ireland's submission, a detailed analysis of Chapter 9 in the light of the applicable jurisprudence demonstrates that it covers an area of shared competence between the EU and its Member States, as:

- The provisions of Chapter 9 EUSFTA in relation to portfolio investment go beyond the EU's exclusive external competence; and

[19] ECLI:EU:C:2014:2053.

- The provisions of Chapter 9 EUSFTA concerning direct taxation, criminal law and procedure, the armed forces and expropriation fall outside the EU's exclusive external competence.

i) The provisions of Chapter 9 EUSFTA in relation to portfolio investment go beyond the EU's exclusive external competence

a. Chapter 9 falls outside the CCP in relation to portfolio investments[20]

48. The amendments to what is now Article 207 TFEU introduced by the Treaty of Lisbon included, amongst the CCP's objectives set out in Article 206 TFEU, the objective of,

> "*the progressive abolition of restrictions on…foreign direct investment*."

49. This expansion of the CCP's scope to include, for the first time, direct investment was reflected in Article 207(1) TFEU, which now provides that the CCP shall be based on "*uniform principles, particularly with regard to (...) foreign direct investment*." While Article 207(1) further specifies that the CCP "*shall be conducted in the context of the principles and objectives of the Union's external action*", the description of these principles and objectives set out in Article 21 TEU does not make any reference to investment.

50. Article 207(4) TFEU specifies that, for the negotiation and conclusion of agreements in the field of foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

[20] See similarly, the conclusions of the Council of the European Union of 27 November 2015 on the EU's trade and investment policy, paragraph 11, which notes that investment policy is "*an area of shared competence and responsibility*" (14708/15).

51. While the Court has not yet had the chance to rule on the meaning of foreign direct investment in the post-Lisbon version of present Article 207 TFEU, the Court has previously ruled on the meaning of direct investment in the context of the Treaty provisions on free movement of capital.

52. In Ireland's submission, consistency of conceptual approach requires that the same definition employed in the free movement of capital context should equally be adopted for Article 207 TFEU.

53. As will be recalled, the concept of direct investment is mentioned twice in the Chapter of the TFEU which deals with free movement of capital, namely in:

- Article 64(1) TFEU, which provides that Article 63 TFEU (*i.e.*, the prohibition on restrictions of capital and payments between Member States and between Member States and third countries) is without prejudice to the application of restrictions on capital movement existing as at 31 December 1993[21] involving, *inter alia*, direct investment; and

- Article 64(2) TFEU, which is a legal basis provision enabling the European Parliament and Council to adopt measures on the movement of capital to or from third countries involving *inter alia* direct investment, including investment in real estate.

54. In *Test Claimants in the FII Group Litigation*, the Court defined the concept of direct investment for the purposes of what is now Article 64(1) TFEU as concerning,

> "*investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity*."[22]

[21] In the case of Bulgaria, Estonia and Hungary, the relevant date is 31 December 1999.
[22] Case C-446/04 *Test Claimants in the FII Group Litigation* ECLI:EU:C:2006:774, paragraph 181.

55. In so holding, the Court drew on the nomenclature set out in Annex I to Council Directive 88/361/EEC for the implementation of Article 67 of the Treaty (which Article was repealed by the Treaty of Amsterdam).[23] This Annex included within the concept of direct investment:[24]

- The establishment and extension of branches or new undertakings belonging solely to the person providing the capital and the acquisition in full of existing undertakings;

- Participation in new or existing undertakings with a view to establishing or maintaining lasting economic links;

- Long-term loans with a view to establishing or maintaining lasting economic links; and

- Reinvestment of profits with a view to maintaining lasting economic links.

56. In the case of shareholdings or participations in new or existing undertakings, the Court in *Test Claimants in the FII Group Litigation* also held that, as confirmed by the explanatory notes to the Annex,

> "*the objective of establishing or maintaining lasting economic links presupposes that the shares held by the shareholder enable him, either pursuant to the provisions of the national laws relating to companies limited by shares or otherwise, to participate effectively in the management of that company or in its control*." (emphasis added)

57. This concept of direct investment may be contrasted, as the Court has held, with the concept of "portfolio" investments, which have been defined as,

[23] Council Directive 88/361/EEC OJ 1988 L178/5.
[24] *Ibid*, paragraphs 178-180.

> "*investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking*."[25]

58. It is clear, therefore, from the Court's case-law that, while both direct and portfolio investments fall within the concept of "*movements of capital*" within Articles 63-66 TFEU, the concept of direct investment is a narrower concept and, in particular, does not extend to portfolio investments.

59. Applying this case-law here, it is common ground that Chapter 9 of the EUSFTA clearly goes well beyond direct investment within the meaning of the TFEU.

60. Specifically, the Chapter adopts a very broad definition of "*investment*", extending to,

> "*every kind of asset which has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk or a certain duration*." (Article 9.1.1, EUSFTA).

61. It follows that the scope of application of the Chapter is similarly broad, extending to all,

> "*covered investors and covered investments made in accordance with the applicable law, whether such investments were made before or after the entry into force of this Agreement*".[26]

62. The Chapter therefore applies to all kinds of investment, not just foreign direct investment but also portfolio investment, within the meaning of the Court's case-law.

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[25] Joined Cases C-282/04 and C-283/04 *Commission v Netherlands* ECLI:EU:C:2006:608, paragraph 19 and case-law cited; Case C-171/08 *Commission v Portugal* ECLI:EU:C:2010:412, paragraph 49.

[26] "Covered investor" is defined as "*a natural person or a juridical person of one Party that has made an investment in the territory of the other Party*" (Article 9.1.2 EUSFTA). "*Covered investment*" is defined as "*an investment which is owned, directly or indirectly, or controlled, directly or indirectly, by a covered investor of one Party in the territory of the other Party*" (Article 9.1.1 EUSFTA). Footnotes omitted.

63. Indeed, this is not disputed by the Commission, who accepts that Chapter 9 goes beyond the scope of the CCP insofar as it extends to portfolio investment (Request, paragraphs 274-275 and 333).

64. For this reason, the EU has no express exclusive competence to conclude Chapter 9 in relation to portfolio investment.[27]

b. No implied exclusive competence in relation to portfolio investment

65. In its Request for an Opinion, the Commission accepts that neither of the first two conditions for implied external exclusive competence pursuant to Article 3(2) TFEU applies in relation to an international agreement in the field of portfolio investment, namely, the conclusion of such an agreement is not provided in any legislative act of the Union, and is not necessary to enable the Union to exercise its internal competence.[28]

66. However, the Commission takes the position that portfolio investment nevertheless falls within the EU's implied exclusive external competence because the provisions of Chapter 9 are at least to a large extent covered by common rules laid down in Article 63 TFEU (Request for an Opinion, paragraphs 275 and 335 - 367).

67. Ireland disagrees with this position, for the following reasons.

68. First, the Commission's position is based on the proposition that a Treaty article, in this case Article 63(1) TFEU, can in itself constitute "*common rules*" for the purposes of Article 3(2) TFEU.

[27] See similarly, judgment of the *Bundesverfassungsgericht* of 30 June 2009 ("*Lisbon*") 2 BvE 2/08 ECLI:DE:BVerfG:2009:es20090630.2bve000208, paragraph 379.
[28] Request for an Opinion, paragraph 373.

69. In Ireland's view this proposition should be rejected and has no basis in the Court's jurisprudence. As the Court has noted, the words used in the last clause of Article 3(2) TFEU correspond to those by which,

> "*the Court, in paragraph 22 of the judgment in ERTA (EU:C:1971:32), defined the nature of the international commitments which Member States cannot enter into outside the framework of the EU institutions, where common EU rules have been promulgated for the attainment of the objectives of the Treaty*."[29]

70. In its original French version, paragraph 22 of the *ERTA* judgment provides,

> "*…dans la mesure où des règles communautaires sont arrêtées pour réaliser les buts du traité, les États membres ne peuvent, hors du cadre des institutions communes, prendre des engagements susceptibles d'affecter lesdites règles ou d'en altérer la portée*."

71. In Ireland's submission, the term "*promulgated*"/"*arrêtées*" in this extract clearly indicates that the concept of "*common rules*"/ *règles communautaires* does not refer to primary EU law, but rather to secondary EU law promulgated on the basis of the Treaties and to attain their objectives.

72. This is all the more so in the case of Article 63 TFEU as applied to restrictions on free movement of capital between the EU and third countries, where the prohibition contained in Article 63(1) is subject to the limitations set out in Article 64 TFEU, Article 65(4) TFEU, and Article 66 TFEU. The Commission's contention that Article 63(1) TFEU achieves "*by itself the full liberalisation of capital movements between the Union and third countries*"[30] is, therefore,

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[29] Case C-66/13 *Green Network* ECLI:EU:C:2014:2399, paragraph 27; Case C-114/12 *Commission v Council* (Protection of Neighbouring Rights of Broadcasting Organisations) ECLI:EU:C:2014:2151, paragraph 66.

[30] Request for an Opinion, paragraph 364. The Commission's argument at footnote 286 of the Request for an Opinion, that the decision to include expanded provisions on the free movement of capital within the Treaty after Maastricht must bring with it exclusive external competence: (1) overlooks the limitations placed on the Treaty on the free movement of capital with third countries; and (2) ignores the fact that, as the Commission itself admits, the rules contained in the Directives on the matter were far narrower in scope

inconsistent with the express and significant qualifications placed on such liberalisation by the Treaty.

73. According to the Commission, the provisions of Chapter 9 can be considered to be capable of affecting common rules or altering their scope simply because they can be viewed as forms of prohibition on restrictions of capital between the EU and third countries,[31] because they target practices which may be "*liable to discourage*" potential foreign investors from investing.[32]

74. This extreme contention, if accepted, would have the effect that any provision in an international agreement which could be "*liable*" to dissuade investment would, irrespective of whether it fell under the CCP or not, fall within the implied exclusive competence of the EU.

75. In Ireland's submission, such an interpretation runs counter to the system of competences established by the Treaty, and is contrary to Article 3(2) TFEU. As noted above, the category of measures which might be considered to dissuade potential investors from investment is extremely broad, extending, for instance, to the design of the national tax system at issue, the employment conditions and salaries in the State at issue, and the level of State subsidies (in compliance with the State aid rules)[33] granted to overseas investors.

76. Under the Commission's proposed test, all of these measures would be susceptible to be included as falling within the EU's implied exclusive competence.

77. Further, contrary to the Commission's contention, if Article 63 TFEU were considered to constitute "*common rules*" within the meaning of the ERTA doctrine, this would render the express inclusion of "*foreign direct investment*"

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than Article 63(1) TFEU. It can therefore not be assumed that, had harmonisation continued on the basis of Directives, the entirety of the investment field would have been covered "*to a large extent*" by secondary legislation.

[31] Request for an Opinion, paragraph 348.

[32] *Ibid*, paragraph 352

[33] Ireland notes that, in the EUSFTA, government-supported loans, guarantees and insurance are excluded from the scope of Article 9.3, but not from the scope of the other Articles, by Article 9.2.2.

within Article 207(1) TFEU redundant. If the Commission's position were accepted, there would have been no need for such inclusion, as the area would have already constituted an implied exclusive competence of the EU. As to the Commission's counterargument that foreign direct investment should be equated to establishment, this is clearly inconsistent with the Court's case-law which, as set out above, provides that the concept of foreign direct investment is broader than that of establishment.[34]

78. The Commission further seeks to rely on the Court's judgments in *Pringle* and *Opinion 1/92* in support of the contention that Treaty provisions in themselves may constitute "*common rules*" for the purposes of the *ERTA* doctrine.[35]

79. In Ireland's view, neither of these cases supports the Commission's position. In the relevant passage of *Pringle*, in holding that the conclusion and ratification of the European Stability Mechanism (ESM) Treaty by Eurozone States was not precluded by Article 3(2) TFEU, the Court considered whether an EU Regulation was affected (in that case, the 2010 Council Regulation establishing a European financial stabilisation mechanism),[36] not just the relevant Treaty provision on which that Regulation was based (Article 122(2) TFEU).[37] The relevant passage of *Opinion 1/92* does not deal with the question of exclusive or shared competence, but rather with the question of the existence of EU competence as such.[38]

80. There is, therefore, no basis in the Court's jurisprudence for the Commission's position.

81. As a subsidiary point, while this has not been argued by the Commission, Ireland would add that no existing EU legislation can be considered to constitute

[34] Neither of the cases cited at footnote 290 of the Request for an Opinion demonstrates otherwise.
[35] Case C-370/12 *Pringle* ECLI:EU:C:2012:75, paragraphs 103-106; *Opinion 1/92* ECLI:EU:C:1992:189, paragraphs 39-40, cited at footnote 284 of the Request for an Opinion.
[36] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism OJ 2010 L 118, p. 1.
[37] Case C-370/12 *Pringle* ECLI:EU:C:2012:75, paragraphs 103-106.
[38] *Opinion 1/92* ECLI:EU:C:1992:189, paragraphs 39-40.

"*common rules*" which cover to a large extent the field of portfolio investment, within the meaning of the Court's jurisprudence.[39] As to the relevance of Regulation 912/2014,[40] as discussed at paragraphs 382 – 388 of the Request for an Opinion, this deals only with the apportionment between the EU and its Member States inter se of financial responsibility resulting from Investor-to-State Dispute Settlement (ISDS) mechanisms. Article 1(1) notes that the Regulation's provisions are expressly *"[w]ithout prejudice to the division of competences established by the TFEU*",

> "…*the adoption and application of this Regulation shall not affect the delimitation of competences established by the Treaties, including in relation to the treatment afforded by the Member States or the Union and challenged by a claim*."

82. This position was confirmed by the Joint declaration of the European Parliament, the Council and the Commission appended to the Regulation, providing that,

> "*The adoption and application of this Regulation are without prejudice to the division of competences established by the Treaties and shall not be interpreted as an exercise of shared competence by the Union in areas where the Union's competence has not been exercised*."[41]

83. Regulation 912/2014, therefore, clearly and expressly distinguishes between the issue of apportionment of financial responsibility for ISDS (which is covered by

[39] See, for instance, C-114/12 *Commission v Council* (Protection of Neighbouring Rights of Broadcasting Organisations) ECLI:EU:C:2014:2151, paragraph 70 and case-law cited; Case C-66/13 *Green Network*, *op. cit*, paragraph 31).

[40] Regulation 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party OJ 2014 L 257/121. See also, Regulation (EU) No 1219/2012 of the European Parliament and the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between the Member States and third countries OJ L 351/40, which similarly states that it is without prejudice to the delimitation of competences between the EU and the Member States (Article 1(1)) and only covers investment protection, not investment promotion.

[41] OJ 2014 L 257/134.

the Regulation) and the substantive rules governing investment (which is not covered).

84. For these reasons, Ireland concludes that the provisions of Chapter 9 of the EUSFTA fall outside the EU's exclusive competence in relation to portfolio investment.

ii) The provisions of Chapter 9 EUSFTA concerning direct taxation, criminal law and procedure, the armed forces and expropriation fall outside the EU's exclusive external competence

a. The provisions of Chapter 9 relating to direct taxation, criminal law and procedure, the armed forces and expropriation fall outside the CCP

85. In Ireland's submission, Chapter 9 EUSFTA includes provisions which fall outside the scope of the CCP insofar as they contravene Article 207(6) TFEU and have no "*specific link*" with international trade, within the meaning of the Court's case-law.

86. As noted above, Article 207(6) TFEU provides,

> "*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*."

87. Further, it is settled case-law that,

> "*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*."[42]

88. In *Daiichi Sankyo*, the Court applied this test to hold that the term "*commercial aspects of intellectual property*", inserted into Article 207(1) TFEU by the Lisbon Treaty, must be interpreted as meaning 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*."[43]

89. In that case, the Court concluded that this test was in fact satisfied by the rules of the TRIPs agreement, because:

- The TRIPs agreement forms an "*integral part of the WTO system*" and is "*one of the principal multilateral agreements on which that system is based*";

- The Understanding on Rules and Procedures governing the settlement of disputes, which forms Annex 2 to the WTO Agreement and applies to the TRIPs Agreement, authorises under Article 22(3) the cross-suspension of concessions between that agreement and the other principal multilateral agreements of which the WTO Agreement consists.[44]

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[42] Case C-414/11 *Daiichi Sankyo v DEMO* ECLI:EU:C:2013:520, paragraph 51, and case-law cited therein.
[43] *Ibid*, paragraph 52.
[44] *Ibid*, paragraphs 53-54.

90. The Court also noted that the authors of the FEU Treaty "*could not have been unaware*" that the term "*commercial aspects of intellectual property*" correspond "*almost literally*" to the title of the TRIPs agreement.

91. For these reasons, the Court concluded that the TRIPs agreement enjoyed a link of a "*specific character*" with international trade.[45]

92. This approach is consistent with that taken in a number of other judgments, including, for instance, in Case C-137/12 *Commission v Council* concerning the European Convention on the legal protection of services based on, or consisting of, conditional access, where the Court applied the *Daiichi* principles cited above in interpreting the meaning of "*trade in services*" in Article 207(4) TFEU. [46]

93. Applying this reasoning to the concept of "*foreign direct investment*" in Article 207(1) TFEU, it follows, in Ireland's submission, that, of the rules adopted by the EU in the field of foreign direct investment, only those with a specific link to international trade, and which enjoy a link of a "*specific character*" with international trade, fall within that concept.

94. In particular, Ireland submits that, in accordance with the Court's case-law,[47] it is not enough for this purpose to assume that the mere fact that a provision on investment has been included in an agreement formally entitled a "Free Trade Agreement" demonstrates the requisite specific link. Rather, a detailed analysis of the substance of the provisions at issue should be carried out to assess whether such specific link with international trade in fact exists.

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[45] *Ibid*, paragraph 54.

[46] Case C-137/12 *Commission v Council* ECLI:EU:C:2013:675, paragraphs 56-58. See also *Opinion 2/00* (Cartagena Protocol), paragraph 40; Case C-347/03 *Regione Autonoma Friuli-Venezia* ECLI:EU:C:2005:285, paragraph 75.

[47] See for instance Opinion 1/08, op. cit., paragraph 163 ("*the interpretation proposed by the Commission, by virtue of which only agreements exclusively or predominantly relating to trade in transport services are covered by the third subparagraph of Article 133(6) EC, would to a large extent deprive that provision of its effectiveness. Indeed, the consequence of that interpretation would be that international provisions with strictly the same object and contained in an agreement would fall in some cases within transport policy and in some cases within commercial policy depending solely on whether the parties to the agreement decided to deal only with trade in transport services or whether they agreed to deal at the same time with that trade and with trade in some other type of services or in services as a whole*.")

95. In this regard, Ireland disagrees with the Commission's contention that an agreement falls within the scope of Article 207 TFEU if it has a specific link, within the meaning of the Court's case-law, with international *investment*.[48] The question is rather whether a specific link has been demonstrated with international *trade*. This is an important distinction, as trade and investment remain distinct, albeit related, fields.

96. It is settled case-law that the fact that provisions may be liable to affect international trade is not sufficient to bring them within the scope of the CCP.[49]

97. Specifically, contrary to the Commission's position, Ireland considers that it is not enough merely to show that the investment provisions at issue apply to investments between EU Member States and third countries. While this might demonstrate a link with international investment, this is not, in Ireland's submission, the correct test, according to the Court's case-law to date.

98. Rather, the investment provisions at issue should be analysed to assess whether they have a link of a specific character with international *trade*.

99. For this reason, the Commission's argument that an agreement concerning any restriction on, or obstacle to, investment falls under the CCP should, in Ireland's submission, similarly be rejected.[50] Nor is it enough, as the Commission contend, that an agreement, or part of an agreement, may be aimed at "*promoting*" investment, or that its provisions are "*liable to deter*" potential investors.[51]

100. Ireland recalls that potential overseas investors may be influenced by a very wide range of issues in taking a decision on whether or not to invest in a particular jurisdiction, many of which issues have nothing at all to do with international trade or the CCP, and which certainly cannot be said to fall within the EU's exclusive competence, such as, for instance, the design of the national tax system

[48] Request for an Opinion, paragraphs 280 - 285.
[49] *Daiichi, op. cit*, paragraph 51; *Opinion 2/00* (Cartagena Protocol), paragraph 40.
[50] Request for an Opinion, paragraph 287.
[51] *Ibid*, paragraph 284.

at issue,[52] the employment conditions and salaries in the State at issue, and the level of State subsidies (in compliance with the State aid rules)[53] granted to overseas investors. Ireland assumes the Commission is not contending that these fields fall within the CCP. Yet this would in fact be the logical result of applying the Commission's proposed test, which would be entirely at odds with the Court's jurisprudence requiring a specific link with international trade.[54]

101. Applying these considerations to the present case, Ireland observes that the investment provisions of the EUSFTA form a distinct part of the Agreement insofar as:

- Chapter 9 has its own dispute resolution settlement procedure, meaning that breach of its provisions would seem to fall outside the scope of the EUSFTA's general dispute settlement procedure provided in Chapter 15.[55]

- The goals of liberalising trade and investment are expressed to be distinct, separate objectives of the EUSFTA in Article 1.2, which provides that "*The objectives of this Agreement are to liberalise and facilitate trade and investment between the Parties in accordance with the provisions of this Agreement*."

102. Ireland would further note that a number of the obligations placed on Parties to the EUSFTA clearly envisage, when applied to the EU context, that a Member State, and not the EU, must be the Party at issue. These areas concern fields where the EU's competence in the internal context is weak, where little or no harmonisation has taken place at EU level, and where such harmonisation is significantly limited by the provisions of the EU Treaties, namely:

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[52] See, for instance, the national dividend tax rules at issue in Case C-446/04 *Test Claimants in the FII Group Litigation* ECLI:EU:C:2006:774.

[53] Ireland notes that, in the EUSFTA, government-supported loans, guarantees and insurance are excluded from the scope of Article 9.3, but not from the scope of the other Articles, by Article 9.2.2.

[54] By contrast, Ireland does not take the position, discussed in the Commission's Request, that only provisions dealing with initial admission of investments can fall under Article 207, and that all post-admission issues are not covered. Rather, the test is not whether the provision relates to pre- or post-admission issues, but whether the requisite specific link with international trade can be demonstrated.

[55] See Article 15.2 ("*Scope*"), "*This Chapter shall apply with respect to any difference concerning the interpretation and application of the provisions of this Agreement except as otherwise expressly provided*."

- **Provisions concerning direct taxation and social security**, namely, Article 9.3.3(f), providing for derogations from the principle of national treatment, and permits Parties to take measures (subject to the requirements in the chapeau to that Article) which are, "*aimed at ensuring the effective or equitable imposition or collection of direct taxes in respect of investors or investments of the other Party*", and Article 9.7.2.(f) and (g) which permits Parties to apply their social security and tax law in an equitable and non-discriminatory manner.

- **Provisions concerning criminal law and criminal procedure**, namely, Article 9.4.2.(a), on standard of treatment, which prevents Parties from adopting measures that constitute, "*denial of justice in criminal, civil and administrative proceedings*", and Article 9.7.2.(d) which permits Parties to apply their law relating to criminal or penal offences in an equitable and non-discriminatory manner.[56]

- **Provisions concerning the armed forces**, namely, Article 9.5.2(a), which obliges Parties to accord restitution or compensation to covered investors of the other Party resulting from "*requisitioning of its covered investment or a part thereof by the other Party's armed forces or authorities*", and Article 9.5.2(b), which contains a similar obligation in the case of destruction of covered investments by the other Party's armed forces or authorities. As a State with a traditional policy of military neutrality, Ireland considers it particularly important that it would retain competence over any provisions of

[56] See in this regard the Opinion of AG Kokott in Case C-13/07 *Commission v Council* ECLI:EU:C:2009:190, at paragraph 153, who notes that criminal law and the legal rules governing criminal procedure do not in principle come within the competence of the EU and is has no general power with regard to the harmonisation of national law in that field. The exception to that principle, that EU competence to provide for criminal penalties has been accepted to the extent necessary in order to ensure that EU rules are fully effective (as, for instance, in the case of environment and marine pollution) is not applicable in much of the field of investment, where little EU harmonisation exists.

an international agreement relating to investment which may concern a Member State's armed forces.[57]

103. In Ireland's submission, these provisions fall outside the scope of the CCP because they contravene Article 207(6) TFEU, and do not display a sufficiently specific link to international trade. If the EU's exclusive competence over foreign direct investment were interpreted as extending to such provisions, this would significantly affect the delimitation of competences between the Union and the Member States in these sensitive areas where EU competence remains weak, and would amount to partial harmonisation of these fields.

104. Similarly, Ireland considers that Article 9.6, entitled "*Expropriation*", is contrary to Article 207(6) TFEU in that it seeks to harmonise aspects of Member States' national property rights regime as applied to covered investors and investments, and affects the delimitation of competences between the Union and its Member States set out in the Treaties.

105. Specifically, and contrary to the Commission's contentions, Ireland considers that Article 9.6 affects the requirement in Article 345 TFEU, which provides that,

> "*The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*."

106. As the Court has held, Article 345 TFEU,

> "*is an expression of the principle of the neutrality of the Treaties in relation to the rules in Member States governing the system of property ownership*."[58]

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[57] See Article 3 of European Council Decision 2013/106/EU, European Council Decision of 11 May 2012 on the examination by a conference of representatives of the governments of the Member States of the amendment to the Treaties proposed by the Irish Government in the form of a Protocol on the concerns of the Irish people on the Treaty of Lisbon, to be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and not to convene a Convention OJ 2013 L 60/129, "*The Treaty of Lisbon does not affect or prejudice Ireland's traditional policy of military neutrality*."

[58] Joined Cases C-105/12 to C-107/12 *Essent Belgium* ECLI:EU:C:2013:677, paragraph 29.

107. The Court has also held that the Treaties, do not preclude, as a general rule, either the nationalisation or privatisation of undertakings, and that Member States may, therefore,

> "*legitimately pursue an objective of establishing or maintaining a body of rules relating to the public ownership of certain undertakings*."[59]

108. Applying these principles in *Essent Belgium*, the Court held that a provision in the Dutch Law on electricity which effectively prohibited privatisation fell within the scope of Article 345 TFEU. However, the Court continued that,

> "*Article 345 TFEU does not mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty, which rules include, inter alia, the prohibition of discrimination, freedom of establishment and the free movement of capital*."[60]

109. The Court went on, as a result, to examine the Dutch provision for compatibility with Article 63 TFEU.

110. The Commission accepts that the *Essent Belgium* reasoning applies equally to rules governing the expropriation or nationalisation of private assets just as it does to rules governing the privatisation of public assets.[61]

111. Nevertheless, it asserts that Article 9.6 EUSFTA subjects the exercise of Member States' right to expropriate "*to similar conditions*" to those imposed by Articles 49 and 63 TFEU, and that, *"[g]iven that Article 345 TFEU does not exclude the application of Articles 49 and 63 TFEU to expropriation measures, there is no reason why Article 345 TFEU should exclude the Union's competence to conclude agreements that, in essence, seek to extend*" a similar standard to third

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[59] *Ibid*, paragraphs 30-31; see also Case 6/64 *Costa* [1964] ECR 585, at 598 and Case C-244/11 *Commission v Greece* [2012] ECR, paragraph 17 (Treaty provisions do not preclude nationalisation or privatisation of undertakings).
[60] *Essent Belgium, op cit*., paragraph 36.
[61] Request for an Opinion, paragraph 305.

countries.[62] The Commission further rejects the applicability of Article 207(6) TFEU to Article 9.6 EUSFTA, arguing that (1) Article 207(6) does not create a "*principle of parallelism*" between the EU's internal and external competences; and (2) harmonisation of property rights is permitted by Article 345 TFEU, as long as it does not "*prejudice*" the Member States' property ownership rules.

112. Ireland submits that the Commission's position on this issue is unconvincing.

113. On the one hand, the Commission dismisses the relevance of Article 207(6) TFEU on the basis that there can be no "*principle of parallelism*" between the Union's internal and external competences; yet, on the other, the Commission seeks to rely precisely on such a parallelism in rejecting the relevance of Article 345 TFEU for Article 9.6 EUSFTA.[63]

114. Ireland recognises that, as the Court held in *Essent Belgium*, national prohibitions on privatisation or nationalisation remain subject to the Treaty's free movement provisions, which are fundamental pillars of the EU's internal market.

115. Ireland submits, however, that it cannot simply be deduced that measures contained in an international agreement, and applicable not in the internal market but between the EU and a third country, similarly take precedence over the provisions of Article 345 TFEU. The Commission's argument is limited to asserting that there is "*no reason to think*" that another conclusion should apply.[64] Yet, as the Treaty itself makes clear, different considerations may apply in the context of arrangements with third countries, including restrictions on capital, compared to the rules which are appropriate within the internal market.[65]

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[62] Request for an Opinion, paragraph 309.
[63] See, confirming the general purpose of the previous version of Article 207(6) TFEU (Article 133(6) EC) as being to prevent the EU from entering into international agreements which it be unable to give effect to internally due to a lack of sufficient powers, the Opinion of AG Kokott in Case C-13/07 *Commission v Council* ECLI:EU:C:2009:190. The case was subsequently removed from the register prior to judgment.
[64] Request for an Opinion, paragraph 309.
[65] See, for instance, Articles 64, Article 65(4) and Article 66 TFEU.

116. In this respect, the Commission's assumption that the internal and external contexts are constitutionally identical has no basis in, and indeed runs contrary to, the Treaty.

117. Rather, Ireland submits that, the effect of Article 345 TFEU, read in conjunction with Article 207(6) TFEU, is that, pursuant to the principle of neutrality of property ownership, Member States remain competent to take decisions on privatisation or nationalisation of property, as long as they comply with the fundamental free movement provisions of EU internal market law, as set out in the Treaty.

118. Article 9.6 of EUSFTA contains rules governing the conditions under which Member States are permitted to nationalise or expropriate covered investments of covered investors. It follows that, if this Article were considered to fall within the EU's exclusive competence, this would "*affect*" the delimitation of competences between the Union and Member States within the meaning of Article 207(6) TFEU. It would also harmonise (albeit not exhaustively) the rules governing such nationalisation/expropriation which, contrary to the Commission's contention, is not permitted by Article 345 TFEU.[66]

119. For these reasons, Ireland respectfully submits that the provisions of Chapter 9 EUSFTA concerning direct taxation, criminal law and procedure, the armed forced, and expropriation, fall outside the CCP.

[66] The Commission's argument that harmonisation of property rights is permitted by Article 345 TFEU as long as national rules governing such rights are not "*prejudiced*" (Request for an Opinion, paragraph 313) is unconvincing and seeks to draw an untenable distinction.

b. No implied exclusive competence over Chapter 9's provisions on direct taxation, criminal law, the armed forces, or expropriation

120. Ireland further submits that Article 3(2) TFEU does not give the EU implied exclusive competence to conclude the EUSFTA's provisions relating to direct taxation, criminal law, the armed forces, and nationalisation/expropriation which, as discussed above, fall outside the scope of the CCP.

121. In Ireland's submission, it is evident that none of the provisos of Article 3(2) TFEU apply to these provisions. No legislative act of the Union has provided for a conclusion of an international agreement on these issues, and no such agreement is necessary to enable the Union to exercise its internal competence. Further, as regards, the third proviso of Article 3(2) TFEU, in Ireland's submission, none of these provisions concern fields which are covered or largely covered by common rules, within the meaning of the Court's case-law.[67] On the contrary, direct taxation, criminal law, the armed forces, and nationalisation/expropriation each constitute fields in which little or no harmonising EU legislation exists, and EU competence remains weak.

122. For these reasons, Ireland submits that there is no implied exclusive competence for the EU over the provisions of Chapter 9 of the EUSFTA relating to portfolio investment, direct taxation, criminal law and procedure, the armed forces, or expropriation.

[67] See, for instance, C-114/12 *Commission v Council (Protection of Neighbouring Rights of Broadcasting Organisations)* ECLI:EU:C:2014:2151, paragraph 70; Case C-66/13 *Green Network, op. cit*, paragraph 31.

c) Forestry (Article 13.7 EUSFTA)

123. Finally, Ireland strongly disagrees with the contention that those elements of forestry policy covered by EUSFTA fall within the exclusive competence of the Union.

124. Specifically, Ireland submits that Article 13.7 EUSFTA, entitled "*Trade in Timber and Timber Products*" clearly goes beyond the regulation of trade in timber products, and covers aspects of forestry policy which remain the exclusive competence of Member States. Article 13.7 includes obligations to:

- Exchange information on approaches to promote the consumption of timber and timber products from legally and sustainably managed forests, and to promote the awareness of such approaches; and

- Promote global forest law enforcement and governance through promoting the use of timber and timber products from legally and sustainably managed forests, including through verification and certification schemes.

125. These obligations are unrelated to trade, and clearly concern forestry policy more generally, which remains a primarily national competence, in which the EU's competences remain weak.[68] As noted by the Council in its Conclusions of May 2014 in regard to the EU Forest Strategy,[69]

> "*while the EU has a variety of forest-related policies, the Treaty on the Functioning of the European Union makes no reference to a common EU forest policy and responsibility for forests lies with the Member States, and EMPHASISING that all forest-related decisions and policies in the EU, including the new EU Forest Strategy, must respect the principle of subsidiarity and Member States' competence in this field*…"

[68] See for instance the 2013 EU Forestry Strategy (COM (2013) 659), which notes that "*there is no common policy or guiding framework for forest-related issues*" in the EU (at p. 17).
[69] See the Press Release and Conclusions at Council document no 9944/14 of 19 May 2014,

126. Ireland would note that there are numerous established precedents of shared competency arrangements in international negotiations on forestry, including in the context of the United Nations Forum on Forests, the Ministerial Conference on the Protection of Forests in Europe (Forest Europe), and the Forest Law Enforcement, Governance and Trade (FLEGT) Committee.

127. The Commission's approach of merely grouping forestry issues together with environmental issues more generally (Request for an Opinion, paragraph 456), and assuming exclusive Union competence on that basis, is therefore unconvincing as a matter of law and ignores the fact that forestry remains a primarily national competence. The Commission's position on this issue, therefore, should be rejected.

IV — Proposed answer to the Request

128. In the light of the foregoing, Ireland would respectfully ask the Court of Justice to respond to the Request for an Opinion as follows:

> The Union's competence to sign and conclude the Free Trade Agreement with Singapore (EUSFTA) is shared with its Member States.
>
> Specifically, the Union does not enjoy exclusive competence in relation to: (a) the provisions of Chapter 8 of the concerning the temporary presence of natural persons, establishment of maritime transport operators, or port services; (b) the provisions of Chapter 9 of the EUSFTA concerning portfolio investment, direct taxation, criminal law and procedure, the armed forces, or expropriation; or (c) Article 13.7 EUSFTA insofar as it concerns forestry policy.

Dated the 8th day of January 2016

Signed: Juliana Quaney
Agent for Ireland
On behalf of Eileen Creedon, Chief State Solicitor

Tony Joyce
Agent for Ireland
On behalf of Eileen Creedon, Chief State Solicitor