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EU Competence and Intellectual Property Rights. Internally Shared, Externally Exclusive?¹

Abstract: EU Competence and Intellectual Property Rights. Internally Shared, Externally Exclusive? Abstract: The European Union's competence in external relations remains widely debated whenever the conclusion of an international agreement is about to happen. The recent focus mainly concerns the EU's planned external trade agreements which grant it exclusive competence in this area. This is particularly complex in the field of intellectual property rights, where the EU has exclusive competence only with respect to the commercial aspects of the domain. This paper examines how the notion of the commercial aspects of intellectual property is interpreted by the Court of Justice of the European Union. We also analyze the possible implications of the broad approach adopted by the Court. In this regard, we first discuss the Court's line of argument in the Daiichi Sankyo case. Then we scrutinize and verify the interpretation applied by the Court, which is significant in order to predict future case law developments in this area. We also relate the Court's verdict to the EU's internal regulations which brings us to the conclusion that the approaches taken in external trade relations and within the internal market contradict each other, leading to a legal or interpretative dead-end. Although detailed and specific, the results of this analysis make it possible to understand the complexities underlying the political turbulences that often occur when the EU negotiates international trade treaties.

Key words: EU's exclusive competence, EU's external relations, commercial aspects of intellectual property, common commercial policy

Introduction

The general objective of this article is to discuss the scope of the concept of commercial aspects of intellectual property as laid down in the Treaty on the Functioning of the European Union (TFEU) in the context of the EU's external relation. In order to answer the main research question, we need to examine the following specific problems.

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Firstly, if we assume – as the Court of Justice of the EU (CJEU, or the Court) ruled – that the above mentioned concept enjoys a very broad scope, we come to the question whether indeed intellectual property rights in external relations belong to the EU's exclusive competence. Should the answer be in affirmative, then we would need to look at the interrelation between creation of intellectual property rights in external relations on the one hand and in the internal market on the other. In the second case, the Court has already ruled that this competence is shared between the EU and its Member States. Therefore, we need to examine what might be the consequences of such a dual approach.

Secondly, we would like to put the main research objective in the broader context of defining the EU's external competence after adoption of the Lisbon Treaty. The question here is what tendencies we can witness in the Court's case-law when it comes to the definition of the EU's exclusive competence in this field. Having established that, we will look at the potential consequences of the defined approach.

Thirdly, we need to take a closer look at a method of interpretation of the TFEU that brought the Court to the conclusion that almost all aspects of intellectual property are commercial. The line of reasoning adopted by the Court seems *prima facie* to contradict the previously adopted methods of interpretation both of the Treaties and international agreements, to which the EU is a party.

Our general research objective as well as the specific problems we have outlined above were ignited by the Court's judgment of 18 July 2013 in the case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* (ECLI:EU:C:2013:520; hereinafter: *Daiichi Sankyo*). Even though it is not the most recent one and it has already been discussed in the literature, it seems evident that the dynamic context of the functioning of the EU implies that the ruling and its consequences require a further analysis allowing more thorough understanding of the problems we set. The present events, e.g. doubts concerning competence to negotiate and sign the Canada-EU Trade Agreement (CETA), prove that many problems are not fixed yet. The scope of the EU's exclusive competence in the common commercial policy is also subject to questions addressed to the Court in the framework of Opinion 2/15 (concerning Free Trade Agreement with Singapore) proceedings.² Fi-

² See also: Proposal for a Council Decision on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part, 5.7.2016, COM(2016)444 final, Explanatory memorandum, point 2.

nally, the question of competence in the field of intellectual property rights may retain significance in the context of the so-called Brexit if only the United Kingdom and European Union decide to arrange future relations in the framework of a free trade agreement.

The *Daiichi Sankyo* case

The case was heard within the preliminary ruling procedure by the Court sitting in its Grand Chamber. The dispute before the national court concerned marketing of medicinal products, while it was questionable if they still were subject to protection granted by patents and supplementary protection certificates. The first question, however, concerned the status of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement), constituting Annex 1C to the Agreement establishing the World Trade Organisation (WTO), signed at Marrakesh on 15 April 1994 and approved by the Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community. More specifically, the question arose with respect to Article 27 of the TRIPs Agreement, which provides for conditions of patentability:

Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. (5) Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

- (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

- (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

The Greek court needed to establish whether the quoted provision belonged to the Member States' primary competence and consequently if those States were still entitled to grant this provision direct effect. The national court asked also whether it could apply the said provision directly in national proceedings, provided that national criteria for such application were satisfied.

Essentially, that question of the national court concerned interpretation of Article 207 TFEU which provides for the common commercial policy, in the field of which the EU is exclusively competent. According to Article 207(1) TFEU, "the common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies." It needs to be stressed that this provision has been significantly changed with the Treaty of Lisbon, and thus the Greek court's question gains its importance.³ Therefore, in brief, it was necessary to decide in that case the scope of the *common commercial policy* concept and whether it embraces the whole TRIPs Agreement. As it occurred, the approach adopted by the Court was remarkably different in comparison to the line of case-law settled within the hitherto legislative framework (Larik, 2015, pp. 791–792).

Advocate General Cruz Villalón delivered his opinion in that case on 31 January 2013. At first, he rightly defined the essence of the described problem as "the extent to which the matters governed by the TRIPs Agree-

³ At the same time, it is not the aim of this contribution to analyse Article 133 EC (preceding Article 207 TFEU) and the *Merck Genéricos* (Case C-431/05 [2007] ECR I-7001) line of case-law. For a comprehensive elaboration of the issue of building the EU's exclusive competence in commercial policy see: P. Eeckhout, 2012, pp. 613–636.

ement – and therefore the interpretation of the relevant law – now fall within the exclusive competence for commercial policy in so far as they constitute *commercial aspects of intellectual property*” (para. 40). Before undertaking the analysis of the problem, AG Cruz Villalón also reminded what intellectual property rights and TRIPs Agreement were. This was important in order to underline the problem of defining a borderline between regulating substantive intellectual property rights (as provisions governing patentable subject matter) on the one hand and those that relate to trade in goods or services.

Then, AG Cruz Villalón referred to the nominalist argument raised by the Commission. To put it briefly, the Commission claimed that the concepts of *trade-related aspects of intellectual property* and *commercial aspects of intellectual property* have almost the same wording, hence the meaning and semantic range should be the same. Consequently, the issue of patentability should also fall within the scope of *commercial aspects of intellectual property*, as it is regulated by the agreement concerning *trade-related aspects of IPRs*. The Advocate General concluded, however, that this concept “must be an autonomous concept of European Union law and that the Court must be independently responsible for its interpretation, instead of its meaning being determined, in a more or less stable or consistent way, by the agreements to which the European Union is a party” (para. 58).

For the second point, AG Cruz Villalón referred to the problem of interrelation in the field of intellectual property protection in the internal market and in external relations. This point is crucial, since regulating intellectual property in the internal market remains shared competence between the EU and Member States,⁴ contrary to the EU’s exclusive competence in the field of commercial aspects of intellectual property. In that regard, the Advocate General concluded that regulation of patentable subject matter (as it is in Article 27 TRIPs) is purely substantive matter and has no direct commercial connotations. Stating otherwise and granting the EU exclusive competence in that regard would affect, if not ‘deactivate’, shared competence in the internal market (paras. 60–61).

These are just two main threads of the elaborate and in-depth opinion of AG Cruz Villalón, who examined also the counter-arguments to those he posed. Effectively, he concluded that Article 27 TRIPs does not regu-

⁴ Judgment of 16 April 2013, joined cases C-274/11 and C-295/11 Spain and Italy v Council, ECLI:EU:C:2013:240.

late subject-matter that would fall within the commercial aspects of intellectual property as set out in Article 207(1) TFEU and, therefore, does not fall within the scope of the EU's exclusive competence.

The Court did not share the views of AG Cruz Villalón and came to different conclusions. The Court departed from the assumption that rules adopted by the EU in the field of intellectual property fall within the concept of *commercial aspects of intellectual property* only if they have specific link to international trade (para. 52). Then it concluded that this is exactly the case of the TRIPs Agreement, which forms part of the WTO system and, therefore, in its entirety it is linked with trade.

The argumentation of the Court is rather terse (Van Damme, 2015, p. 80). Firstly, the link with international trade was interpreted from the Understanding on rules and procedures governing the settlement of disputes (hereinafter: DSU), which forms Annex 2 to the WTO Agreement and applies to the TRIPs Agreement. Article 22 (3) DSU allows cross-suspension of concessions between principal WTO agreements, including the TRIPs Agreement. Therefore, indeed failure to respect some obligations derived from the TRIPs may have consequences in relation to other trade regulations.

Secondly, according to the Court, the authors of the FEU Treaty were perfectly aware that the term *commercial aspects of IP* corresponds 'almost literally' to *trade-related aspects*.

Thirdly, the Court examined the argument concerning the troublesome relation between regulating intellectual property in external and internal dimension, where competence remains respectively exclusive and shared. According to the Member States, Article 27 TRIPs should be subject to the latter competence. However, that problem – said the Court – does not rebut the assumption that the TRIPs Agreement as a whole has specific link to international trade, since it aims at “strengthening and harmonising the protection of intellectual property on a worldwide scale”. It also follows from the Agreement's preamble that its aim is to reduce distortions in international trade.

To sum up, the Court limited its reasoning to interpretation of the TRIPs Agreement, concluding that it falls within the concept of commercial aspects of intellectual property as provided in Article 207 TFEU. Therefore, no autonomous meaning was granted by the Court to that concept.

From further developments, it seems that *Daiichi Sankyo* will constitute a point of departure for what is called the Court's settled case-law. In

his opinion delivered in the opinion procedure 3/15,⁵ AG Wahl follows the Court's reasoning when concerning the concept of *commercial aspects of intellectual property*. Basing his reasoning on the said case, the Advocate General finds the link between international trade and the Marrakesh Treaty⁶ from the fact that some of that Treaty's provisions influence the international exchange in goods and services (para. 46) as well as from the aim of the Marrakesh Treaty and its links to the TRIPs Agreement.

The Court's method of interpretation

Before examining the substantive issues, we would like to focus on the way the Court interpreted Article 207 TFEU and the concept of *commercial aspects of intellectual property*. As we will try to prove, the *formal* questions in this field effectively surmount the *substantive* ones. The problem is worth giving a closer look for a couple of reasons. Firstly, it is rather rare that either advocate generals or the Court refer to particular methods or philosophies of interpretation. Secondly, it is seen even less often when the Court interprets EU law (which is believed to be built on autonomous concepts) through concepts introduced by international law that entered into force even after the Rome Treaties.

Advocate General Villalón defined this problem in *Daiichi Sankyo* as a conflict of contradicting methods of interpretation. On the one hand, functional interpretation aiming at guaranteeing full effectiveness of EU law would advocate for a holistic approach resulting in a broader meaning of the concept of *commercial aspects of intellectual property*. On the other hand, a systematic way (or: 'topographical', 'compartmentalised') would require a substantive analysis of each TRIPs Agreement's provision to be done separately, which could result in concluding that some of them belong to the EU's exclusive competence while some do not. The Advocate General then concluded that effectiveness of Article 207 TFEU would not have been undermined if the Court decided that Article 27 TRIPs remained in the sphere of shared competence. Moreover, effectiveness of that provision could have been strengthened with other means such as gradual harmonisation and unification of IPRs within the EU – to which

⁵ Opinion of Advocate General Wahl delivered on 8 September 2016 (ECLI:EU:C:2016:657).

⁶ The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.

competence remains shared between the Union and its Member States. The Court, however, did not follow these conclusions.

The present authors share the view that deciding otherwise than the Court did would not undermine the effectiveness of Article 207 TFEU. At least, no convincing argument or evidence in that matter was submitted to the Court and it did not actually adjudicate in this regard. Therefore, it is difficult to discuss that matter in its merits as it is far too abstract. It also needs to be remembered that effectiveness of EU law has its limits and does not prevail over other arguments,⁷ being subject to balancing of values and interests just as any other ones.

What is more interesting is the fact that the Court interpreted the concept of *commercial aspects of IPRs* on the basis of international agreement. By doing so, it seems to have deprived that concept of the EU autonomous meaning.

The Court concluded that the term *commercial aspects of IPRs* is almost literally identical to *trade-related aspects of IPRs*, which forms the title of the TRIPs Agreement. We would not like to enter philosophical or theoretical discussion on ontology, albeit it is difficult to accept the statement that the name determines the essence. The sole fact of similarity of names should not affirm similarity of contents. It is so especially when the latter derives from different legal orders and different legal contexts. The Court shared this view, e.g. in the *Demirkan*⁸ case. It concerned the question whether freedom to provide services set out in Article 56 TFEU and the Agreement establishing an Association between the European Economic Community and Turkey with its Additional Protocol has the same scope and meaning, even when the wording remained identical. The answer was in negative, as the Court concluded that “the interpretation given to the provisions of European Union law, including Treaty provisions, concerning the internal market cannot be automatically applied by analogy to the interpretation of an agreement concluded by the European Union with a non-Member State, unless there are express provisions to that effect laid down by the agreement itself” (para. 44). Therefore, one may ask why the Court is reluctant to interpret international agreements

⁷ What seems to be the case, e.g. in C-119/15 *BP Partner* (AG opinion of 2.6.2016, ECLI:EU:C:2016:387, the case is still pending) where the Court will probably decide that the national system of consumer protection against was – to simplify it – ‘over-effective’ as for the EU law standards.

⁸ Judgment of 24.9.2013, C-221/11 *Demirkan*, ECLI:EU:C:2013:583 (Grand Chamber).

through EU law, while it allows the opposite direction of interpretation in *Daiichi Sankyo*.

When taking the functional approach into consideration, the Court did not limit itself to comparing the wording of *commercial aspects* and *trade-related aspects* of intellectual property. It also settled that a direct link to international trade was a decisive factor whether something falls or not within the concept of *commercial aspects of IPRs*. The postulate of looking for the mentioned direct link with international trade seems to be legitimate (yet problematic, Dimopoulos, 2014, pp. 220–221). However, the Court in this regard continued to examine the whole TRIPs Agreement and its preamble, not referring particularly to Article 27 TRIPs, which was subject to the preliminary question. To put it briefly, the Court concluded that since the TRIPs preamble states that the Agreement's aim is to reduce barriers in trade, then the entire Agreement as such is directly linked to trade.

However, this line of reasoning seems to be incorrect. As it was stated above, it is not only the name, but also the (creator's, or legislator's) intent that determines the essence. The present authors claim though, and it is rather obvious, that one needs to examine the actual content to know what it consists of. There is no reason to limit one's interpretation only to the goals accompanying the legal act. If we remain consistent with the Court's line of reasoning, it would be very easy to circumvent the Treaty's provisions on competence and regulate some matters by concluding an international agreement with a title and preamble stating one thing and the substantive provisions dealing with something else.

Even if the above argument may seem absurd, it is not very far away from the *Daiichi Sankyo* conclusions. If we look at the question of patentable subject-matter, it obviously reveals no direct link with international trade in its substance. Of course, in the modern economic system almost everything may be subject to trade relations, albeit this pessimistic conclusion should not be argument for interpretation of the concept of *commercial aspects of intellectual property*. If we assume that even patentability of inventions falls within the scope of that concept, it leads to the conclusion that there are no other aspects of intellectual property, but commercial ones.⁹ That finds confirmation in the above-quoted AG Wahl's opinion delivered in the opinion procedure 3/15. The Advocate General concluded there that

⁹ With the possible exception, e.g. to the personal rights that may be derived from copyrights and are not subject to the TRIPs Agreement.

non-economic intellectual property rights provide for a clearly residual category: “broadly speaking, intellectual property rules are meant to confer certain exclusive rights regarding the exploitation of creations of the intellect in order to foster creativity and innovation. Those exclusive rights are nothing but *sui generis* forms of monopolies which may limit the free circulation of goods or services. Thus, by their very nature, intellectual property rules are mostly trade-related” (para. 56).

The link between trade and intellectual property protection has been subject to the Court’s review with respect to the free movement provisions. This line of case-law and vague formulation of *commercial aspects of IP* allows, according to Tanghe, three interpretations of that concept (Tanghe, 2016, pp. 32–35).

The first one, proposed, *inter alia*, by Eeckhout, claims that the common commercial policy applies if there is a risk of diverging external policies by the Member States, which could lead to competition distortions within the EU. Consequently, the common commercial policy would form a sort of counterpart of the internal market legal basis set out in Article 114 TFEU. Tanghe recognizes that this interpretation ensures coherence between internal and external policies as well as provides for efficient methods of analysis developed under internal market regime. However, she claims that this approach cannot be adopted in the field of intellectual property, since national intellectual property rights do not restrict trade in terms of Article 34 TFEU. It is so because they can be justified on the grounds of derogations set out in Article 36 TFEU. That leads her to conclusion that accepting the said approach would mean that all intellectual property legislation is excluded from the common commercial policy.

The present authors have two remarks about that criticism. Firstly, it is rather believed that Articles 34–36 TFEU provide for at least a twostep analysis. The first thing is to decide whether a national measure (also exercise of intellectual property measures) constitutes a measure having equivalent effect to quantitative restrictions. Only afterwards the second step is taken, where it is analysed if such a measure may be justified on the basis of derogations from Article 36 TFEU. If it may, it still constitutes a measure having equivalent effect to quantitative restrictions, yet it is justified and, therefore, not unlawful (f.ex. Gormley, 2015, p. 928; Enchelmaier, 2010, p. 216¹⁰). Secondly, given that the said premise was

¹⁰ It seems therefore that the author confuses exceptions from Article 36 TFEU with the so-called ‘mandatory requirements’ following from the *Cassis de Dijon* case-law.

wrong, it is also the conclusion that is not right: it follows from the Court's settled case-law on Articles 34–36 TFEU that even if we consider that the internal market and common commercial policy are two sides of the same coin, still *some* aspects of intellectual property may fall within those legal orders.

The second interpretation boils down to – known from the Court's case-law concerning internal market – the division of intellectual property into moral and economic rights. These could be therefore the moral rights (we can assume they consist, e.g. of the author's right to be associated with his work) that do not fall within the scope of commercial aspects of IPRs. Also here, Tanghe does not agree with such an approach claiming – as in the first case of interpretation – that the Court follows different reasoning and develops different concepts in the internal market and commercial policy areas. To the present authors, the suggested division into moral and economic rights does not seem to be coherent, mutually exclusive and logical. In order for it to be a 'good' division, there may be no case of rights being both moral and economic at the same time. Whereas patentability of inventions or author's basic rights seem to fall within both spheres. However, the sole idea of dividing aspects of intellectual property rights into *commercial* or *trade-related* and *others* seems rather obvious and reflects the idea presented by the Court in *Daiichi Sankyo*. However, defining the borderline between them constitutes the main problem appearing in that case.

The third approach concerns examination of the general objectives and the rationale of the EU's competence in the common commercial policy. The goals of CCP can be identified from Articles 205–207 TFEU and Article 21 TEU which constitute in general that the EU is to contribute to harmonious development of the world trade, progressive abolition of trade and foreign direct investment restrictions, etc. The main rationale seems to be integrating countries into the world economy by pursuing gradual liberalisation and abolishing international trade restrictions. These general goals lead Tanghe to the conclusion that measures having specific link to international trade are these that actually aim at eliminating or maintaining the same degree of liberalisation. Following from this, the author concludes that the Court's 'pragmatic approach' in *Daiichi Sankyo* can be justified. Intellectual property rights are significant part of international trade, which can be reflected in the number of disputes concerning the TRIPs Agreement. Therefore, disconnecting the common commercial policy and the WTO system could seem artificial and ineffective.

However, this approach may be questioned, for it still does not solve the problem of substantive content of the agreement that entirely falls within the common commercial policy. Of course, the Court should not be required to conduct any economic analysis of each provision of the TRIPs, albeit it seems accurate to expect it balances the *commercial* or *economic* substance of each provision with its other aspects. Depending on which prevails, it should either fall within the scope of Article 207 TFEU or not.

The three said ways of interpretation do not seem to exclude each other. On the contrary, it would be rather worrying if general rationale of common commercial policy could contradict or oppose to the goals of the internal market. Therefore, all three postulates should be taken into account and balanced in order to obtain coherent interpretation, in which both internal and external dimensions of the EU action could co-exist. Following from the foregoing, the present authors claim that each provision of the TRIPs Agreement should be evaluated separately with regard to the field of competence, regardless of the name, preamble or the goals of the Agreement itself.

These are not the only methods of interpretation that can be found in the literature. For instance, Kampf advocates for a more holistic and dynamic approach when looking for a direct link between trade and intellectual property (Kampf, 2015, pp. 113–117). However fair and right it may be, this postulate seems far too general to be applied when interpreting the concept of *commercial aspects of intellectual property*.

The EU's competence in the field of intellectual property rights

It follows from the foregoing observations that the concept of *commercial aspects of intellectual property* is interpreted broadly and it is justified to claim that almost all aspects of intellectual property enjoy a sufficient link with international trade. Therefore, they fall within the sphere of the EU's exclusive competence. The consequences of this were defined by the Court in para. 59 of the *Daiichi Sankyo* ruling: “[A]dmittedly, it remains altogether open to the European Union, after the entry into force of the FEU Treaty, to legislate on the subject of intellectual property rights by virtue of competence relating to the field of the internal market. However, acts adopted on that basis and intended to have validity specifically for the European Union will have to comply with the rules

concerning the availability, scope and use of intellectual property rights in the TRIPs Agreement, as those rules are still, as previously, intended to standardise certain rules on the subject at world level and thereby to facilitate international trade.” Such conclusions can be found also prior to the *Daiichi Sankyo* judgment (Villalta Puig, 2011, p. 293).

Even if this perspective seems wide enough, before examining the interplay between external and internal competence in intellectual property protection, we need to discuss the idea of the EU's *implied competence*, developed by the Court in *Commission v Council*.¹¹ In this case the Commission sought for annulment of the Decision of the Council and the Representatives of the Governments of the Member States meeting within the Council on the participation of the European Union and its Member States in negotiations for the Convention of the Council of Europe on the protection of the rights of broadcasting organisations, of 19 December 2011. In this decision, the EU and its Member States were jointly authorised to participate in negotiations for the Convention on the rights of broadcasting organisations drafted by the Council of Europe. Consequently, the decision was based on the assumption that the EU and the Member States share their competence in that field. However, it is worth mentioning that the broadcaster's rights are regulated by a number of international (e.g. in the TRIPs Agreement) and the EU (Directives 2006/115/EC on Rental and Lending Rights, 2006/116 Satellite and Cable Directive and, to some extent, 2001/29 InfoSoc) legal acts (Woods, Peers).

The Commission argued that these negotiations would be based therefore on the EU's *acquis* in that field. Consequently, it concluded that “where a body of rights gradually introduced by EU law reaches [...] an advanced stage and the envisaged international agreement seeks to consolidate and, at most, to marginally improve the protection of the right holders concerned on peripheral aspects not currently covered by EU law, the European Union must have exclusive competence” (para. 46). Moreover, the Commission argued that the EU has already undertaken legislative initiatives in this field which go beyond setting minimum standards. The fact that it did not constitute full harmonisation measures would not prevent this sphere from falling within the EU's exclusive competence. Lastly, the subject matter of the negotiations formed – according to the

¹¹ Judgment of 4 September 2014, Case C-114/12 *Commission v Council*, ECLI:EU:C:2014:2151 (Grand Chamber).

Commission – a “consistent and balanced body of intellectual property” that intended to ensure the unity of the EU’s legal order.

The Court shared the Commission’s views, basing the judgment on the *ERTA*¹² settled line of case-law. From a rather lengthy and detailed analysis the Court deduced that since a large part of the substance of the negotiations was already covered by EU law, these negotiations could affect common EU rules or alter their scope. Consequently, competence to hold these negotiations should belong exclusively to the European Union. Therefore, one may conclude that *externally* the EU holds exclusive competence in certain fields even if *internally* it has regulated a particular area only partially. This phenomenon may be called the EU’s implied exclusive competence.

The above described concept of the EU’s *implied competence* seems to reveal the specific link that exists between internal and external dimensions of the EU’s competence in intellectual property rights. It is worth mentioning that since the entry into force of the Lisbon Treaty, it provides in Article 118 TFEU for specific legal basis for creation of unitary IPRs. Concerning this provision, the Court has ruled that it confers competence in the context of establishment and functioning of the internal market and, therefore, in accordance with Article 4 (2) TFEU, this competence is shared between the EU and its Member States.¹³ The further cases concerning the European unitary patent confirmed that statement.¹⁴

This brings the question whether AG Cruz Villalón was right in the *Daiichi Sankyo* when concluding that combining in the field of IPRs the EU’s exclusive competence in external relations with shared one with respect to internal market leads nowhere but to a dead end. This observation might be strengthened by the *implied exclusive competence* doctrine as it occurs that the EU’s legislative initiatives within internal market may trigger exclusive external competence.

This indeed may lead to a paradox, which can be well illustrated by the European unitary patent example. The Member States could not reach a compromise concerning the details of the unitary patent protection sys-

¹² Judgment of 31.03.1971, Case C-22/70 *Commission v Council*, ECLI:EU:C:1971:32.

¹³ Judgment of 16 April 2013, joined cases C-274/11 and C-295/11 *Spain and Italy v Council*, ECLI:EU:C:2013:240, paras. 17 and following.

¹⁴ Judgments of 5.05.2015, cases C-146/13 *Spain v European Parliament and Council*, ECLI:EU:C:2015:298, para 40 and C-147/13 *Spain v Council*, ECLI:EU:C:2015:299.

tem (mainly due to the language arrangements), which led to the launch of the enhanced cooperation procedure (on the history and legal structure of the European unitary patent see Plomer, 2015, pp. 508–533; Malaga, 2014, pp. 621–647). Essentially, it means that the EU legal acts are adopted just in a certain number of the Member States, leaving the possibility for the others of not participating and not having such a legal act binding in their legal orders. This procedure is prohibited in the domains where the EU holds exclusive competence, which is why Spain and Italy in the above-mentioned cases sought to prove that the EU is exclusively competent with respect to creation of the said patent. The entry into force of the system would therefore result in having some Member States out of it. Anyway, they would be prohibited from undertaking any legislative actions that could compromise the unitary patent system, because the EU has had executed its competence in that field. This is a regular feature of shared competence. However, the fact of introducing enhanced cooperation, strengthened by the TRIPs Agreement being in force, would imply the EU's exclusive competence in this field in an external dimension. As a result, very little space for national initiatives in intellectual property rights domain remains for the Member States.

The other paradox could be revealed by the case of the Unified Patent Court Agreement. The latter is an international agreement concluded by the Member States that participate in the unitary patent enhanced cooperation. The Agreement in its major part establishes¹⁵ the said Unified Patent Court, which is exclusively competent to hear cases concerning the unitary patent. However, the Agreement contains also some substantive provisions, including the right holder's right to prevent both direct and indirect use of the invention (i.e. the purely *commercial* or *trade-related* right, conferring a monopoly on its holder in particular domain). After the *Daiichi Sankyo* an interesting question occurs whether the Member States had any competence to negotiate and conclude between each other such international agreement. If we stay coherent with this case-law, then the answer might be in negative (or at least that the Court retains its jurisdiction over the Unified Patent Court Agreement: A. Dimopoulos, 2014, p. 232).

The foregoing observations lead to the conclusion that the Member States' competence in intellectual property rights is significantly limited under the current regime. Firstly, they may not undertake any legislative

¹⁵ To be more precise: is going to establish, since the ratification process has not ended yet and some major problems are expected due to potential *Brexit*.

initiatives when the EU takes one in the field of the internal market. This is a normal consequence of shared competence concept. Secondly, however, they may not do anything that would compromise the EU's international commitments in that domain. These commitments result from agreements to negotiation of which the EU (or the Commission) is exclusively competent. Consequently, one may conclude that the EU's exclusive competence in IPRs – significantly developed in the discussed case-law – remarkably limits any Member States' opportunities to act in this field.

This conclusion shall turn us to the wording of Article 207(6) which provides for:

The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

To simplify, the quoted provision, *inter alia*, prohibits introduction of the EU's exclusive competence through the 'back door' of common commercial policy (on by-passing the EU's internal shared competence: Hestermeyer, 2013, p. 930.). It indeed seems to advocate strongly for coherent nature of the EU's competence in both internal and external dimensions (more elaborate on the discussed provision: W. Weiß, 2013, p. 36 *et seq.*).

Considering the interrelation of competence in IP rights in its internal and external dimensions, we need to look also at the question of justifications of restrictions in internal trade in goods. As it is commonly known and was signalled above in this article, the Member States may justify infringement of Article 34 TFEU on the basis of one of derogations listed in Article 36 TFEU. However, the primary interest of the Member States may never be of an economic nature: these are only non-economic values that benefit from Article 36 TFEU exemptions. However, one of these exceptions is 'the protection of industrial and commercial property', i.e. protection of intellectual property. Therefore, Article 36 TFEU reflects an assumption that protection of IPRs serves non-economic interests.

This brings us to discussion whether the notions of *commercial* and *trade-related* on the one hand and *(non-)economic* on the other are different enough to conclude that they exclude each other. However, it seems very difficult to find convincing arguments that the very same rights might be at the same time *commercial (trade-related)* and *non-economic*.

However, this is the consequence of the outlined reasoning of the Court according to which the decisive factor seems to be situated in either internal or external dimension of the EU's policy.

To conclude, it clearly follows from the Court's case-law that the EU is exclusively competent in almost all aspects of intellectual property protection when it comes to external relations. At the same time and with respect to substantively the same rights, the EU shares with the Member States its competence in the IP field of the internal market. That leads to at least two conclusions.

Firstly, however bizarre it may sound, the decision whether any aspect is *commercial* or *economic* depends not on the substantive matter of that aspect, yet on its territorial application: whether it belongs to the internal market or the EU's external action field. Therefore, the Court seems to adopt tacitly rather a formalistic and not substantive approach in that regard. It is, however, difficult to find any good legal or systemic reasons for justification of that approach. On the contrary, it rather seems to clearly contradict the hitherto applied methods. At the same time, it needs to be admitted that such an approach results in clarity of interpretation, especially when compared to AG Cruz Villalón's nuanced proposal (Gotsova, 2014, p. 527).

Secondly, the shared competence in the field of the internal market will probably become more and more elusive. This competence is and will be significantly restricted by the scope of competence executed by the Union in its external relations.

Coming back to the AG Cruz Villalón's question: does this way of interpretation lead to a dead end? If we perceive 'a legal dead-end' as no further possibilities of undertaking coherent and logical interpretation which leads to interpretative uncertainty and a sort of limbo, then probably the answer should be in affirmative. However, it looks clearly that even after provision of such self-contradicting case-law of the Court, there is still the way ahead. The only open question remains whether that way leads in any direction one could have imagined when the Lisbon Treaty was entering into force.

Conclusions

In this contribution, we have examined scope of the *commercial aspects of intellectual property* concept, as spelled out in Article 207

TFEU. Legal initiatives undertaken within that scope belong to the EU's common commercial policy and, therefore, to its exclusive competence. Then, the question about semantic scope is indeed a question about the competence scope. The analysis of the recent Court's case-law leads to the conclusion that the meaning of that concept is very broad, leaving hardly any aspects of intellectual property that are *not* commercial or trade-related (the only example we found is the author's personal rights in the field of copyright).

This, however, applies only to the EU's external relations dimension. When it comes to the internal market, the EU's competence with regard to substantively the same rights remains shared with the Member States. However, the Member States are limited in their competence not only by legal initiatives taken by the EU in the internal market, but also are obliged not to compromise any initiatives taken or that are being taken in external action (Vatsov, 2014, p. 205.). That leaves very little room for manoeuvre for the Member States.

That also reflects the general tendency that is observed in the Court's case-law concerning the EU's external powers (Larik, 2015, pp. 797–798). The discussed issue of *implied exclusive competence* is yet another example of broadening the EU's exclusive competence when interpreting the actual scope of the common commercial policy.

Such a structure of reasoning is disappointing for many reasons. We do not wish to advocate for any political options (more autonomy to the Member States vs more competence to the Commission that represents the Union), albeit we would expect more coherence and consequence from the Court's case-law. However, as we have described above, there are too many self-contradicting points in the Court's lines of reasoning as well as too many interpretative 'innovations' not to have an impression that the question of the EU's competence in intellectual property rights belongs rather to political discussion where legal arguments form a little part of many others.

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Kompetencje Unii Europejskiej a prawa własności intelektualnej. Wewnętrznie dzielone, zewnętrznie wyłączne?

Streszczenie

Kompetencje wyłączne Unii Europejskiej w relacjach zewnętrznych tej organizacji są przedmiotem wielu debat za każdym razem gdy ma dojść do zawarcia przez UE umowy międzynarodowej. W ostatnich latach szczególną uwagę przywiązuje się do planowanego zawierania przez UE umów o wolnym handlu, w której to dziedzinie Traktaty przyznają Unii kompetencje wyłączne. Problem zakresu tych kompetencji okazuje się szczególnie problematyczny w odniesieniu do ochrony własności intelektualnej. W tej dziedzinie Unii Europejskiej przyznano kompetencje wyłączne jedynie w zakresie handlowych aspektów tej dziedziny. W niniejszym artykule badamy jak pojęcie „handlowych aspektów własności intelektualnej” interpretowane jest w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej (TSUE). Rozważamy także skutki, jakie nieść może za sobą szeroka wykładnia tego pojęcia zaproponowana przez Trybunał. W związku z tym, w niniejszym artykule po pierwsze, omówiliśmy linię orzeczniczą TSUE rozpoczętą wyrokiem w sprawie Daiichi Sankyo. Następnie ustalamy i dokonujemy oceny metod wykładni przyjętych przez Trybunał w ramach tej linii orzeczniczej. Jest to szczególnie istotne dla przewidzenia dalszego rozwoju orzecznictwa w tym zakresie. Odnosimy też powyższe wnioski TSUE do regulacji rynku wewnętrznego, dochodząc do wniosku, że odmienne podejścia przyjęte przez Trybunał w relacjach zewnętrznych oraz w ramach rynku wewnętrznego wykluczają się wzajemnie i prowadzą do prawnego czy interpretacyjnego impasu. Mimo że przedstawiona w niniejszym artykule analiza odnosi się do konkretnego i szczegółowego problemu, to wywiedzione na jej podstawie wnioski pozwalają na zrozumienie przyczyn prawnych i politycznych komplikacji towarzyszących zawieraniu przez Unię Europejską umów o wolnym handlu.

Słowa kluczowe: kompetencje wyłączne Unii Europejskiej, relacje zewnętrzne Unii Europejskiej, handlowe aspekty własności intelektualnej, wspólna polityka handlowa