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**NOTE**

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From:	Presidency
To:	CATS
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Subject:	International agreements that concern EU competences in the area of criminal law - systematic examination

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At its meeting of 22-23 September 2015, CATS examined the issue of international agreements that raise an issue of EU competence in the area of criminal law. It was noted that the handling of the draft Council decisions regarding these agreements follows different paths and timelines, which is explained by the fact that the agreements differ in origin, EU competences that are concerned, geographical scope, the EU's stance in the relevant international organisation or forum, timing of the Commission draft, and last but not least the subject matter of the agreement.

While there is therefore no possibility nor intention to set out a uniform way of treating international agreements that raise an issue of EU competence in the area of criminal law, delegations indicated that a more systematic examination of such current or future agreements and the related Council decisions would be useful, both at EU level and for the national handling of these agreements.

This document therefore sets out an indicative list of issues that need to be considered in the examination of such international agreements and the related draft Council decisions. It also proposes a pragmatic way of ensuring better coordination in the handling of these agreements and decisions.

The hypothesis underlying this document is where the Union has exclusive competence in relation to an international agreement either in its entirety or in part, in the sense that it has exercised its internal competence by adopting common rules on the subject matter(s) covered by the international agreement.

Where the Union is exclusively competent either for the entire agreement or for parts thereof, a political decision has to be taken by the Council as to whether the Union should become a party to the international agreement (provided that the international agreement includes a clause allowing the Union to become a party), or in the alternative, whether the Union shall authorise its Member States to become a party on its behalf.

### **Indicative checklist**

The list in annex does not intend, nor would it be able, to define the outcome of the Council's examination of issues relating to international agreement in the area of criminal law. It merely lists the issues that need to be examined and includes references to relevant EU law, case law and solutions used for existing agreements. The list would thus be a supporting tool for those preparing / discussing the case-by-case decision relating to an agreement. Such Council decisions may relate to the opening of negotiations, the signature or conclusion of the agreement, or the Union's position to be adopted in a body set up by an agreement where that body adopts acts having legal effects.

The Council Legal Service, which assists all preparatory bodies of the Council, is at the Council's disposal and provides legal opinions on issues relating to external competences of the Union in relation to international agreements and any related Council decisions.

### **Improving coordination**

#### *i) Inventory*

It is proposed to continue keeping an inventory of present and future international agreements that raise an issue of EU competence in the area of criminal law and the stage of EU decision-making in relation to those agreements (opening of negotiations and negotiating directives, signature, possible provisional application, conclusion, position to be adopted within a body set up by an agreement).

This inventory was started under the Luxembourg Presidency (doc. 11901/15) and was updated on 13 May 2016 (doc. 5632/16). The aim is to do this regularly, at least once per Presidency.

This should facilitate the appropriate examination at national and/or EU level and facilitate loyal cooperation in the area of external action. It should in particular facilitate advance warning on possible issues of EU competence so as to diminish the risk of having to act in a situation of urgency, with the Commission submitting recommendations or proposals at the last minute before a given negotiating session taking place.

It is proposed that CATS reviews the inventory at least once per Presidency, thus allowing at least some preliminary discussion among delegations as to the approach to take at national and/or EU level.

*ii) Council preparatory bodies*

With regard to the handling of the file within the Council preparatory bodies, it will be decided on a case-by-case basis whether consultation or association of JHA counsellors and/or further discussion at CATS is called for, taking into account the responsible Council preparatory body, the subject matter of the agreement, the expertise required and the timeline implications.

The Council Secretariat will continue its practice of including relevant JHA acronyms on the documents and of informing JHA counsellors about on-going work in non-JHA Council preparatory bodies.

*iii) National coordination*

Meanwhile, since the primary responsibility for coordination between different areas of EU activity lies with the Member States, delegations should ensure that their delegates in any Council working parties inform their JHA counterparts and/or CATS delegates of any discussions on international agreements that raise an issue of EU competence in the area of criminal law, so that positions expressed by delegates are consistent.

**CATS is invited to**

- **note the indicative list of issues to be considered as shown in the Annex and suggest any useful additions or corrections**
- **agree on the above proposal for improving coordination.**

**EXAMINING INTERNATIONAL AGREEMENTS THAT RAISE AN ISSUE OF EU  
COMPETENCE IN THE AREA OF CRIMINAL LAW**

*The purpose of this paper is illustrative, i.e. not to give an exhaustive list of relevant rules and case law applicable to external competences of the EU as this would require to enter into nuances and variations in the case law which would go beyond the scope of this note, all the more so that the case law is constantly evolving. The Council Legal Service is there to give its advice on a case-by-case basis through analysing the relevant draft agreements or provisions in the light of such rules and case law, so as to help the Council and its preparatory bodies to define their position.*

**General overview**

The EU competence in criminal law is a shared competence (Article 4(2)(j) TFEU). Therefore, the EU competence becomes exclusive only through exercise of that competence by adopting EU internal legal acts on criminal law matters on the basis of the relevant criminal law legal bases (Article 82 and 83 TFEU). These acts are the "common rules" mentioned at the end of Article 3(2) TFEU which, in so far as the conclusion of the international agreement may affect them or alter their scope, will trigger the exclusivity of the EU competence internationally.

The text of the draft international agreement needs to be closely analysed to determine what provisions of this agreement, if any, fall within the exclusive EU competence (ie whether the relevant provisions "may affect common rules or alter their scope") and whether the EU should act or not (which may take the form of either authorising the Member States to act in the interest of the EU or acceding itself to the agreement in question, provided the agreement includes a clause allowing the Union to become a party).

Under the Treaties, each formal step relating to the negotiation, signature and conclusion an international agreement or to the taking of a position in a body set up by an agreement will require the adoption of a decision by the Council, on a recommendation or proposal from the Commission. Such decisions need to be based both on the relevant substantive legal basis (Articles 82 on cooperation in criminal law matters and 83 on substantive criminal law, but also possibly Article 87 on police cooperation) and on the relevant procedural legal basis (Article 218(3) to (6) and (9) TFEU).

## **Indicative list of issues to be considered**

On the international agreement:

- nature (exclusive or not) and extent of the EU's competence in relation to the agreement, which leads to:
- whether the agreement should be concluded solely by the EU or by the EU and the Member States as a mixed agreement and
- whether the EU competence is solely Title V or also non-Title V and therefore whether the related EU decisions should be split between Title V and non-Title V legal bases.

On the conditions of the participation of the EU to the international agreement:

- What is the EU's status with the international organisation that is "parenting" the agreement ?
- Does or will the agreement allow for regional organisations to participate in it ?
- Even if the agreement allows for regional organisations to participate, does the agreement link the voting rights in the possible bodies of the agreement to the number of States parties or not ?<sup>1</sup> If so, examine what is the best interest of the EU.

## **For illustration: some relevant case law of the Court of Justice (non-exhaustive list)**

- Judgment of 31 March 1971 in Case 22/70 (ERTA/AETR)
- Opinion 2/91 of 19 March 1993 (ILO)
- Opinion 2/00 of 6 December 2001 (Cartagena Protocol)
- Opinion 1/09 of 7 February 2006 (Lugano Convention)
- Opinion 1/08 of 30 November 2009 (GATS)
- Judgment of 18 July 2013 in Case C-414/11 (Daiichi Sankyo)
- Judgment of 22 October 2013 in Case C-137/12 (Commission v. Council- Conditional Access)
- Judgment of 11 June 2014 in Case C-377/12 (Commission v. Council- Philippines agreement)
- Judgment of 4 September 2014 in Case C- 114/12 (Commission v. Council- Broadcasting agreement)
- Opinion 1/13 of 14 October 2014 (Hague Abduction Convention)

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<sup>1</sup> If each State party is given a voting right, while the EU as such would be given only one vote instead of a number of votes equal to the number of EU States, it will be more appropriate for the EU to authorise its Member States to act in the interest of the EU and conclude the agreement themselves, so as to secure both the proper exercise of the EU exclusive competence and to secure the same number of votes as the number of EU Member States parties to the agreement.

- Judgment of 26 November 2014 in Case C-66/13 (Green Network SpA)
- Judgment of 18 December 2014 in Case C-81/13 (UK v. Council - Coordination of social security systems - EEC - Turkey Association Agreement)
- Judgment of 28 April 2015 in Case C-28/12 (Commission v. Council - Hybrid Acts)
- Judgment of 14 June 2016 in Case C-263/14 (EP v. Council - Tanzania agreement)
- Judgment of 28 July 2016 in Case C-660/13 (Council v. Commission - Swiss MoU)

### **Existing international agreements**

Doc. 5632/16 sets out an inventory of present and future international agreements and information on the stage and documents of EU decision-making in relation to those agreements.