1. INTRODUCTION

In the white paper on the future of Europe issued by the European commission on March 1, 2017, five alternative scenarios for the European Union (EU) post Brexit are presented and discussed. A first alternative is to carry on; a second alternative is to focus only on the internal market; a third alternative is a multi-track advancement where those who want more do more; a fourth alternative is doing less in all fields but more efficiently; and a fifth alternative is to do much more together. True, all of the illustrative scenarios aim at saving the EU and they often have features in common, but the main message that “united we stand, divided we fall” is persuasive. Indeed, it was reiterated in the subsequent Rome declaration of the leaders of 27 Member States, the European Council, the European Parliament and the Commission. In the big picture, the Union has become the world’s largest exporter and importer of goods and services, and the global interactions have created millions of jobs and new market openings, which in turn have contributed to propel national economies out of the recession. Perhaps it is also true as the Commission explains in the white paper, that in an uncertain world, “the allure of isolation may be tempting to some,
but the consequences of division and fragmentation would be far-reaching. It would expose European countries and citizens to the spectre of their divided past and make them pray to the interest of stronger powers.\textsuperscript{5} In any event, the Union needs to be understood in the light of a more connected world and the socio-economic development in Europe will to a great extent be conditioned on the new generation free trade and investment agreements (FTA:s) which are now concluded within the ambit of the legal and institutional framework of the World Trade Organisation (WTO).\textsuperscript{6} Inevitably, the efforts of the Union to harness globalisation changes the legal landscape, and whatever routes the EU 27 will take, the new regulatory context brings an increased need for analyses of the interrelations between “international law”, “EU law” and “domestic law” in its train.\textsuperscript{7} In this contribution, inquiries will be made into how the liberalisation of international trade and investments can be reconciled with the rule of law within the Union, and what implications it may have for the relationship between the sources of law on various levels in the emerging multidimensional legal framework. Also, the implications for methodological awareness in a nation State such as Sweden will be discussed.

2. INTERNATIONAL LAW AND DOMESTIC LAW

It is often said that the normative system called “EU law” differs in nature from “international law”.\textsuperscript{8} In legal philosophy, EU law has been conceptualised as a form of “transnational law” that brings legal orders together by transcending geographical borders as well as domestic norm-hierarchies.\textsuperscript{9} All word-coining aside the unique character of the Union legal order is widely accepted. Nevertheless, many good lawyers intuitively perceive EU sources of law as rather ger-

\textsuperscript{5} Commission White paper on the future of Europe, supra note 2, p. 26.
\textsuperscript{8} There is an abundance of doctrine on EU law in English and for an overview consult a standard work such as D. Chalmer, G. Davies and G. Monti, European Union Law, 3rd ed. Cambridge University Press 2014; or P. Craig and G. de Búrca; EU Law – Text, Cases and Materials, 6th ed. Oxford University Press, 2015. See as to the Union as a party to international Agreements, P. Eeckhout, EU External Relations Law, 2nd ed. Oxford University Press, 2011.
\textsuperscript{9} See as to the original concept of “transnational law” Philip C. Jessup, Transnational Law, Yale University Press, 1956.
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mane and international as opposed to integrated in the domestic legal system. True, the traditional classification of legal sources among “domestic law” or “international law” sounds in the answers to three questions, namely: who has created the norms, how are the norms created, and what effect do the sources of law have in the domestic legal system? And, when focusing on the first two questions the EU sources of law may often appear to be “international”. But, the dichotomy between “international law” and “domestic law” collapses within the ambit of the Union legal order since the national norm giving powers are obliged to adapt the entire legal systems to the autonomous Union legal order that they have created. Indeed, as the European Economic Community (EEC) matured into a European Community (EC) and eventually into a Union, the sui generis legal order has emerged more clearly. Whereas “international law” is characterised by a relatedness to domestic law, “EU law” is characterised by system-coherency and adaptation to common values and objectives.

An appropriate starting point for distinguishing “EU law” from “international law” would be to recapitulate the relation between a domestic legal system and the international sources of law. Traditionally, the primary subject of international law has been the political entity called “State” (which not necessarily coincides with a nation) and the States may enter into agreements. Since the domestic legislative, executive and judiciary powers are at the centre of gravity, the international legal frameworks are normally designed to solve specific inter-State issues, including conflicts of laws concerning private parties, to the benefits of the contracting States.

From the perspective of legal effects, domestic law has traditionally been classified among either “monistic systems” or “dualistic systems” depending on how the external commitments are absorbed within the confines of the jurisdiction. Evidently, this binary categorisation is too blunt a tool for properly describing any legal system but it may serve as a starting point for explor-

10 In the United Kingdom (UK) Lord Denning uttered back in 1974 that the Treaty of Rome was “like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back…” in Bulmer Ltd v. Bollinger [1974] Ch 401, 418F. Most remarkably this line of reasoning was considered good law by Lord Carnwath (dissenting) in the recent Judgement handed down by the UK Supreme Court in R (on the application of Miller and another) v. the Secretary of State for Exiting the European Union [2017] UKSC 5, [1] (hereinafter “the Brexit ruling”) para. 274.
11 For further reading on the concept of international law see e.g. M. N. Shaw, International law, 7th ed. Cambridge University Press, 2014.
13 For further reading, see e.g. J. Fawcett, J. Carruthers, and P. North, Private International Law, 14th ed. Oxford University Press, 2008.
ing the characteristics of international law. According to monistic theory, the legal norms resulting from external actions by the Government become part of the internal “sphere” of domestic law without any further ado or upon mere approval by the national Parliament. By contrast, dualistic theory stipulates that international law and domestic law “operate in independent spheres”, and the external actions by the Government typically take effect in the contracting State only through internal legislative measures by the Parliament, which either transform the sources of international law into domestic law or incorporate them into the domestic regulatory framework.15 It may happen in both monistic and dualistic systems that national Courts reveal inconsistencies between domestic law and the international sources of law. If so, the Courts in a monistic system construe the law shaped on national level in accordance with the international commitments and may ultimately set aside incompatible legislation.16 In contrast to such a blunt norm-hierarchy, the inadequate adaptation of national law to international commitments in a dualistic system is solved by universal legal maxims such as lex specialis derogate legi generali and lex posterior derogate legi priori.17 However, also Courts in dualistic systems seek to as far as possible adapt the directly applicable legislation to international commitments by consistent interpretation of domestic law.18 After all, the Vienna convention on the law of the Treaties establishes the methods for interpretation of international agreements and the methodological hierarchy ranges from lexical construction to teleological and consistent interpretation at some level.19

In practice, all known domestic legal systems within the EU have features of both monism and dualism.20 In e.g. Finland, Germany, Italy, Sweden and the UK the international sources of law normally take effect only through conversion into domestic law, but the Courts nevertheless apply international cus-

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15 See as to the concept of “independent spheres” in German law, decision by the Federal Constitutional Court (Bundesverfassungsgericht) in Order of the Second Senate of 14 October 2004 – 2 BvR 1481/04, Görgülü, paragraph 34; and in UK law, Judgement by the Supreme Court in the Brexit ruling supra note 11, para. 55 et seq.
16 In e.g. French law “consistent interpretation” is used as a rule to solve conflicts between national laws since 1957, see the Conseil d’État, 4 January 1957, Syndicat autonome du personnel enseignant des Facultés de droit; and between national law and international law, see Conseil d’État, 4 May 1975, Mathis.
17 See as to Italian law, V. Barsotti, P. G. Carozza, A. Cartabia, and A. Simoncini, Italian Constitutional Justice in Global Context, Oxford University Press 2015.
18 See e.g. B. Gerrit, The Doctrine of Consistent Interpretation – Managing Legal Uncertainty, Oxford Journal of Legal Studies, Vol. 22 No. 3 2002, p. 398 et seq. See as to consistent interpretation in Swedish law rulings by the Supreme Court (Högsta Domstolen) in e.g. Case NJA 2005 s. 462; Case NJA 2005 s. 805; and Case NJA 2007 s. 295.
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temporary law (jus cogens) directly without any domestic legislation.21 Conversely, e.g. the French, Dutch and Polish Constitutions turn on monistic theory as they establish that ratified international agreements form part of domestic law, and approved international commitments, should normally prevail over national law without legislative measures.22 However, it is in the nature of things that legal norms can prevail over other legal norms only when they are sufficiently clear and precise, and since international law is often rather open-ended it may be effectively materialised only through domestic legislation and case law. Some legal orders are truly hybrids of dualism and monism, and e.g. the Cyprus Constitution requires on the one hand incorporation of all international agreements, but establishes on the other hand that incorporated agreements have primacy over all national law.23

In addition to the various Constitutional traditions, it follows from the fundamental principle of pacta sunt servanda that an international agreement may explicitly or implicitly define its internal effects irrespective of any monistic or dualistic approach. Whereas the State is free to decide whether e.g. the Convention on the Law of the Sea is directly applicable or should have legal effect only through domestic legislation, the provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) shall prevail over domestic law in some sense also in a dualistic legal system.24 For instance in Sweden, the applicable provision of the ECHR are transformed into domestic legislation (Act 1994:1219), but at the same time the Instrument of Government (Regeringsformen) establishes that the Convention sets standards for the exercise of all public powers with the jurisdiction.25 Furthermore, an action may be brought against Sweden before the European Court of Human Rights (ECtHR) in Strasbourg when all domestic legal remedies have been

21 See as to the effect of jus cogens, see the Vienna Convention on the Law of the Treaties, supra note 19. Article 53. See for an overview I. Brownlie, Principles of Public International Law, supra note 15. In Finnish law, see the Constitution Articles 94–95. In German law see the Basic Law (Grundgesetz) Articles 25 and 59. In Italian law, see the Constitution Article 11. In Swedish law, see the Fundamental Instrument of Government (Regeringsformen) 10:1. In UK law see e.g. the House of Lords in Jones v. Ministry of Interior Al-Mamlak Al-Arabiya AS Saydiya (the Kingdom of Saudi Arabia) and others [2006] UKHL 26.

22 In French law, see Constitution of the Fifth Republic of 1958, Articles 55 and 52 and e.g. Conseil d’État, 2 May 1975, Mathis Supra note 17. In Dutch law, see Constitution of the Kingdom of the Netherlands of 2008 Articles 93–94. In Polish law, see Constitution of the Republic of Poland of 1997, Articles 9, 91, 188 and 241.


exhausted.\textsuperscript{26} If the State is held to act in breach of its commitments under the Convention, the ECtHR may order Sweden to compensate the private party and prescribe concrete changes of law. Naturally, the ECtHR applies the ECHR \textit{per se} in cases brought against States, and the judgements by the Court in Strasbourg define the rights and freedoms transformed into Act 1994:1219. Hence, even if the domestic legislation is relevant in so far as it specifies which protocols to the Convention Sweden has acceded to, the scope of the rights is ultimately defined by the ECtHR which in turn makes the transformation of the Convention into domestic law uncalled for. In the dualistic Italian legal system, the ECtHR has been given the same legal status as the Constitution. By contrast, the Convention is said to carry only the same weight as an ordinary federal statute in German law, but it should be taken into account when construing fundamental rights in the Basic Law (Grundgesetz).\textsuperscript{27} In 2004, the German Supreme Court (Bundesverfassungsgericht) clarified that also the case law of the ECtHR should be respected when interpreting federal fundamental rights.\textsuperscript{28} However, the rule of law has been considered dictating that the case law from the ECtHR must apply only in accordance with “accepted methods of interpretation” in Germany not to upset the division of competences within the domestic legal system.\textsuperscript{29} At the end of the day, international law turns on diplomacy and the will of the polities. Because even when it is in the nature of things that international law prevails over domestic law, the contracting States still have a discretion to decide how to integrate the legal norms in the domestic legal system. Ultimately, international law has teeth only in so far it is admitted by the contracting State.

3. EU LAW AND DOMESTIC LAW

Evidently, the Union is a product of agreements between independent States and it would be convenient to classify the Treaty on European Union (TEU)
and the Treaty on the Functioning of the European Union (TFEU) among the basic sources of public international law. Indeed, the Member States are “the masters of the Treaties” and they can change the legal framework, dissolve the EU, or leave it unilaterally as we have become painfully aware of. Moreover, it follows from the fundamental principle of *pacta sunt servanda* that the EU institutions may act only within the powers conferred upon them by the letter of the Treaties. Conversely, it is required that the conferral of normative powers to the EU-Institutions is recognised and explained at some level in the domestic legal systems. However, as the UK Supreme Court recently clarified in its seminal Brexit ruling, such a statutory framework for recognition of EU law is but a “conduit pipe” through which EU law taps into domestic law. Indeed, the European Court of Justice (ECJ) explained already back in the early 1960s, that the Community regime at the time constituted “a new legal order of international law [...]” Instead of construing the Treaty of Rome in accordance with the Vienna convention on the law of the Treaties the ECJ introduced the doctrine of *primacy* over domestic legal sources. It was considered transpiring from the Treaty that the Member States had made commitments beyond reciprocity, non-discrimination, and concepts of economic efficiency in international law. Some years later, the ECJ established in the Case *International Handelgesellschaft* that directly applicable EU law prevails also over fundamental rules of national constitutional law. Indeed, the *primacy* of the EU sources of law challenges the role of the State as the normative centre of gravity.

From time to time, domestic legislators and precedent instances have contested the principle of primacy. Famously, the Bundesverfassungsgericht declared already in response to the ruling by the ECJ in *International Handelgesellschaft* that the effects of the sources of EU law could be accepted only as long as (“solange”) fundamental rights recognised in domestic federal law were safeguarded.

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31 Domestic law in the Member States often provides procedures for leaving the Union. However, the procedure for withdrawing from the Union was unclear in UK law until the UK Supreme Court clarified in the Brexit ruling supra note 11, that a decision by both the Houses of the Parliament is required. See the European Union (Notification of Withdrawal) Act 2017 conferring powers to the Prime Minister to notify the EU of the withdrawal.


33 See Brexit ruling supra note 11, para. 80. See also the preliminary ruling by the ECJ in Case *Nimz* C-184/89 EU:C:1991:50.


ed. Similarly, when Sweden acceded to the Union in 1995, the legislator considered it necessary to clarify in the Regeringsformen 10:6, that the transfer of decision-making powers requires that the protection of fundamental rights “is equivalent to that given in this instrument of Government and in the [ECHR].” Evidently, the perceived problems with insufficient protection of fundamental rights within the scope of EU law are nowadays remedied and belong to legal history. In 2000, the ECJ clarified that fundamental rights could justify barriers to inter-State trade. Following the Lisbon revision, Article 6(3) TEU was introduced in 2009 establishing that fundamental rights guaranteed by the ECHR and resulting from the constitutional traditions common to the Member States, “shall constitute general principles of EU law.” In addition, the Lisbon revision clarified that the Charter of Fundamental Rights of the EU (the EU-Charter), which was adopted as a policy document already in 2000, should have the same legal value as the EU Treaties pursuant to Article 6(1) TEU. The EU Charter shall provide the same scope of protection or even more protection than the ECHR. However the basic rights are integral parts of the normative system called “EU law” and even if the Charter provides a wider range of rights than the ECHR, they are confined to a proportionate protection in order to solve conflicts between different fundamental rights and between fundamental rights and other objectives such as market integration. Consequently, the ECJ recently clarified that the Union can not as such accede to the ECHR mainly because of the need to safeguard coherency in the autonomous Union legal order. Whereas the provisions in the ECHR should prevail over incompatible domestic legal norms, they are pursuant to Article 6(3) TEU merely transposed through EU law as general principles. Also the provisions in the EU Charter are mainly transposed through substantive EU law to safeguard a coherent unification process on national and supranational level. As the ECJ made utterly clear in Case C-617/10 Åkerberg Fransson concerning the meaning of the right not to be tried or punished twice for the same conduct (“ne bis in idem”) in

56 BVerfGE 37, 29 May 1997 – 2 BvL 52/71 (“Solange 1”). Compare with Re Wünsche Handelsgesellschaft, BVerfGE 73, 22 October 1986 – 2 BvR 177/83 (“Solange II”). In France the principle of primacy was accepted in general law by the Court de Cassation already in 1975. By contrast it was not accepted in administrative law by the Conseil d’Etat until 1995 in the case of Nicolo published in the Common Market Law Review (CMLR) [1990] 1 173. In the UK there are incompatible rulings on the matter from on the one hand the House of Lords in R v Secretary of State for Transport, ex p Factoriame Ltd maintain the principle of primacy, and on the other hand the UK Supreme Court in Case R (HS2 Action Alliance Ltd) v. Secretary of State for Transport qualifying the principle.

57 Nevertheless, the German Supreme Court have other concerns with the principle; BVerfGE 37, 7 June 2000 – 2 BvL 1/97.

58 See Article 6(3) TFEU and e.g. Case Schmidberger v. Austria C-112/00 EU:C:2003:333.


60 See in particular Case Meloni C-399/11 EU:C:2013:107.

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the context of repression of tax evasion, “[...] situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.” At the same time, the ECJ has been responsive to the different weight that various fundamental rights are afforded in the Member States’ domestic legal systems due to their historical heritage. Obviously, the respect for human dignity is a particularly sensitive subject in Germany that may justify barriers to trade which are not recognised in other Member States. Then again, the Member States must abide by the basic values underpinning EU law. For the time being Poland has difficulties to accept these values expressed in the TEU and in the EU-Charter and the Polish Constitutional Court considers EU law to be viewed as international law for that reason. Considering the many socio-economic settings in which EU law operates one thing is for sure; without primacy, there would be too great a variety of EU law concepts and no **acquis communautaire**. In the 17th declaration by the intergovernmental conference that preceded the Lisbon revision, it is recalled that the Treaties and the law adopted on the basis of the Treaties have primacy over domestic law under the conditions laid down by the case law of the ECJ. Indeed, the principle of sincere cooperation written into Article 4(3) TEU stipulates that the EU sources of law override incompatible domestic law that is more recent or more specific.

Gradually, the basic legal framework of the Union has arguably assumed the features of a constitution. Articles 1–3 TEU articulate the shared values and objectives of the Member States and the sweeping recognition of “human rights” is as mentioned nowadays materialised in the EU Charter. In addition, Articles 4–12 TEU lay down basic principles for the multi-layered legal order. Furthermore, the TEU and the TFEU comprise rules on the division of powers

42 Case Åkerberg Fransson, C-617/10, EU:C:2013:105, para. 21.
43 See Case Omega Spielhallen C-36/02 EU:C:2004:614.
45 For further reading on the need for coherency see preliminary ruling by the ECJ in Case Lyckekog, C-99/00 EU:C:2002:329. In Swedish law the importance of coherency was recognised by the Högsta Domstolen in NJA 2016 s. 320 p. 22.
46 Case Costa v. E.N.E.L, supra note 35.
48 In many instances the principle of conferral in Articles 4(1) and 5(1) TEU is specified by the principles of subsidiarity in Article 5(2) TEU and of proportionality in Article 5(3) TEU. A new Member State must abide by the values according to the “Copenhagen criteria” available at http://europa.eu/rapid/press-release_DOC-93-3_en.htm/locale-en, last visited 2017-07-24, now materialised in Article 49 TEU in conjunction with Article 6(1) TEU.
on the one hand between the Member States and the Union, and on the other hand between the EU Institutions. Besides these basic algorithms for the unification process in terms of values, objectives and principles, the EU Treaties also entail substantive rules that apply as national law. The Treaties and the Charter are the main sources of primary law in the Member States as opposed to prevailing international sources of law in a norm hierarchy along the lines of monism.49

The Treaties establish the procedures for adoption of secondary legislation and decisions applicable within the Union, as well as for external actions and for the administration of justice.50 When it comes to secondary legislation the EU regulations should pursuant to Article 288 TFEU, be directly applicable in the Member States. Treaty provisions and EU regulations which apply without implementation measures also has “direct effect” in domestic law when conferring rights (but not necessarily obligations) on private parties that are sufficiently clear, precise and unconditional.51 A provision has vertical direct effect if it can be invoked against an emanation of the State, and it has horizontal direct effect when it can be invoked against other private parties.52 Hence, Treaty provisions and regulations with direct effect are virtually “domestic law”. In fact, the very concept of “domestic law” is challenged by the effect of these EU sources of law, since they may due to their primacy override any incompatible domestic legislation. For instance, in Swedish law, Regeringsformen 1:1 establishes that “Public power is exercised under the laws.” However, the normative framework for the exercise of public powers in Sweden consists both of legislation adopted by the national Parliament and of EU law. It could, therefore, be argued that the concept of “law” in Regeringsformen 1:1 should from a rule of law perspective be extended to embrace also directly applicable EU sources of law.53 Obviously, the counterargument would be that domestic law at least indirectly governs the exercise of public powers in the country in so far as the transfer of normative powers to the Union is vindicated by Regeringsformen.

49 Accordingly, the Kelsian norm-hierarchy with a “Grundnorm” cannot be used to properly describe the autonomous legal order. Compare with H. Kelsen, Pure Theory of Law, (new print) The Law Book Exchange Ltd. 2005.

50 Decisions can be of general applicability and constitute “legislation” pursuant to Article 288 TFEU in particular when they are directed to Member States, see e.g. the “European Arrest Warrant” established by the Commission’s Framework Decision 2002/582/JHA, OJ L 190, 18.7.2002, p. 1. By contrast, decisions directed to private parties do not have such a general applicability that they can be considered constituting “legislative acts”.

51 Originally Case Van Gent en Loos, supra note 35. See as to the direct effect of Regulations Case Munoz, C-253/00 EU:C:2002:497. Also rulings from the ECJ may have direct effect, see e.g. Case Comet v. Produktschap, C-45/76 EU:C:1976:191.

52 Case Defrenne C-43/75 EU:C:1976:56. See as to the concept of “emanation of the State” Case Foster v. British Gas plc., C-188/89 EU:C:1990:313.

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Then again, it is at least far-fetched to consider an open-ended statutory basis for conferral of powers to the Union as a legal framework for the exercise of domestic public powers. Such a “conduit pipe” is pivotal for the recognition of the effects of EU law, but it does not have a normative effect for the State or the emanation of the State in any intelligible way. Instead, directly applicable EU law may govern the exercise of public powers with primacy in domestic law as long as Sweden is an EU Member State. On that note, the letter of Regeringsformen supports such a broad concept of “law”. Whereas Regeringsformen earlier established that “laws are adopted by the Parliament” it now says that the “Parliament adopts laws” which does not exclude the EU from also having that competence.54

An EU directive is, as the name suggests, directed to the Member States and it can neither be relied upon directly as a source of law in a national Court, nor can it confer rights with direct effect.55 Instead, directives normally have but indirect effect, which means that they should be transposed through domestic law in a way that is decided by the national norm giving powers.56 If a directive has not been implemented by legislative changes, the national Courts “should do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration […]” to approximate the domestic legal system to the letter and intention of the directive.57 In fact, the directive has a “stopping effect” preventing the national Court from applying provisions in domestic law that are incompatible with the letter or purpose of the directive.58 However, there is a limit to the obligation of the national Court to bend domestic law. As the ECJ explained in Case C187/15 Pöpperi, emanating from a dispute regarding a German pension scheme “[…] the obligation on a national court to refer to the content of EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law contra legem.”59 Hence, the requirement to adapt the scope of national law to directives yields to the division of powers between

54 See Regeringsformen 1:4 last sentence, changed most recently in 2010.
55 Article 288 TFEU.
56 Case von Colson, C-14/83, EU:C:1984:153. As to the recognition of administrative practice and jurisprudence when establishing whether a directive has been implemented, see also Case European commission v. the UK C-382/92 EU:C:1994:233; Case European commission v. the UK C-300/95 EU:C:1997:255; and European commission v. Italy C-129/00 EU:C:2003:656.
57 Case Pöpperi, C-187/15 EU:C:2016:550, para. 43; and Case Pfeiffer, C-397/01 EU:C:2004:584.
58 Case Marleasing, C-106/89, supra note 48. See as to the stopping effect of directives prior to the laps of time for implementation Case Wallonie, C-129/96 EU:C:1997:628.
59 Case Pöpperi, supra note 58, para. 43. See also the debacle in Danish law where the Supreme Court refused to abide by the preliminary ruling in Case Rasmussen C-441/14 EU:C:2016:278, since it considered the changes in the state of Danish law brought about by a directive would be incompatible with the general principle of legal certainty and more precisely of foreseeability in judgement of 6 December 2016 in Case 15/2014, Ajos A/S.
the national legislator and the national Courts within the Member State. At the outset, the effect of the directive in domestic law may remind of consistent interpretation of domestic law to abide by international commitments. However, the requirement to take the purpose of the directive into consideration establishes a link to the overall values and objectives of the Union and demands a system coherent interpretation of the approximated domestic rules.

Evidently, it is an infringement of primary law by the State not to correctly implement an EU directive. Since the State shall not benefit from its own failure to implement a directive, and in order to save the expenditures for bringing an infringement action, the ECJ established in 1974 that a directive that has not been correctly implemented can be invoked against the State. Whereas the raison d’être for this vertical direct effect was at the time the effect utile of Community law, it now sounds in the principle of sincere cooperation in Article 4(3) TFEU. Anyhow, the objective to punish a Member State that does not abide by its Treaty obligations cannot justify horizontal direct effect of directives in disputes between private parties. Nevertheless, the ECJ has stretched the concept of vertical direct effect to embrace an obligation for the national Court to disregard rights in domestic law for private parties that should have been notified to, and approved by the Commission, if the State has failed to do so. Consequently, the directive requiring such a notification takes upon a negative horizontal direct effect as it prevents the Court from applying national law in disputes between private parties.

In case the national Court would have to apply national law contra legem to abide by the directive in a dispute between private parties it faces a dilemma. Wheras the letter of the domestic legislation prevents the Court from approximating domestic law to the directive, the stopping effect of the directive prevents the Court from applying the letter of the domestic legislation. However, since all EU law transposes the fundamental rights guaranteed by the EU-Charter, the ECJ has explained in cases concerning discrimination of employees on basis of age that these fundamental rights may assume horizontal direct effect when specified in a directive. Hence, the employee could invoke the general

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60 Case Impact v. Minister for Agriculture and food, C-268/06, EU:C:2008:223.
61 Case Van Duyn, C-41/74 EU:C:1974:133.
62 There is still some reluctance in French law to accept that directive can have vertical direct effect: see Conseil d’Etat, 30 October 2009, 298348 Mme Perreu. See also Conseil d’Etat, 1 October 2014, 365054, Mme B. A. et Mme A.; Conseil d’Etat, 30 December 2013, 350191, Association CIMADE; Conseil d’Etat 24 March 2006, 288460 Société KPMG; and compare with Conseil d’Etat, 9 January 1991, 71041, Banque Populaire; Compare with Cour de cassation, social chamber, 18 November 2009, 08-43.397, Open Cascade; and Cour de cassation, criminal chamber, 19 November 2014, 13-80.161, Pedja X.
63 Case Faccini Dori, C-91/92 EU:C:1994:292.
64 Case CIA security, C-194/94 EU:C:1996:172.
right established by the Charter not to be discriminated on basis of age against an employer through a directive harmonising domestic labour law. Whereas the general prohibition against discrimination in the Charter is not sufficiently clear or precise to have direct effect, and the directive must be implemented somehow in domestic law, the rights in the Charter take upon horizontal direct effect when specified in a directive.

Ultimately, private parties may bring separate actions for compensation against the State before a national administrative Court in accordance with the Francovich-doctrine in case the legislator or the Courts have failed to implement a directive or apply another EU source of law correctly. Consequently, the primacy of EU law extends beyond the scope of directly applicable EU law.

Neither the fact that the Member States have conferred normative powers to EU institutions, nor the fact that EU law creates rights for private parties distinguishes it from “international law.” True, international agreements archetypically create rights and obligations for the contracting States but the contracting States may of course also decide to create supranational organisations with competences to create new legally binding norms in the domestic legal systems. Evidently, also the ECHR confers rights that private parties can invoke in national Courts. However, the extent and nature of the powers conferred on the EU-institutions with a view to realise the common objectives and values of the Member States makes EU law unique. Indeed, the reduced sovereignty of the Member States result from the fact that legal norms on various levels must fit into a multidimensional coherent system of law ultimately safeguarded by the ECJ. Whereas “international law” is above domestic law, “EU law” is to a great extent, as the UK Supreme Court explained in its Brexit ruling, “an independent and overriding source of domestic law.”

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67 See as to primacy of directives Case Factortame, C-213/89 EU:C:1990:257.
68 The fact that EU law confers rights upon private parties has been emphasised by the ECJ ever since Case Van Gent en Loos, supra note 35, and is particularly palpable in the legal framework for the social dimension of the Union. See in particular Case Zambrano, C-34/09 EU:C:2011:124; and Case Dereci and others, C-256/11 EU:C:2011:734.
71 See the Brexit ruling, supra note 11, para. 80.
4. JUDICIAL AUTONOMY VERSUS JUDICIAL COOPERATION

It cannot be emphasised enough that in the absence of a federal Court organisation for the administration of justice, the national Courts are the ordinary Courts of the Union legal order. It is e.g. for the national Court to determine whether the implementation of a directive would require it to apply national legislation contra legem or merely to stretch its lexical meaning, and the ruling by a national Court on basis of EU law cannot be appealed to an EU Court. Indeed, the administration of justice within the Union turns on procedural autonomy. Along the lines of the trias politica model for governance of a State, neither branches of national government, nor the EU institutions shall interfere in the work of the judiciary. Nevertheless, the national Court has a duty to cooperate sincerely in accordance with Article 4(3) TEU when applying the EU sources of law and the domestic sources of law within the ambit of the Union legal order. Whereas a national Court or Tribunal may pursuant to Article 267 TFEU request clarifications regarding the EU sources of law from the ECJ when it is necessary to decide a case on the facts, a Court or Tribunal against whose decision there is no legal remedy must do so. Hence, the margin of appreciation to decide how to apply the EU sources of law brakes against the obligation of the State to actually give those legal sources the intended effect in substance. At the end of the day, the ECJ has the prerogative under Article 19 TEU to construe EU law to “ensure that in the interpretation and application of the Treaties the law is observed.”

Tentatively, the obligation for national precedent Courts to request clarifications in law from the ECJ sits uncomfortably with the idea of “jura novit curia” (the Court knows the law). True, the legal maxim should primarily be understood negatively as meaning that no one else can decide whether a judgment

73 Case CILFIT, C-283/81 EU:C:1882:335. For further reading see the preparatory works 2007:85, Grundlagsutredningen rapport VIII, Olika former av grundlagskontroll.
74 See Case DHL v Chronopost, C-235/09 EU:C:2011:238. For further reading see e.g. The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law (ed. A. Rosas et. Al) T.M.C. Asser Press, 2013.
75 Compare in Swedish law with Regeringsformen 11:3.
76 See further about the limits of rights and obligations to refer questions because of acte clair (already answered question or merely hypothetical questions) e.g. in Case Ferreira da Silva, C-160/14 EU:C:2015:565; and acte éclair (questions with an obvious answer) e.g. in Joined Cases of X and Others, C-72/14 and C-197/14 EU:C:2015:564.
77 See with respect to the definition of precedent instance, Case Lyckeskog, supra note 46. A State can be held liable for infringement of the Treaties in case a Court does not cooperate sincerely, see Case Köbler, C-224/ 01 EU:C:2003:513.
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is right, which ultimately sounds in the *trias politica* model. 78 And, the legal maxim does not imply that the judges are always right since errors in procedural law as well as in substantive law may be disclosed and later on give rise to a new trial. But, to require a Court to ask another Court for advice in the same case is something new. 79 Even if the national Courts decide when references for a preliminary rulings are required, the Commission monitors that the States abide by the principle of sincere cooperation. 80

In a reasoned opinion of 2004, the European commission notified Sweden about the problem with too few references for preliminary rulings from the national precedent instances in particular. 81 Since then, the Swedish precedent instances have become more attentive to their role as EU Courts, and the Administrative Supreme Court (Högsta Förvaltningsdomstolen) has recognised straight-out its qualified judicial autonomy within the ambit of the autonomous EU legal order. 82 Evidently, the Swedish Supreme Court (Högsta Domstolen) referred questions for preliminary rulings to the ECJ already prior to Sweden's accession to the EU in 1995. 83 However, whereas the Swedish Courts could prior to the 1st of January 1995 apply the sources of EU law in a way akin to consistent interpretation of international law, the accession to the Union brought radical changes in its train with respect to the applicable law and methodology. As the Swedish legislator recognised already in the governmental bill on accession from 1993, it has changed the role of the national Courts in so far as they have become less bound by preparatory works and must take a more active part in the shaping of law and society on the whole. 84 Indeed, this understanding of the relation between the will of the domestic legislator and the directive approximating domestic law was confirmed by the ECJ in Case C-371/02 Björnekulla. In its preliminary ruling regarding the concept “in the trade” in the former trade mark directive, the ECJ established that a national Court shall interpret domestic law as far as possible in the light of the *wording and the purpose* of the directive “[…] notwithstanding any contrary interpretation which may arise from the *travaux préparatoires* for the national rule.” 85

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78 See in Swedish law Högsta Förvaltningsdomstolen in RÅ 1995 ref. 45 and Högsta Domstolen in NJA 2004 s. 743.


80 *Case CILFIT*, C-283/81 EU:C:1982:335, and *Case Lyckeskog*, supra note 46.


82 Högsta Förvaltningsdomstolen recognises the principle of qualified judicial autonomy in HFD 2014 ref. 8 with reference to *Case Lesoubrandtske zaškupenje VLK*, C-240/09 EU:C:2011:125.


84 SOU 1993:99 s. 197.

On that note, the UK Supreme Court made an important *obiter dictum* in its Brexit ruling, when rejecting the analogy between the UK’s withdrawal from the EU with the country’s withdrawal from the European Free Trade Agreement (EFTA) back in the early 1970s. EFTA is an organisation for inter-State cooperation and EU is a polity with a legal order. Even if some EU sources of law have effect in three of the remaining EFTA countries, they are filtered into domestic law through the Treaty on the European Economic Area (EEA). Whereas the international agreement requires the national Courts in the EFTA States to apply domestic law in a way *consistent* with the EU sources of law, the national Courts in an EU Member State must as explained above apply the EU sources of law in a *teleological* and *system-coherent* way. Hence, in contrast to national approaches to give internal effects to external actions, EU law embraces large parts of the domestic legal systems and establishes a unitary legal order across the Member States. After all, the Member States have decided to create a polity with its own legal personality.

System-coherency stipulates that the EU sources law apply in the same way throughout the Union. Hence, an EU regulation should have the same effect in Stockholm and in Lisbon in the same way as domestic Swedish legislation should apply the same in Stockholm and in Goteborg. However, the lack of inter-State coordination of the enforcement of EU law invites to forum shopping and torpedo litigations, bringing aspects of private international law to the fore. That is why the ECJ has required the domestic norm giving powers to provide for “equivalent legal remedies” beyond the letter of a regulation, on basis of the general principle *ubi ius ibi remedium* (where there is a right there is a remedy) known from domestic legal systems. Nevertheless, a coherent administration of justice requires close cooperation between national Courts and reflexive harmonisation beyond the letter of the law seems far-fetched in practice. Even if the digitalised European Case Law Identifier (ECLI) and the European e-justice portal are designed to encompass rulings from national
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Court there is in practice a long way to go before such an institutional cooperation can be established.

A coherent legal order requires that the national Courts in an EU Member State apply the same method as that used by the ECJ when construing the EU sources of law. Evidently, the ECJ is under a duty to apply all EU sources of law in accordance with the Treaties. Notably, Article 13 TEU establishes that the institutional framework of the Union “shall aim to promote its objectives, serve its interests, those of its citizens and those of its Member States, and ensure consistency, effectiveness and continuity of its policies and actions”. Moreover, the EU shall pursuant to Article 7 TFEU “ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.” In addition, Article 5(2) TEU establishes that the Union shall act only within the limits of the competences conferred upon it by the Member States “to attain the objectives set out therein.” Hence, teleology and system-coherent is required by the Treaties and also the national Courts have to abide by this methodology.

As mentioned the telos of EU law is written into the basic provisions of the TEU and in the EU-Charter. Even if economic theory has attracted attention in some quarters and in particular in the field of competition law, it is but a tool to be used in the context of a value-based legal framework. Indeed, if EU primary law can at all be considered “constitutional”, it provides a constitution for sustainable social development and there is no such a thing as an economic constitution. When it comes to system-coherency, four different kinds of coherency can be discerned. Most obviously, horizontal consistency demands that the various fields of EU law must not be contradictory in scope. For instance, EU-competition law needs to tally with the rules on free movement of services at some level.93 Furthermore, vertical consistency is akin to an integrated norm-hierarchy of primary law, secondary EU legislation and ultimately domestic law. Things would be easy if the division of competences within the EU could be discussed in terms of federalism, and the division of powers with respect to areas such as the customs union and the regulation of competition may, indeed, assume the features of a federal norm hierarchy.94 However, when it comes to the Free Trade Area (FTA) called the “internal market”, the EU and its Member States share normative competences. Hence, the norm-hierarchy collapses with respect to the right to regulate anything that can obstruct the free movement of goods, services, natural and legal persons, or capital. Instead, ver-

93 See e.g. Joined Cases Premier League and Others, supra note 89.
94 Populists sometimes refer to the Union as “the United States of Europe”. See e.g. Daily Mail Online published 24 April 2016: “Plans have been drawn up for a full-blown ‘United States of Europe’ and Britain will have little to say, warns top Tory minister”, available at http://www.dailymail.co.uk/news/article-3556298/Plans-drawn-blown-United-States-Europe-Britain-little-say-warns-Tory-minister.html, last visited 2017-07-24.
tical consistency implies that the EU institutions must neither extend nor limit the scope of primary law by means of adopting secondary legislation on basis of the Treaties. Conversely, substantive primary law does not apply when there is particularising and complementing secondary legislation. In general, the interrelation between EU sources of law turns on *lex specialis derogate legi generali* in contrast to their primacy over domestic law. In addition, *evolutionary consistency* in the legal system is stipulated by the rule of law and requires the ECJ to shape consistent lines of reasoning, albeit there is no *stare decisis* doctrine. If the construction of primary law has been codified in regulations and directives, the secondary legislation should be understood in accordance with that earlier case law. Finally, there must be coherence between the Union’s *external actions and internal measures*. Indeed, this is the starting point for discussing the common commercial policy (CCP).

5. INTERNATIONAL TRADE AND FOREIGN INVESTMENTS

In addition to internal EU law that blurs the boundaries of “international law” and “domestic law”, the EU has pursuant to Article 21 TEU also powers to take actions on the international scene. In its external relations vis-à-vis non-EU States (third countries) the Union shall promote “democracy, the rule of law, human rights, respect for human dignity, equality and solidarity, and respect for the principles of the United Nations Charter and International law.” When it comes to international trade and investments the Union has far-reaching competences with respect in particular to transport, environment, and to shape a commercial policy. Indeed, the Member States have pursuant to Article 3(1)(e) TFEU entrusted the EU institutions, and most immediately the Commission, with the exclusive competence to shape a CCP. In Part Five of the TFEU, regarding external actions, Article 206 establishes somewhat enigmatically, that the Union shall by establishing a customs union in the common interest “contribute to the harmonious development of world trade, the progressive abolition of restrictions on international trade and foreign investment, and the

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95 See e.g. *Case Tobacco I*, C-376/98 EU:C:2000:544.
96 For an overview see e.g. A. Arnulf, the European Union and its Court of Justice, Oxford University Press 2nd ed. 2006.
97 The Union shall pursuant to Article 47 TEU have legal personality.
lowering of customs and other barriers.” Even if a customs union might seem counterproductive to the elimination of trade barriers, the common tariffs and quantitative restrictions are prerequisites for the EU to negotiate with countries extramural the Union and to make concessions under the WTO regime.99

As a result of the customs union being implemented in 1968, the creation of a CCP could begin. Originally, the external competences of the EEC in the policy area were confined to inter-State trade in goods within the scope of the General Agreement on Tariffs and Trade (GATT).100 The GATT had been concluded in 1948 as a result of the post-war negotiations on tariff reduction and even if it laid down mainly procedural rules for reduction of protectionism that could lead to political unrest and war, the fora for cooperation gradually assumed the features of an international organisation through a process that is described as “institution-building by accident”.101 All the original six EEC Member States and all the States that acceded to the Communities during the 1970s and 1980s adhered to the GATT and a joint policy was considered necessary in order to develop the internal market. Indeed, the external actions in the area and the creation of an internal market are but two sides of the same coin. Evidently, goods produced entirely or partly in third countries are traded between the Member States, and the traders may be established in the Member States through foreign investments. However, there has always been a tug of war between the European commission’s pursuit of free reins to develop a coherent trade and investment regime, and the Member States’ reluctance to give up sovereignty and their right to regulate.102 Then again, the branches of the States may end up in the back seat of economic globalisation unless they cooperate and the efforts to harness globalisation propels the European unification process. Indeed, legal and institutional frameworks shaped by non-commercial actors are more apt to cater social interests and to distribute wealth than big business taking “rational” decisions in view of quarterly reports, even if the transfer of normative powers comes at a cost in terms of democratic deficits. Instead of attracting investments by regulatory competition, the polities build

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99 Besides the EU Member States, also Monaco and some territories of the UK which are not part of the EU participate in the customs union (Akrotiri and Dhekelia, Bailiwick of Guernsey, and the Isle of Man). It is with exception for some products also extended by means of bilateral agreements to Andorra, San Marino and Turkey. See the Union Customs Code (UCC) amended and corrected as of 13 June 2017 by Commission Implementing Regulation (EU) 2017/989, OJ L 149, 13.6.2017, p. 19. See also Regulation (EU) No. 608/2013 of 12 June 2013 concerning enforcement of Intellectual Property Rights.

100 General Agreement on Tariffs and Trade originally signed in Geneva on 30 October 1947 and as revised.


bridges and this development of global and regional governance is a topical field of research in social science.\footnote{See e.g. D. Stone, Global Public Policy. Transnational Policy, Communities and Their Networks, Policy Studies Journal 36(1) 2008, pp 19–38. As elucidated by one of the winners of the Sveriges Riksbanks Prize in Memory of Alfred Nobel 2016, Oliver Hart, in his banquet speech, economic theory may lay bare interrelations that are not intuitively understood, but it does not reveal the whole picture.}

For a long time, the CCP derived much inspiration from the Member States’ external relations policies. However, the development of the CCP changed gear in 2009 when the Member States through the Lisbon revision decided to transfer more express external powers to the Union. A truly independent policy is now taking shape as the Union is developing own model Agreements.\footnote{Communication from the Commission, Towards a comprehensive European international investment policy COM((2010)343 final. C. Titi, International Investment Law and the European Union: Towards a New Generation of International Investment Agreements, The European Journal of International Law 2015, Vol. 26 no. 3, 639–661.}

On that note, some words should be said about the development of the CCP through the interplay between external actions and internal measures by the EU institutions. The industrial and technological development made it increasingly clear that the scope of international regulatory and institutional frameworks for commerce needed to be broadened. During the negotiations 1986–1994 leading up to the WTO, it was laid bare that the international framework needed to address also services and intellectual property rights (IPRs).\footnote{For further reading see P. Eeckhout, EU External Relations Law, supra note 9, p. 26–36.}

Hence, the multilateral Uruguay Round Agreements signed in Marrakesh on 15 April 1994 comprised an agreement on trade in services (GATS) and on trade-related aspects of intellectual property rights (TRIPS) besides the agreement on gods (GATT) as annexes to the WTO Agreement establishing a common institutional and regulatory framework for commerce.\footnote{The Agreements are available at the WTO website https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm last visited 2017-07-24.}

As the Treaties at the time were silent on whether the CCP covered services and IPRs, a debacle between the commission and the Member States preceded the signing of the Agreements. Finally, the ECJ established in Opinion 1/94 that the Union and its Member States had shared competences in the areas and, hence, they should all sign the Marrakesh Agreements.\footnote{Opinion 1/94, EU:C:1994:384. See also Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994), OJ L 336, 23.12.1994, p. 1.} However, the problem with “mixed Agreements” is that they cause uncertainties about the distribution of competences of the Union and its Member States in specific cases. At first blush a mixed agreement may be understood as actually creating \textit{shared competences} in the area concerned. Pursuant to Article 2(2) TFEU the Member States would then have competence to adopt legally binding acts in the area only to the extent that the
Union has not exercised its competences. In other words, if “mixity” implied shared competences to implement external actions, the Member States would be free to regulate until the Union adopts secondary legislation. However, since the Union has exclusive competence to shape the CCP, only the Union is entitled to implement the parts of the Agreement that comes within its external competence. Article 2(1) TFEU provides that a Member State may act in areas where the Union has exclusive competences, only if empowered by the Union. Conversely, the Member State has exclusive competences extramural the scope of the CCP. Hence, national Courts have to ask the ECJ for clarifications to determine the areas in which the Agreement has effect only in domestic law and where it shall be transposed through EU law. In that connection, it is a clear tendency towards expansion of the Union’s competences since the ECJ is inclined to safeguard coherent internal effects of the mixed external commitments. In other words, system-coherency makes EU law accumulate more and more normative mass, like a snowball that grows bigger and bigger as it is set in motion across the snowy fields. As the Treaties were silent on whether the CCP covered services and IPRs, the ECJ clarified in Opinion 1/94 that services were covered but only “commercial aspects” of IPRs. For a long time it remained a mystery what aspects of the IPRs were “commercial”, and when the ECJ eventually clarified that the very name of the TRIPS Agreement suggested a link to trade, it effectively established that the Union had exclusive powers to interpret the Agreement.  

At the outset, the competence of the Union to take external actions regarding services and IPRs without any express support in the Treaties, may appear to sit uncomfortably with the principle of conferral. As long as the Member States have not afforded the Union a competence in the Treaties, the EU institutions are by no means entitled to attribute to themselves that very same competence. In that connection, however, implied powers and parallelism needs to be addressed. The ECJ recognised already in the early 1970s an implied competence for the Community to take actions when it might be necessary to attain the objectives set out in the Treaties. Subsequently, the Member States have accepted this hyper-teleological approach by providing a generally applicable statutory basis for the implied powers in Article 352 TFEU. Furthermore, Article 216(1) TFEU nowadays provides a statutory basis for the Union to conclude Agreements with third countries or international organisations where

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108 Case Daiichi Sankoy and Others, C-414/11 EU:C:2013:520, para. 55.
109 Originally, the concept of Kompetenz-kompetenz was devised by the Bundesverfassungsgericht with respect to the competence of the Court to “give a binding ruling on the extent of one’s own jurisdiction”. However, it has taken upon the connotations of an inverted principle of conferral in the context of EU law as it rather means that the EU-institutions must not attribute competences to themselves beyond those conferred by the Treaties. See e.g. T. Hartley, Constitutional Problems of the European Union, Hart Publishing 1999, p. 152 et seq.
110 Case AETR, C-22/70 EU:C:1971:32.
it is considered necessary “in order to achieve one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.” A closely related concept is parallelism between the external actions and internal measures. Also parallelism was originally laid bare by the ECJ but is now manifested in Article 3(2) TFEU. According to that provision, the EU has exclusive external competences when “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 rule or alter their scope.” As clarified by the ECJ, the Union may derive parallel external powers only from secondary legislation, and measures adopted on basis of the Treaties and not from primary law. A distinction needs to be made between the two closely interrelated doctrines. In fact, parallelism takes upon the features of lex specialis in relation to the implied powers. Indeed, the Union may have implied powers also in other areas than with respect to external relations, and it may form basis of exclusive as well as shared competences for the Union irrespective of whether any internal measures have already been taken on basis of the Treaties. Whereas parallelism afford the Union an exclusive competence within the scope of the CCP, the Union may have implied powers extramural the CCP to take external actions.

At the time for the Marrakesh Agreements, the Union had already taken internal measures to approximate the domestic systems in the Member States for the protection of trade mark rights to establish and maintain the internal market. Hence, in Opinion 1/94, the ECJ justified the competence of the Union to sign the TRIPS Agreement on basis of parallelism with the internal legislative measures already taken by the EU. Without parallel Union competences to interpret the TRIPS Agreement, the disparities between the constructions of the Agreement by the national Courts could create trade barriers that jeopardised the liberalisation of cross-border trade in proprietary products within the Union in conflict with the internal measures. As the exclusive external powers of the EU within the scope of the CCP were derived from legislation adopted on basis of the shared competence to regulate the internal market they only addressed the “commercial aspects” of the IPRs. Indeed, the concept of IPRs as a kind of “property” that transpires from the old separate international framework for protection of IPRs has always been uncomfortable in an EU law context. Because Article 345 TFEU establishes an explicit limitation in scope

114 See in particular the Paris Convention for the protection of Industrial Property of 20 March 1889 as revised; and the Bern Convention for the Protection of Literary and Artistic Work originally adopted in 1886 and revised primarily through the Paris Act of 24 July 1971, as amended 28 September 1979. Compare with e.g. Communication from the Commission
of the competences conferred from the Member States upon the Union in so far as EU law shall “in no way prejudice the rules in the Member States governing the system of property ownership.” Recently, the idea that IPRs are not to be classified among “property” at all in the context of EU law has gained acceptance and that is the only intelligible explanation to why the Union has been able to adopt regulations introducing complete systems for Union wide IPRs. At the time for the signing of the Marrakesh Agreements, the Union had adopted a trade mark regulation, establishing a system for registration and protection of the Community trade mark (CTM) on basis of the implied powers which are now to be found in Article 352 TFEU. Subsequently, a statutory basis for adoption of internal EU legislation establishing Union-wide IPR regimes has been introduced as a result of the Lisbon revision in Article 118 TFEU. That being said, the idea of IPRs as not being property sits uncomfortable with the right to property in the EU-Charter Article 17(2) providing that “intellectual property shall be protected.” Nevertheless, as a result of the Lisbon revision, Article 207 TFEU now establishes that services and the commercial aspects of IPRs are covered by the Union’s exclusive external powers. Indeed, the IPRs are a case in point with respect to the expansion in scope of the CCP.

Evidently, there are limits to the competences of the Union to interpret international Agreements to which the Member States have acceded even if they could affect the internal market. Notably, Article 351 TFEU provides that the rights and obligations arising from international Agreements before the entry into force of the Treaty of Rome, or for acceding States before the date of their accession, “between one or more Member States on the one hand, and one or more third country’s on the other, shall not be affected by the provisions of the Treaties.” It is difficult not to understand the wordings of this provision as meaning that no competences have been conferred upon the Union to interpret Agreements which the Union has not signed. However, the ECJ has taken teleology as a pretext for disregarding the letter of the provision. In a series of

115 Indeed, tug of war between the concept of IPRs as property or merely rights to exclude can be traced back to the first rulings on trade mark rights in the UK common law system and nowadays the doctrine on “fair remuneration” developed by the ECJ challenges the idea of ownership in IPRs. See e.g. preliminary rulings by the ECJ in Case Hewlett-Packard v. Reprobel, C-572/13 EU:C:2015:750; and Case Coty Germany, C-360/12 EU:C:2014:1318.

116 It is fair to say that the concept of “property” in both the EU Charter, and in Article 1 of the first protocol to the ECHR, sounds in the liberal labor theory of property that was elaborated by John Locke in Two Treatises of Government (first published in 1689). Indeed the preparatory documents of the EU Charter specify that Article 17 shall apply in the same way as Article 1 of the first Protocol to the ECHR. See Notes from the Presidium regarding the Draft Charter of Fundamental Rights of the European Union, CHARTE 4487/00 Convent 50, Brussels 2000, p. 19–20. See e.g. Judgement of the ECtHR of 11 January 2007 in Anheuser-Busch Inc. v. Portugal, Application No. 73049/01 p. 23 establishing that the “legitimate expectations” emanating from IPRs is akin to property.
rulings regarding copyrights, the ECJ has without any doubts overstretched its implied powers by interpreting the Berne Convention for the Protection of Literary and Artistic Work, which has not been signed by the Union but by the Member States.\(^{117}\) Obviously, the construction of the Convention aimed at internal system coherency but from a rule of law point of view, the goal to establish a digital internal market cannot justify the means to interpret an international Agreement that the EU has not signed. In fact, the ECJ justified its liberties to construe an Agreement extramural its conferred competences by a misconstruction of Article 2(2) TRIPS providing that “[n]othing in Part I to IV of this Agreement shall derogate from existing obligations that Member States may have to each other under the Paris Convention, the Berne Convention, the Rome Convention […].” By reversing the lexical meaning of the provision in conflict with Article 30 of the Vienna Convention on the laws of the Treaties, the ECJ explained that the property centred Berne Convention should be interpreted in the light of the trade centred TRIPS Agreement instead of interpreting the TRIPS agreement in accordance with the Berne Convention.\(^{118}\) Naturally, this stirred quite a debate and in fact there is still no general consensus regarding the Member States’ duty to accept the ECJ’s construction of the Bern Convention. Then again, the ECJ has the interpretative prerogative as to the Treaties and the state of EU law can be rectified only along diplomatic and political routes as there is no legal remedy.

Besides the recognition of the external competence of the Union regarding services and IPRs, the Lisbon revision afforded the Union exclusive external powers regarding foreign direct investments. In fact, the Member States had concluded more than 1000 bilateral investment treaties (BITs) with third countries prior to the expansion in scope of the CCP to embrace investments.\(^{119}\) Hence, the external powers of the Union regarding establishment and business transactions qualifying as direct investments entailed questions regarding the validity of the BITs. Evidently, the ECJ had established already in the 1970s that the Union may succeed the Member States in their external commitments when they have “transferred to it, by one of the founding Treaties, their competence relating to those commitments and it exercises those commitments.”\(^{120}\)

\(^{118}\) Case Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v. Retriever Sverige AB, C-466/12 ECLI:EU:C:2014:76 (the Svensson Case). See also Case Sociedad General de Aurores y Editores de España (SGAE) v. Rafael Hoteles SA, C-306/05 ECLI:EU:C:2006:764 (SGAE) paras. 40 and 42; and Case C More Entertainment AB v. Linus Sandberg, C-279/13 ECLI:EU:C:2015:199.  
\(^{120}\) Joined Cases International Fruit Company and Others, C-21/72 to 24/72 EU:C:1972:114, paras 10–18; and Opinion 2/15, supra note 113, para. 248.
Nevertheless, the Union may as mentioned above, according to Article 2(1) TFEU, empower the Member States to take actions in an area where the Union has exclusive competences. Hence, the Union could afford the Member States to keep their BITs within the CCP. In 2012, the Union adopted a regulation establishing transitional arrangements for BITs between the Member States and third countries to pave the way for a common investment policy. Article 1(2) of the regulation lays down “the terms, conditions and the procedures under which the Member States are authorised to amend or conclude bilateral investment agreements.”\textsuperscript{121} In brief, the Commission shall in response to compulsory notifications assess whether there are provisions in the BITs that may constitute serious obstacles to the Union’s external actions regarding direct investments with a view to the progressive replacement of the BITs. The Member States shall take all appropriate measures to ensure that the BITs do not infringe upon the exclusive powers of the Union to negotiate and conclude investment Agreements. If a BIT is considered incompatible with the EU’s new powers, the Commission and the Member State shall expeditiously enter into consultations and find a solution within 90 days. A Member State may, on basis of the findings, be authorised to amend an existing Agreement or to conclude a new Agreement in order to realise the shared objectives of the Union.\textsuperscript{122} However, the Member States are no longer authorised to maintain their BITs when an Agreement between the Union and a third country covering direct investments enters into force.\textsuperscript{123} Hence, the ECJ established in Opinion 2/15 on the competence of the Union to conclude the trade and investment Agreement with Singapore, that the provisions on direct investment in that Agreement replaces the BITs concluded by the Member States with Singapore.\textsuperscript{124}

In contrast to the Union’s exclusive external competence regarding direct investments, the Union has no express competences to conclude international agreements on non-direct investments. However, in Opinion 2/15, the ECJ also ruled on the powers regarding e.g. “portfolio investments” and free flow of capital without business conduct. Whereas the Union had not taken internal measures that could justify parallel external actions such actions regarding non-direct investments were considered necessary to achieve the objectives of the internal market as to free movement of persons, services and capital. Hence, the Union has implied powers to conclude Agreements regarding non-direct investments.\textsuperscript{125} Since the competence is derived from the functioning of the internal market, and the Union shares the competences to regulate the internal


\textsuperscript{122} This article does not address the BITs between the Member States.

\textsuperscript{123} Opinion 2/15, supra note 113, para. 250.

\textsuperscript{124} Opinion 2/15, supra note 113, para. 249.

\textsuperscript{125} Opinion 2/15, supra note 113, para. 240.
market with the Member States pursuant to Article 4(2)(a) TFUE, it also shares
the external powers regarding non-direct investments. Conversely, to afford
the Union exclusive external powers regarding non-direct investments would in
effect strip the Member States of all internal normative powers in the field.
Problem was that the European commission had negotiated and concluded the
Agreement with Singapore without involving the Member States sharing the
competences. Hence, if ECJ establishes that the Commission has infringed the
Treaties.

Whereas the European unification process is value-driven, the external
Agreements provide blunt tools for regulations such as reciprocity, non-dis-

126 At the same time, these legal frameworks set the standards for the regulation of intra-EU trade and
investments, and ultimately for the socio-economic development in the Union.
Even if the Agreements protect investments made only by foreign companies, it
might be difficult to maintain standards that discriminate domestic companies
in the long run. Hence, ill-defined obligations for the contracting parties and
for the businesses with respect to fundamental rights and freedoms may have
negative repercussion for broader social interests in the Union.127 However, in
the new generation of trade and investment Agreements, the Union endeavours
to export its social market economy model, and to promote and defend its
values and interests as well as to contribute to the protection of its citizens pur-
suant to Article 3(5) TFEU.128 Indeed, the Union seeks to safeguard the right to
regulate on domestic and Union level.129

Whereas the economic, industrial and technological developments brings a
need for broader international legal frameworks in its train, the extending inter-
national commitments entail a need to safeguard the rule of law and admin-
istration of justice. With a view to afford investors access to justice and effec-
tive legal remedies, investor-state dispute resolution systems (ISDS) have been

126 For an overview, see P. Eeckhout, EU External Relations Law, supra note 9.
127 UN guiding principles on business and human rights endorsed on 16 June 2011, available
at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf,
last visited 2017-08-03.
128 See for further reading Commission communication Trade for all – Towards a more respon-
129 See in particular, the EU-Vietnam Free Trade Agreement signed in January 2016 and estab-
lished by Council Decision (EU) 2016/2117 of 29 September 2016 on the conclusion, on
behalf of the Union, of the Framework Agreement on Comprehensive Partnership and Coop-
eration between the European Union and its Member States, of the one part, and the Socialist
Republic of Vietnam of the other part. See also the proposal for a Trans-Atlantic Trade and
Investment Partnership (TTIP) with the United States (US) based on the Mandate issued
by the EU Council of Ministers for the European Commission to negotiate the TTIP of 9
October 2014, 11103/13 DCL 1.
introduced in the Union’s new generation Agreements.130 However, to afford big business tools to enforce their interests against the Union and the Member States on basis of often open-ended provisions in the Agreements may promote short-term accumulation of wealth on the account of a sustainable distribution of wealth.131 Already the risk of big business taking legal actions may chill the will to regulate and even if the Agreement recognises a sweeping “right to regulate” it may result in a “freight to regulate”.132 The Union is for the time being addressing the problem with casuistic decisions by arbitrators and the lack of transparency in ISDS proceedings by developing its institutional framework. In 2015, the commission commenced the work to set up a permanent judiciary body for investment disputes assuming the features of an overarching multilateral investment Court.133

In fact, already the Comprehensive Economic and Trade Agreement (CETA) between EU and Canada, signed in October 2016, introduced a system with a two instances arbitral investment Tribunal.134 On that note, the Commission decided in the spring of 2016 to put forward the CETA as a mixed Agreement because of the case pending at the time regarding the Singapore Agreement. As Commissioner Malmström has stressed, the system with two instances CETA Tribunals reminds of an international Court and “these changes will ensure

130 See e.g. WTO panel dispute settlement DS467: Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging.

131 See the UNCITRAL framework for ISDS, supra note 70. Compare with e.g. the protection for investments and the criteria for public procurement within the Union particularly in Directive 2014/24/EU OJ L 94, 28/3/2014, p. 65. See also Case Micula, T-646/14 EU:T:2016:135; Case Dunamenti, T-179/07 EU:T:2014:236; and UNCITRAL decision in U.S. Steel Global Holdings I.B.V. v. Slovak Republic, PCA Case No. 2013-6. International commitments may also be unilateral. See e.g. Commission decision 2000/520/EC, OJ L 215, 25/08/2000, p. 7, regarding exchange of personal data for commercial purposes between the EU and the US, which was considered incompatible with Article 7 and 8 of the EU Charter and, hence, was declared null and void by the ECJ in Case Schrems, C-362/14 EU:C:2015:650. A new framework for exchanges of personal data for commercial purposes (“privacy shield”) was established by an agreement between the Commission and the US Government on 2 February 2016 (IP/16/216).

132 See how the costs for breaching an Agreement are apportioned between the EU and its Member States in Regulation (EU) No 912/2014 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 L 257, 28.8.2014, p. 121.


that citizens can trust it to deliver fair and objective judgements." 135 Indeed, the
Tribunals will probably develop a body of case law akin to precedents and the CETA makes express reference to the creation of the multilateral investment
Court. 136 Then again, this transfer of normative powers to international Courts is far from unproblematic. Notably, the preamble to CETA merely reafirms the commitment of the parties to democracy and fundamental rights as laid down in the Universal Declaration of Human Rights done at Paris on 10 December 1948, and the right to regulate transpires but from often brief and open-ended exemptions from market access and protection of investments. 137 Moreover, the CETA Tribunals shall construe the Agreement in accordance with the Vienna Convention, and the provision in EU law and Canadian law are considered merely facts. Since EU law is a matter of fact as opposed to an applicable normative frameworks for the CETA Tribunals, the values and objectives of the Union are not binding law for the Tribunals. If the rulings of the CETA Tribunals would deviate from the teleology and system-coherency of EU law, the "autonomous" EU legal order should yield to the international case law.

On 4 July 2017, the Commission registered a citizen's initiative to stop
Agreements such as CETA and the envisaged Trans-Atlantic Trade and investment Partnership with the USA (TTIP). 138 In brief, the European Citizen's Initiative (ECI) maintains that the external actions include "several critical issues such as investor-state dispute settlement and regulatory cooperation that pose threat to democracy and the rule of law. We want to prevent employment, social, environmental, privacy, and consumer standards from being lowered and public services (such as water) and cultural assets from being deregulated in non-transparent negotiations." 139 True, the Commission did not accept the ECI petition with respect to the CETA as it had already been provisionally adopted and signed by the Union and all Member States. But, the reason why the CETA is merely provisionally adopted is that questions have been referred to the ECJ on whether the CETA Tribunals are at all compatible with EU law. 140

135 Commission Press release of 29 February 2016, IP/16/399.
137 Canada has not implemented the Guiding Principles on Business and Human Rights endorsed by the UN on 16 June 2011, supra note 128. Compare, however, e.g. Articles 13(15) and 28(3)(2)(ii) CETA with Articles 34–36 TFEU.
139 Commission Decision on the proposed citizen's initiative supra note 139, para. 3.
140 In fact the controversial investment Tribunal system is not included in the provisional application according to the Commission press release, EU-Canada summit: newly signed trade agreement sets high standards for global trade, 26 October 2016 CETA. However, in Novem-
to the point, the Belgian Government could approve the Agreement only on condition that it requested an advisory Opinion from the ECJ regarding the international Tribunals’ compatibility with EU law, due to a settlement with the local Parliament of Wallonia. In fact, the ECJ has already rejected the idea of submitting the EU institutions to external review under international law in Opinion 2/15 on the Union’s accession to the ECHR.141 As EU law cannot be subordinated to the construction by the ECtHR of the ECHR, it shall not be subordinated to the Tribunals’ construction of the CETA the line of reasoning goes. Perhaps “Europe has always been at crossroads and has always adapted and evolved”.142 It seems difficult to reconcile the view that the transfer of normative powers undermines the rule of law and the social standards in the Union with the view that the creation of international investment Courts promotes the rule of law and broader social interests. Ultimately, the ECI sounds in protectionism and the Union actions in a liberal worldview. Tentatively, the creation of legal and institutional frameworks for harnessing globalisation is to prefer notwithstanding the reduction of powers for national and regional parliaments.

6. INTERNAL IMPACT OF EXTERNAL ACTIONS

In the light of the aforementioned, it is possible to investigate the effects of an international Agreement concluded by the Union in the domestic legal system of a Member State such as Sweden. As mentioned, the Union has at the outset exclusive competences to develop the CCP. Whereas Article 207 TFEU establishes that trade in goods and services as well as direct investments and IPRs comes within the scope of the CCP it is questionable whether the EU is authorised to e.g. regulate non-direct investments and to set up an international Court organisation. If the Union shares the external powers with its Member States, and a mixed agreement would be required, the national Courts will ultimately have to seek clarifications regarding the distribution of competence from the ECJ. Then again, this tends to transform the mixed agreement into an agreement coming within the exclusive powers of the Union since the ECJ is inclined to safeguard internal system-coherency.143

When it comes to the effects of agreements within the scope of the exclusive powers of the Union, it is easily believed that the external commitments over-

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142 Commission White paper on the future of Europe, supra note 2, p. 6.
143 See in particular the expanding competences of the Union with respect to the TRIPS-Agreement from Opinion 1/94, supra note 108; and Case Hermès v. FHT C-53/96 EU:C:1998:292; to Case Daiichi Sankyo and Others, C-414/11, supra note 109.
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ride all internal EU sources of law. Indeed, EC law originally appeared to turn on monistic theory since the ECJ clarified that the provisions in international Agreements must not “vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States, and in the latter case, according to the effects in the internal legal order of each Member State which the law of that State assigns to international agreements concluded by it.” However, the fact that international Agreements concluded by the Union shall be applied in the same way by the national- and the supranational norm giving powers, does not necessarily imply that the Agreements have direct effect or are directly applicable within the Union. Instead, the ECJ has clarified that provisions in such Agreements can be invoked directly as sources of law only in so far as they meet the general criteria of being sufficiently clear, precise and unconditional when taking also the very nature of the Agreement into consideration. Normally, the effects of the EU sources of law transposing the Union’s external actions into domestic law override the various domestic approaches to fulfil international commitments. The Agreement might e.g. be materialised in a regulation that creates rights and obligations for private parties, or in a directive that approximates the domestic legal systems. For instance, the TRIPS Agreement mentioned above, is given effect in domestic law through the many directives and through the directly applicable regulations concerning IPRs. Consequently, the norm giving powers within an EU Member State need to understand the effects of internal EU sources of law to materialise the external commitments of the Member States under the CCP.

At the outset it follows from the fundamental principle *pacta sunt servanda*, that the Union and its Member States must abide by the common external commitments. However, the ECJ has explained that international Agreements do not dictate the scope of “EU law” in parity with a norm-hierarchy but form integral parts of EU law. It follows from the principle of primacy that the provisions in an international Agreement adopted on basis of the EU Treaties cannot have an impact on the meaning of the very same Treaties. Famously, in Case C-402/05 P Kadi, the ECJ conditioned the implementation of a UN resolution requiring the Union to freeze the financial assets of a person who had been affiliated with Usama Bin Laden, on the right to fair trial provided by Article 47 of the EU Charter. Evidently, coherency in the legal system between the EU’s external actions and internal measures is achieved by adapting the external commitments to the internal EU legal context.

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145 See e.g. Case *Intertanko*, C-308/06 EU:C:2008:312; and Case *Hermès v. FHT*, supra note 144.
Casuistic ISDS resolutions are not likely to challenge the margin of appreciation of the EU institutions to establish the effects of international commitments within the autonomous legal order. However, it will be difficult even for the ECJ not to abide by the case law handed down by international Tribunals construing the often open-ended provisions in an international Agreement. Indeed, the CETA Tribunals may set standards for the right to regulate in the EU with respect to investments by Canadian companies, and down the road a multilateral Court might have jurisdiction to balance all foreign direct investments against broader social interests. True, reverse discrimination of companies established within the Union is not prohibited. But it would sit uncomfortably with the rule of law to afford foreign companies more protection than EU companies against for instance indirect expropriation and nationalisation. At the end of the day it would be an infringement of the international Agreement to disregard the rulings from the international Courts and this may challenge the right to regulate. Then again, the remedy would be a more fine-tuned protection of investments where the international Courts safeguard broader social interests rather than trade barriers and protectionism.

In case an international Agreement has been concluded by the Member State extramural the Union’s competences, the domestic norm giving powers might seem free to define its legal effects.\textsuperscript{148} Indeed, the ECJ clarified in Case C-617/10 Åkerberg Fransson, that it has no jurisdiction to rule on the ECHR where a situation does not come within the scope of EU law “and any provisions of the Charter relied upon cannot of themselves, form basis for such jurisdiction.”\textsuperscript{149} However, Article 351(2) TFEU provides in parity with sincere cooperation that the Member State shall, as far as possible, approximate its external commitments with EU law. On that note, the norm giving powers shall primarily construe international law lexically which would with respect to the Bern Convention discussed above probably tell against an EU-conform construction of the Convention and result in legal glitches. By contrast, the Swedish Högsta Domstolen recently approximated the legal effects of the ECHR in the domestic legal system with EU law, and particularly to the EU-Charter, extramural the immediate scope of any substantive EU law in Case NJA 2013 s. 502 (PMP). In cases concerning VAT, the Supreme Court had been reluctant to assess whether it was in accordance with the principle of \textit{ne bis in idem}, to make the same tax evasion subject to both administrative sanctions and criminal law penalties. As there were no “clear support” for the view that Swedish law was incompatible with the relevant provision in the ECHR as transformed into Swedish law by the Act 1994:1219, the Supreme Court did for many years reject requests

\textsuperscript{148} Compare with section 2 in this article “International law and domestic law”.

\textsuperscript{149} Case Åkerberg Fransson, supra note 43. See also Case Currá and Others, C-466/11 EU:C:2012:465, para. 26.
for leave to appeal regarding the alleged infringement.\textsuperscript{150} Clear support would require a case where the ECtHR explicitly considered Swedish law or a similar (read Nordic) legal order incompatible with the Convention.\textsuperscript{151} However, the principle of \textit{ne bis in idem} is also manifested in Article 50 of the EU Charter. When questions about the implementation of the VAT-directive transposing the EU Charter were brought before the Northern Swedish district Court of Haparanda, it did not hesitate to stop the proceedings and refer questions to the ECJ regarding the dual punishment prohibition.\textsuperscript{152}

Initially, the request for a preliminary ruling was met with much criticism and the public prosecutor appealed the district Court’s decision to the Appeal Court for Northern Sweden.\textsuperscript{153} Fortunately, the Appeal Court judge dismissed the appeal on basis of Article 267 TFEU.\textsuperscript{154} As the ECJ had explained in the \textit{Cartesio} case, the right to request clarifications in law cannot be called into question by domestic rules permitting an appellate Court to “vary the order for reference, to set aside the reference and to order the referring Court to resume the domestic law proceedings.”\textsuperscript{155} Consequently, the questions on the one hand regarding the relation between the provisions in the ECHR and in the EU Charter, and on the other hand regarding the scope of the EU concept of \textit{ne bis in idem}, could be referred to the ECJ. As mentioned in Case C-617/10 \textit{Åkerberg Fransson} the ECJ clarified the meaning of the principle of \textit{ne bis in idem} in EU law.\textsuperscript{156} In brief, the ECJ explained that administrative measures can be seen as “punishment” and should accordingly be taken into consideration when giving effect to Article 50 of the Charter.\textsuperscript{157} Indeed, the ECJ applied the criteria for “\textit{bis}” developed by the ECtHR, but clarified that a more flexible approach to fundamental rights is needed within the scope of EU law. Because, in EU law the administrative measures and criminal law sanctions are contrary to \textit{ne bis in idem} only as long as the remaining penalties are effective, proportionate, and dissuasive.\textsuperscript{158}

As the preliminary ruling in the \textit{Åkerberg-Fransson} case suggested that Swedish tax law could infringe EU law, the Högsta Domstolen considered it necessary to review the state of law. In the PMP case, a photographer who had

\begin{itemize}
\item \textsuperscript{150} Compare with Regeringsformen 11:14.
\item \textsuperscript{151} See the reasoning of the Swedish Högsta Domstolen in Case NJA 2013 s. 502.
\item \textsuperscript{152} Haparanda Tingsrätt, Case B 550-09.
\item \textsuperscript{153} For further reading in Swedish see e.g. K. Fast, Tusen skäl att förekomma istället för att förekomnas – en kommentar till dubbelbeträffningsfallen i EU-domstolen och Högsta domstolen 2013, Juridisk Tidskrift 2013–14 Nr. 1, P 24 et seq.
\item \textsuperscript{154} Decision by the Appeal Court of 1 September 2011 in Case Nr Ö 496-11.
\item \textsuperscript{155} Case \textit{Cartesio}, C-210/06 EU:C:2008:723, paras. 95–98.
\item \textsuperscript{156} See Case \textit{Åkerberg Fransson}, supra note 43.
\item \textsuperscript{157} Case \textit{Åkerberg Fransson}, supra note 43, para. 35, referring to Case \textit{Bonda}, C-489/10, EU:C:2012:319 where rulings of the ECtHR such as that in Case \textit{Zolotukhin}, Appl. No 14939/03, is recognised.
\item \textsuperscript{158} Case \textit{Åkerberg Fransson}, C-617/10, supra note 47, para. 29.
\end{itemize}
allegedly made a fraudulent VAT and income tax return was subject to adminis-
trative measures as well as to public prosecution. In paragraph 59 of the ruling, 
the Supreme Court establishes that the ECHR protocol 7 Article 4 should not 
provide a lower level of protection than Article 50 of the EU-Charter since 
that would create inconsistencies in Swedish law contrary to predictability and 
equivalence. Hence, with a view to safeguard system-coherency in Swedish law, 
the Supreme Court explained that legal changes are required as soon as there 
is sufficient support for considering domestic law to be out of pace with the 
ECHR, also extramural the scope of EU law. As a result, persons convicted for 
tax evasion were granted new trials across the country and in many instances 
penalty fees were refunded and convicted persons were released from prison. 
Indeed, NJA 2013 s. 502 must be understood as rebutting the clear support 
doctrine in general. It elucidates that reflexive approximation to EU law beyond 
the scope of applicability of the EU sources of law is necessary to safeguard the 
rule of law within the domestic legal system. Hence, it is a qualified truth that 
the Member State is free to decide along the routes of monism or dualism how 
to give internal effect to its external commitments extramural EU law.

7. CONCLUDING REMARKS

I have in this article discussed the effects of the EU sources of law and of inter-
national agreements concluded by national Governments and by the Union, 
relating in particular to the CCP. It cannot be enough emphasised that “EU 
law” differs in nature from “international law”. Whereas international law 
relates to the domestic legal systems in limited areas, EU law embraces large 
parts of the domestic legal systems and establishes a unitary legal order across 
the Member States that is geared towards realisation of common objectives and 
values. True, State independence dictates that the conferral of internal norma-
tive competences to the EU-Institutions must be recognised and explained at 
some level in the domestic legal system. But as the UK Supreme Court clar-
ified in it seminal Brexit ruling, the measures in a Member State to manifest 
the membership in the Union is but a “conduit pipe” by which EU law is 
brought into the domestic legal system. Instead, the prevailing principle within 
the Union is primacy.159 Many EU sources of law are integrated in the domestic 
legal systems and can only be enforced in national law, but also domestic law 
may form part of the autonomous legal order. Indeed, the evolution of EU law 
brings a need for closer cooperation between the public administrations and 
the national Court organisations in its train. In fact, the national Courts are

159 See the Brexit ruling, supra note 1, para. 65. See also the ECJ in Case Nimz C-184/89 
EU:C:1991:50.

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the ordinary EU Courts, and this implies powers and obligations to review the state of domestic law.

When it comes to the external actions of the Union, which ultimately have internal effects in the Member States, the CCP has gradually embraced more and more aspects of the economic life. From being a policy dealing mainly with international trade in goods, it now encompasses also services, IPRs and direct investments such as establishments and organisation of industry. However, the policy is still vaguely defined and resort is still had to implied powers and parallelism to safeguard coherency between the internal measures and external actions. For instance, the Union has only shared external competences with respect to non-direct investments and arguably no competence at all to set up an international Court organisation. Indeed, the new generation of trade and investment agreements are far-reaching and e.g. the CETA establishes an embryonic FTA across the Atlantic resembling the internal market. In general, the Agreements concluded by the Union shall be applied in the same way by the EU Institutions and by the domestic norm giving powers, and they are normally transposed through internal EU sources of law classified among primary law and secondary legislation. Hence, provisions in a regulation implementing the Agreement may have direct effect, and a directive transposing the Agreement into domestic law normally has but indirect effect. In addition, the rule of law and in particular the need for normative coherency, implies that the EU sources of law may affect the construction of international Agreements concluded by the Member States beyond the scope of the immediate applicability of the EU sources of law. Even if there is support for such a reflexive approximation of domestic law in Article 351(2), the ECJ made it utterly clear in its Åkerberg-Fransson ruling that the Member States should be free to decide how to give internal effect to external commitments extramural EU law. Then again, to apply an international Agreement in one way within the scope of EU law and in another way outside its scope would create unacceptable inconsistencies in domestic law. Hence, the membership in the Union may have general implications for the interrelation between domestic law and international law.

In addition to the enforcement of international commitments through EU law and domestic law, the new generation trade and investment agreements allows for “investor-State” dispute resolution. If the Union has concluded a trade and investment Agreement, the ISDS warranted by the WTO affords foreign investors legal remedies against both the Union and the Member States. The problem is that even the most far-reaching Agreements within the scope of the CCP have merely vague references to fundamental rights and open-ended exemptions from the protection for investments which all rhetoric aside at some level jeopardises the right to regulate. With a view to promote the rule of law and a transparent and balanced regulation of international investments, the Union is keen to develop a multilateral investment Court organisation. Already
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the CETA introduces a system with two instances of Tribunals akin to Courts. However, the transfer of normative powers further away from the national and regional Parliaments is problematic per se and it has provoked a strong reaction within the Union. Whereas a citizen’s initiative seeks to stop the conclusion of new trade and investment Agreements, the Belgian Government has under pressure from the regional Parliament of Wallonia, referred questions to the ECJ on whether CETA Tribunals are compatible with EU law.

It will probably be difficult to maintain the idea that the CCP Agreements are not directly applicable but merely integral parts of the Union legal order in view of case law from international Courts clarifying the meaning of the open-ended provisions on protection of investments. Down the road of shaping legal and institutional international frameworks the regulation of the internal market and the socio-economic development in the Union might be affected. Hence, Europe is facing a choice between protectionism or progressive cooperation. As stressed by commissioner Malmström, free trade is the only known way to economic growth without burdening State budgets, and big business will find a way to exploit market openings irrespective of whether the polities compete or cooperate by means of regulation. Tentatively, law shall prevail and cooperation around the globe is better than frictions. Hence, the Union is on the right track when harnessing globalisation through the CCP. However, this development brings challenges for the judges in national Courts in its train. Because, if it once upon a time sufficed to deal with the interrelations between domestic law and international law in the field of commercial law as broadly defined, it is now necessary to understand the effects of many sources of law on various levels in a multidimensional legal framework.