TO DEFINE OR NOT TO DEFINE? A QUERY ON THE NOTION OF COMMERCIAL ASPECTS OF INTELLECTUAL PROPERTY

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ABSTRACT: *The European Union (the EU) owes its existence to economic objectives. In territorial terms, Europe is the historical cradle of intellectual property (IP) and the pioneering economic activities in the region have long been inextricably intertwined with the IP-intensive sectors. Therefore, the importance of IP in the European economy, both internally and globally, is ubiquitous. At the external relations level, the competence allocation between the EU and its Member States hinges upon the elusive notion of 'commercial aspects of intellectual property' which has been prone to definitional ambiguity since its inception. Against that background, this article primarily aims to pinpoint whether the said notion is intended and/or utilized to delineate a confinable area within the international affairs of IP. In doing so we shall put in the perspective the economic/political continuum preceding the inception of that concept and piece together the legislative and jurisprudential development with a view to reason a definitional apprehension. Finally, having formulized a definitional paradigm, we shall reflect on the likelihood of an autonomous EU law concept in this particular context.*

KEYWORDS: Intellectual property; commercial aspects; trade-related aspects; common commercial policy; external EU competence
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1. INTRODUCTION

The valid curiosity of legal scholars on the notion of 'commercial aspects of intellectual property' dates back to the adoption of Nice Treaty, and the attempts to extract an understanding of the said notion queued up ever since. In the sequel of the landmark *C-414/11 Daiichi Sankyo* ruling where the post-Lisbon interpretation of this concept was first exposed, the number of scholarly undertakings has been abundant. Yet, it is fairly relevant to observe that, despite many addressing the ambiguity of this notion, only on rare occasions has this scholarly interest advanced beyond the particulars of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).

Having claimed to severe the ties with the pre-Lisbon practice (Case C-414/11, para. 48), the ruling in *Daiichi Sankyo* undertook the mission of providing a reference point in delineation of the borderlines of 'commercial aspects of intellectual property', though it is doubtful whether this mission was a success. At the same time, there is now more material

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available[1] wherefrom further dimensions of this concept could potentially be discerned. Now that we are more than two decades into the adoption of the Treaty of Nice and 12 years into that of the Lisbon Treaty, this article shall discuss how much closer we currently are to an autonomous concept of "commercial aspects of intellectual property" in European legal order; and whether the direction being taken in the course of two decades is intended to bring us closer to such a concept at all.

In doing so the Section 2 of this study lays the background, respectively, to the Common Commercial Policy (the CCP) of the European Union (hereinafter the EU or the Union) with a reference to the competence allocation therein and the interface of intellectual property (IP) with the latter policy area following a chronological order such as to encompass the debut of the notion of commercial aspects. From a critical analytic perspective, the 3rd Section sets about dissecting the ruling in *Daiichi Sankyo* whereby the Court of Justice of the European Union (hereinafter the Court or the CJEU) put that notion under the spotlight for the first time. The 4th Section, in turn, draws the (lacking) definitional landscape that persisted in the sequel of the latter ruling followed by an inspection of the questions that remained open thereafter. The 5th Section analyses the development of the post-*Daiichi Sankyo* jurisprudence of the CJEU to the extent that they could factor into shaping up of the notion of commercial aspects. Drawing on these discussions, the 6th Section formulates an answer to the above-posted question deriving from the aggregate jurisprudential development. The author finally takes the view that the definitional ambiguity surrounding that notion is not necessarily incidental but better explained by the global economic (and political) pathway the EU traditionally follows on the axis of the CCP, albeit this is likely to come at a legal doctrinal cost.

2. THE CCP AND EXCLUSIVE EU COMPETENCES IN A NUTSHELL

Consistently with the founding economic objectives of the European Union (European Community at the time), a native concept of the original Treaty has been in place ever since: Common Commercial Policy. As articulated by the original Treaty (Treaty of Rome or the EEC Treaty), "*the common commercial policy shall be based on uniform principles, particularly in regard to tariff amendments, the conclusion of tariff or trade agreements, the alignment of measures of liberali[z]ation, export policy and protective commercial measures including measures to be taken in cases of dumping or subsidies."* (Art. 113(1) EEC).

In the quoted provision, two niceties need to be accentuated. Firstly, the verbal interpretation of the provision *prima facie* suggests that the portfolio of policy areas covered by the umbrella of CCP is not exhaustive.[2] Secondly, despite the establishment of the CCP is one of the primary tasks attributed to the Community and correspondingly its powers in that realm are derived directly from Art. 113 of the Treaty read in conjunction with Art. 114[3], remainder of the Treaty provisions brought no further clarity as to the exact nature of these powers. Put differently, while the above cited provisions pinned down the

[1] See the case law analyzed in Section 5 below.
[2] To the same effect, see: Lerman (1985, pp. 93)
[3] Art. 114 EEC reads: "The agreements referred to in Article 111, paragraph 2, and in Article 113 shall be concluded on behalf of the Community by the Council acting during the first two stages by means of a unanimous vote and subsequently by means of a qualified majority vote."

conferral of powers to the Community, the first and foremost structural principle which underlies the *modus operandi* of the Community (Govaere 2018, pp. 72), the modality of this conferral was yet unknown. With that, on the face of the early jurisprudence of the CJEU, it was ascertained that the competences in the CCP area were of exclusive nature and that this policy area was to be construed dynamically; a restrictive interpretation must, therefore, be eliminated (Opinion 1/75, pp. 1363-1364; Opinion 1/78, para. 38). Fast forwards to the present legislative landscape, primary law of the Union unequivocally lists the CCP among the areas wherein the EU retains *a priori* exclusive competence (Art. 3(1) TFEU).

What deserves a distinct attention within this landscape, is the question whether the regulatory powers in intellectual property field should also be perceived to fall in the concept of CCP. At the first glance, the incrementally broad apprehension of this policy realm and dependently that of the exclusive competence area following from the case law on one hand, and the apparent trade-related connotations intellectual property rights on the other hand, seem to contribute into a positive answer to this question. Yet, should the answer be affirmative, this would amount to categorically ascribing a commercial character to IP rights; in other words, this would suggest, these rights are exclusively commercial beings. Rather obviously, the relevance of such a bold statement would widely be open to debate.

Against this background, was not until the adoption of the TRIPS Agreement that intellectual property started occupying a prominent space in the EU's external trade agenda (Tanghe 2016, pp. 27). The question of "how commercial are the intellectual property rights?" which, then, unfolds the answer to whether the conclusion of TRIPS Agreement fell in the scope of the CCP (and consequently that of exclusive competence sphere of the Community) was to be faced and resolved in the absence of a clear competence allocation.

2.1. Opinion 1/94 of the CJEU on the Conclusion of the TRIPs Agreement

The Court of Justice dealt with the abovementioned question in its *Opinion 1/94* whereby -in contrast to its tendency of expanding the ambit of CCP- a rather restrictive approach was adopted. In that, the Court having recalled the Commission`s view that intellectual property rights are closely linked to the trade in corporeal goods and services, thus falling under exclusive Community power, went on to express that this view was only partly admissible. This was only to such extent that the provisions at hand concern the prohibition of the release of counterfeit goods into free circulation. This was justifiable firstly because the section of TRIPs concerning the prohibition of the release of counterfeit products had its counterpart in the EU law particularly in the provision of Regulation 3842/86[4], meaning the Community power has been previously exercised over this specific area, thus hinting at the Community's implicit exclusive competence. Secondly, the provisions in question pertained to the measures to be taken by the customs authorities at the external frontiers of the Community. Insofar as the measures of that sort can be adopted autonomously by the Community institutions on the basis of Art. 113 of the EEC Treaty, it is for the Community solely exercise power on conclusion international agreements on such matters.

[4] Council Regulation (EEC) No 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods OJ L 357, 18.12.1986

As far as the remainder of the TRIPS Agreement is concerned however, the Court held, the Commission`s assertion of exclusive EU power on the grounds of 'close links to international trade' was unacceptable (Opinion 1/94, para. 56). From the Court`s viewpoint, intellectual property, due to its fundamental premises, inevitably retains certain links to trade in goods. Precisely, the defining function of intellectual property rights is to confer on those holding them the right to prevent third parties from carrying out certain acts. The Court exemplified typical and simplistic appearances of exclusionary functions of intellectual property rights, for instance, the power to prohibit the use of a trade mark, the manufacture of a product, the copying of a design or the reproduction of a book, a disc or a videocassette etc. and added: these inevitably have certain effects on trade and, in fact, the very existence of intellectual property rights is to produce such effects (Opinion 1/94, para. 57). Moreover, this effect was not unique to international trade (Opinion 1/94, para. 57). Secondly, The Court based its dismissive view on the legitimacy concerns as regards the internal level of law-making. Accordingly, having taken the Community as to retain exclusive powers to conclude agreements with the third countries aimed at harmonizing the protection of intellectual property, which meanwhile would also amount to harmonization at Community level, there occurs a risk that the Community institutions would be able to escape the internal constraints to which they normally are subject, specifically in relation to procedures and to rules as to voting. The whole paradigm would, then, open up a way to, so to say, illicit harmonization of the laws in the Internal Market. In the light of given, the Court held, with the exception of provisions which concern the prohibition of the release into free circulation of counterfeit goods, the TRIPs shall fall outside the scope of the CCP (Opinion 1/94, para. 71), thus excluded from exclusive competence of the Community. This follows, therefore, that the Community and its Member States were jointly competent to conclude TRIPs (Opinion 1/94, para. 105).

Aforesaid interpretation accommodated several notable connotations. First and the foremost, the Court seemed to have sought a more dependable basis than a somewhat remote link of intellectual property rights to trade. *A contrario* deduced from the Court`s line of reasoning, in order for the matters to fall in the CCP, a specific link to international trade must exhibited (Opinion 1/94, para. 57). Intellectual property rights, according to the Court, did not particularly fulfill the 'specificity' requirement to be construed as a part of the CCP. Secondly, the Court here followed a comparatively particularistic approach in two layers. In that, not only did the Court go about the individual agreement in question, independently from the main body of agreements, namely the WTO Agreements, but it also reviewed, albeit in an eliminatory manner, the individual provisions thereof. It is therefore plausible to suggest that the Court sought the 'specific link' to international trade in the individual provisions of the TRIPs. Having observed that only a limited part of the Agreement exhibited such links, the Opinion appears to have marked one of the rare occasions on which the generously expansionist view of the Court in relation to scope of the CCP was significantly inverted.

When the disposition of the prior case law taken into consideration, such an unpredictable alteration from broad interpretation as to the breadth of the CCP formed, at the time, one pillar of the criticism directed to the *Opinion 1/94*. The main reaction against it, however, centered around the argument that the Court failed to align the Community competences with the significant developments in the multilateral trading system brought along by the WTO Agreements (Ankersmit 2014, pp. 196). This stemmed from the

assertion that the fragmental pattern of competences that the Court seems to have followed in relation to trade agreements is at odds with the realities of negotiations of multilateral trade agreements (Pescatore 1999, pp. 399). Accordingly, it may not be practically feasible to negotiate a multilateral treaty on different competence bases depending upon/varying based on the theme of different substantive provisions therein. With the shared competence, and unanimity requirement causing therefrom, being the general rule for the most activities inside the WTO framework, the Court`s view potentially results in serious difficulties in connection to the Community`s participation in present and future framework of the WTO. This is particularly so when one considers the shift towards less traditional trade topics which would not crystal-clear fall within the exclusive competence area though having serious impacts and implications on trade (Herrmann 2002, pp. 12). It is, nevertheless, interesting to note that, an earlier imperative the Court set forth almost perfectly addresses the 'practical feasibility' criticism in retrospect. In that, albeit in a different context, the Court maintained that *"difficulties, such as those referred to by the Commission, which might arise for the legislative function of the Community cannot constitute the basis for exclusive Community competence."* (Opinion 2/91, para. 19-20). Therefore, the Court`s position exhibits a certain consistency in loyalty to the constitutional coherence which, however, comes at the cost of a narrow interpretation of the CCP.

2.2. The Aftermath

The reaction to the Court`s Opinion has been reflected in a set of amendments to Art. 133 EC (ex. Art. 113 EEC) with a view to bringing intellectual property matters within the reach of the CCP. In that, the initial mention of intellectual property and services was brought about by the Amsterdam Treaty and later that was amended, with inclusion of the term 'commercial aspects', by the Treaty of Nice. The manner of reference was however quite unorthodox.

The Treaty of Amsterdam, instead of inserting these controversial areas straightforwardly into the CCP sphere, merely enabled the Council to extend the application of general provisions to international negotiations and agreements on services and intellectual property.[5] Similarly, and unlike the traditional methodology through which the borders of the CCP have been mapped out, the Treaty of Nice resorted to a complex and overwhelmingly ambiguous method (Cremona 2001, pp. 68). In that, paragraph 5 of the post-Nice Art. 133 EC, with a cross-reference to the paragraphs 1-4 of the same article (i.e. the paragraphs set out the 'core' of the CCP), provided that the "*Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property".* While the initial reading of this provision suggests a default extension of the CCP to the commercial aspects of intellectual property, the remainder of that paragraph nevertheless explicitly preserved the

[5] Amsterdam Treaty amended Art.133 EC by adding up the following: "The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs."

(concurrent) Member State competence in that field.[6] Against this background, both the verbal interpretation of the Treaty and the academic *communis opinio* suggest that the Community`s competence in relation to the commercial aspects of intellectual property cannot be construed *a priori* exclusive in the sequel of the Treaty of Nice.[7]

Although this was able to shed some (dimmed) light into the controversial issue of services and intellectual property being covered by the CCP, and certainly was sufficient to portray the overall intention to bring these areas within the reach of the CCP, it was insufficient to yield the intended clarity insofar as it failed to clear up the nature of that competence and -by extension- the jurisdictional issue (Ankersmit 2014, 197). This uncertainty was signified once again in the *C-431/05 Merck Genericos* case concerning competence to interpret TRIPs Agreement and whether that could be given direct effect by national courts, whereby the Court, referring to former *Dior Principle*, held that in those areas where the Community has not yet exercised its powers -that being the sphere of patent in that specific case-, the Member States remain principally competent; they may choose whether or not to give direct effect to that provision. That is to say so the Community law neither requires nor forbids the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the TRIPs Agreement or to oblige the national courts to apply that rule of their own motion (Case C-431/05, para. 34; Joined Cases C-300/98 and C-392/98, para. 48).

The oppositions spoken up against the Court`s position in the Opinion 1/94 have been most notably mirrored in the Lisbon Treaty. The entry into force of the Lisbon Treaty, in December 2009, has changed the scenery quite radically in respect *inter alia* to a clearer comprehension of external aspects of intellectual property realm.[8] Commercial characteristics attributable to intellectual property rights are now ascertained on Treaty basis. Thusly, the question of whether the concept of CCP should embrace the intellectual property field, in reaction to the Opinion 1/94, has been clarified: commercial aspects of intellectual property does fall in the scope of the CCP, hence subject to exclusive Union competence. Unlike the modality of former 133 EC, new Art. 207(1) of the Treaty on the

[6] The last indent of Art. 133(5) EC read: "This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organi[z]ations insofar as such agreements comply with Community law and other relevant international agreements.".

[7] To the same effect see: Holdgaard (2008, pp. 1249); Kaiser (2009, pp. 39); Cremona (2001, pp. 84)

[8] It is worth noting that there existed opposing views on whether the subsequent development in the primary Community legislation was a rection to the Court`s view in Opinion 1/94 or it was rather a codification thereof. Some commentators took the view that the Treaty of Nice provided a consolidation of the Court`s Opinion 1/94. To that effect, see: Herrmann (2002, pp. 22). Indeed, the inclusion of 'commercial aspect' may not seem completely reactive when it is taken to underline the 'specific link' criterion generated by the Court in Opinion 1/94. Quite the contrary however, judging by the almost identical wordings (i.e. commercial aspects and trade related aspects) it is substantially reactive inasmuch as the intention behind was to bring the TRIPs into the reach of the CCP, having in mind the downsides to exclusion of it we have pointed out above. Moreover, not only was this intention put forward ever so clearly by means of the Treaty of Lisbon but also, until then, the definitional protocol annexed to the draft Treaty of Nice (though excluded in the final version) had explicitly indexed the concept of 'commercial aspects' to the TRIPs Agreement. Reported by Cremona (2001, pp. 71), the said protocol defines the commercial aspects included in Art. 133(5) EC as to apply to "[T]he matters covered by the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) set out in Annex 1C to the Agreement of 15 April 1994 establishing the World Trade Organisation, as that Annex stands on the date of signature of this Protocol." Therefore, both the historical context and the legislative continuum that led up to the Treaty of Lisbon suggest that the invention of the 'commercial aspects' notion served for attaining the opposite outcome to what the Court had reached in its Opinion 1/94.

Functioning of the European Union (TFEU) now explicitly lists 'commercial aspects of intellectual property' among the CCP areas.[9]

Despite this significant legislative development, it is nevertheless difficult to assert that the new provision replacing the Art. 133 EC utterly settled the historically contentious relationship between the CCP and IP rights inasmuch as the contextual exactness of the commercial aspects was not fully provided. In different words, having inserted the intellectual property with the reservation of 'commercial aspects' into the CCP, thus into the exclusive Union competence catalogue, the issue of competence now depends on the scope of 'commercial aspects' of intellectual property, in determination of which there is again no pre-established or exact criterion. Therefore, the resolution on the competence issue was embedded in the fashion of interpretation to be chosen by the Court in clarifying the concept of 'commercial aspects', taking into consideration that IP rights quite naturally retain commercial attributes either directly or remotely.

2. UNFOLDING THE NOTION OF COMMERCIAL ASPECTS

Being the landmark decision in the post-Lisbon era, the Court`s ruling in *Daiichi Sankyo* was bound to be a breaking point primarily because how the Lisbon amendment played out was to be revealed on that very occasion. Amidst the high hopes for a definitional imperative on the mystery of commercial aspects, doctrinal outcome of the judgment appears fairly underwhelming. While the same was not true of the practical outcomes of the judgement – at least in the particulars of the TRIPs-, it is difficult (if not impossible) to reason an objective definition of 'commercial aspects' from the lines of argument the Court drew upon. On that note, we shall set about dissecting the Court`s ruling for a critical appraisal.

3.1. Facts and Questions

The dispute in the main proceedings before Athens Court of First Instance[10] centered around a patent infringement claim brought by Daiichi Sankyo and Sanofi-Aventis in respect to their medicinal product against the generic manufacturer. As pharmaceutical products were patentable in Greece as only from 1992, the plaintiff`s patent, having been applied for in June 1986 and granted in October 1986, originally did not extend to the protection of the active ingredient as such but rather covered the manufacturing process of the latter. Now that the patentability of pharmaceutical products is allowed under Art. 27 TRIPs, the referring court refrained from overlooking the possibility -in the event that the TRIPs Agreement should be accorded direct effect- that Daiichi Sankyo`s patent -more precisely, the supplementary protection certificate thereof- might extend to the active ingredient itself (Case C-414/11, para. 30). Of crucial importance above all, the Greek Court remained unsettled whether it falls to itself or to the CJEU to interpret the provision of TRIPs Agreement concerning patentability requirements (Case C-414/11, para. 31).

[9] With the Lisbon Treaty in place, Art. 207(1) TFEU sets forth the non-exclusive catalogue of the CCP areas as follows: "… [P]articularly 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 liberali[z]ation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies…"

[10] Polimeles Protodikio Athinon (Greece)

Following the autonomous legal order of the CJEU, the jurisdiction on interpretation flows from exclusive competence of the Union. Accordingly, if the TRIPs Agreement falls within the exclusive Union competence realm on the axis of the CCP, it is for the Court of Justice to interpret and determine its effects. The latter therefore, converts into the question of whether the patentable subject matter fits in the notion of 'commercial aspects' of intellectual property which evidently calls for the clarification of the latter notion.

In the wake of these circumstances, the Greek Court stayed the main proceedings and sought preliminary ruling on (i) whether or not the invention of a pharmaceutical products should be construed as to qualify patentable subject-matters within the meaning of Art. 27 TRIPs; (ii) now that the Greek law prohibiting the patenting of pharmaceutical products is abrogated and TRIPs Agreement enables the patentability thereof, whether the extension of protection granted on the basis of the SPC should apply to the medicinal product itself as well -in line with the initial patent filing- or it continues to apply to their manufacturing process only. Crucially, however, these substantive questions were preceded by a jurisdictional question of extreme importance. That is whether Art. 27 of the TRIPs Agreement on patentability requirements fell within a field for which the Member States continue to have primary competence and, if so, whether the Member States themselves could accord direct effect to that provision so that the national court could apply it directly, subject to the requirements laid down by national law (Case C-414/11, para. 32). This was, in other words, the question of who retains the jurisdiction as to interpreting the provisions TRIPs Agreement. Quite clearly the answer to the latter resides at the allocation of external competences in the realm of intellectual property.

3.2. Court`s Ruling

In the light of foregoing, the Court embarked on the issue, starting with the reiteration that the CCP is not to relate to trade within the Member States but only to that with third countries. It further recalled the 'specific link to trade' as a pre-requisite in order for a specific matter to fall into the realm of the CCP thus in the exclusive Union competence (Case C-414/11, para. 50, 52). In that, it suggested, the link is unfolded in respect to a Union action when that is intended essentially to promote, facilitate or govern international trade and has immediate and direct effects thereto (Case C-414/11, para. 51). The Court then went on to observe that the specific link criterion was fulfilled in the context of TRIPs Agreement, albeit noted that such a link is not to be sought in each individual provision contained in the Agreement. Quite conversely, according to the Court, the trade-relatedness followed naturally from the structural idiosyncrasy of the WTO system of which TRIPs is an integral part. Notwithstanding the actuality that each rule therein does not straightforward pertain to detailing the operations of international trade, they have a specific link with international trade to the extent that it inextricably belongs to the WTO system and represents one of the principal multilateral agreements that lay the basis of the system (Case C-414/11, para. 53).

Yet again, the illustration of this link has been deduced from the formal composition of the Agreement. In that, the Court effectively pointed at the Annex 2 of the Agreement setting out the Dispute Settlement Understanding (DSU)[11], in particular the cross-

[11] Annex 2 to WTO Agreements: Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

retaliation as a consequence of non-compliance with the obligations arising from WTO agreements. This, in brief, amounts to an effect over the other aspects of international trade that is covered by the WTO agreements. Also, insofar as the Court`s envisagement of 'specific link' vaguely centered around promoting or facilitating the international trade, the Court was well enabled to justify the existence of such a link on the basis of the preamble of the TRIPs Agreement, where the objective is set out to be reducing distortions of international trade by ensuring the effective and adequate protection of intellectual property rights in the territory of each member of the WTO.

Having opted for a holistic (or functional) interpretation[12] rather than a particularistic (compartmentalized or systematic) one in the interest of systematic integrity of the WTO setting, the Court ruled that the TRIPs Agreement falls within the field of the CCP, an area where the Union retains exclusive competence, in its entirety (Case C-414/11, para. 61).

3.3. Remarks on the Judgement and its Implications for the Notion of Commercial Aspects

The formal question on the competence allocation in *Daiichi Sankyo* boils down to the question of actual scope of commercial aspects of intellectual property. In answering to the latter, it is observed that, the Court essentially had two paths to select from.[13] First, particularistic (systematic) way of interpretation that requires delving into the substantive character and content of the provisions of TRIPs Agreement on the basis of which the Court would then conclude whether it relates to an area where the EU retains exclusive power. This was the path taken while constructing the Opinion 1/94 in respect to pinning down -then concluding for the absence of- the specific link to international trade. Second alternative, on the other hand, was a holistic (functional) approach whereby the main purpose -or intended function- of the TRIPs Agreement as a whole becomes determinant. Distinct implications are immersed in each one of the aforesaid. On one hand, opting for the systematic approach would amount to repeating the same 'mistake' as was fallen by the Opinion 1/94: failure to effectively align the CCP with the areas regulated in WTO Agreements (Ankersmit, 2014). On the other hand, functional interpretation, although tends to enhance the effectiveness and the visibility of the EU identity within the context of WTO, involved a great risk of encroaching upon the Member States` involvement in external IP actions (Case C-414/11, AG's Opinion, para. 68-70). The Court opted for the second.

Although it exhibits a sharp alteration from the position taken when the *Opinion 1/94* was delivered, the outcome of *Daiichi Sankyo* judgement was no surprise, notwithstanding the fact that TRIPs Agreement remained the same. Rightfully at this point the question emerges: What has changed since then? This is most clearly answered with a reference to Art. 207(1) TFEU. In a broader perspective however, it is crucial to see into the intentions which gave a rise to the said article, in particular to the concept of commercial aspects. While the latter is deemed to be qualified, according to the settled case law, when the act in question has a 'specific link to international trade' which notion is hardly any less ambiguous than that of commercial aspects itself, the emergence of the whole idea was

[12] This is also referred to as outwardly oriented interpretation. See, Ankersmit (2014, pp. 197).
[13] This dichotomy was mapped out in the Advocate General Villalón's opinion; see: (Case C-414/11, AG's Opinion, para. 68-70)

with a view to bringing the competences over TRIPs Agreement into the sphere of the CCP.

Likewise, from a teleological point of view and seeing into the chronological order (that of the TRIPs Agreement, Opinion 1/94, Amsterdam, Nice and Lisbon Treaties), the provision added in the Functioning Treaty rather clearly intended to correspond to the TRIPs framework. All considered, the ruling in Daiichi Sankyo is hardly surprising. In fact, it is rather accurate to the extent that it pragmatically aligns with the deliberation behind the introduction of commercial aspects notion. Further, the outcome of the judgement was relatable and coherent to the expansionist inclination that was formerly and consistently adopted by the Court up until the Opinion 1/94. That is to say, Daiichi Sankyo decision adds up to a recourse to the former tenor of broadening the CCP`s scope.

Although the final say of the Court was 'functionally' (and certainly politically) justifiable, there remained number of rather momentous points yet to be thought over. First and foremost, the Court seems to have strictly refrained from attaching any importance as such to the specific content of the provisions in question. Conversely, it confined its reasoning solely to the formal characteristics of the WTO setting in general and that of TRIPs Agreement in particular, and set about deducing the 'specific link to international trade' therefrom, which ultimately appeared to be an oddly oversimplified stance to take. This stance particularly focused on three elements: (i) The integrated multiple-agreement structure of WTO; (ii) the wording of the title of the TRIPs Agreement and that of Art. 207(1); (iii) the cluster of objectives referred to in the preamble of TRIPs Agreements (Case C-414/11, para. 53-60). These shall be discussed below.

The first basis the Court relied on in justifying its view, and that is at the same time relatively convincing in comparison to the other grounds, was the fact that the TRIPs Agreement is an integral part of the WTO system (Case C-414/11, para. 53). Attaching utmost importance to the containment relationship between the umbrella agreement (WTO Agreements) and specific IP-related body therein (TRIPs), the Court apparently presumed a built-in 'link to trade'. Further, it recognized that built-in link to be specific enough to bring the TRIPs entirely within the scope of Art. 207(1). Altogether, one may argue, this amounted to an irrebuttable assumption established in favor of the existence of such a link. However confidently that containment relationship has been put forward as a sufficient link, the Court went further on to reify this presumption on the basis of the dispute settlement mechanism included in the WTO system[14]. The said mechanism particularly enabled suspension of concessions, and under relatively exceptional situations the cross-suspension of concessions, in respect to different agreements under the WTO setting. In other words, this provision, in case of (and in response to) non-compliance of a member state with its obligations under the WTO Agreements, authorizes the other member states to suspend the benefits under the WTO Agreements against that non-complying state. However, it is crucial to note that this remedy gradually follows a sector-parallel, agreement-parallel and inter-agreement pattern, meaning that before cross-suspension is able to be employed, (i) the same-sector and (ii) the same-agreement based remedies

[14] Annex 2 to WTO Agreements: Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

should be exhausted or proven unpracticable.[15] Hence the Court strived to illustrate the specific link to international trade on the basis of the risk that breach of TRIPs may erupt the cross-suspension consequence which subsequently, in respect to other agreements within the system, creates adverse effects susceptible to devastate international trade.

This illustration could effortlessly be found problematic from various perspectives. Firstly, cross-suspension of concessions is a distant alternative among the others insofar as for that to be invoked, the suspension of benefits should be implemented and have failed in other layers. Hence, this could come into play only when those two layers -which are factually more relevant to the subject matter of breach that is proceeded upon- are exhausted or ruled out. Secondly, the measures to be taken in form of suspension of concessions are temporary in nature, therefore, even in the event that the distant option of cross-suspension is implemented, its effect on international trade is very likely to be temporal.[16] Finally, there could be observed a -what we may call- formal-logical peculiarity: Having construed the cross-suspension provision as a link to trade the Court has founded such a link not upon what TRIPs substantively concerns, but instead, on the potential consequences of breach of the Agreement. Seemingly the relevance to international trade therefore, does not to arise from what the Agreement contextually is, as it would have been expected, but instead originates from the scenario where a party fails to comply with that agreement. At any rate, the possibility of cross-retaliation is neither a trade-related nor a commercial aspect of intellectual property in a straightforward sense; in fact, it is not an aspect of intellectual property to begin with. The argument of cross-retaliation, therefore, can be said to add up to a distant and noninstinctual way of establishing the 'specific' link.

The second pillar of the Court's justification centered around the 'striking similarities' between the title of TRIPs Agreement and that of the provision of the TFEU that set forth the CCP sectors. Pointing at the former that defines itself with 'trade related aspects', and the latter referring to 'commercial aspects', the Court maintained that the authors of the TFEU could not have been unaware that the terms thus used in that provision correspond almost literally to the very title of the TRIPs Agreement (Case C-414/11, para. 55). This observation is inarguable when a brief glance is taken to the sequence of events: the TRIPs Agreement to be concluded 1994; Nice Treaty to introduce the commercial aspects in 2001 and Lisbon Treaty rendering the latter a CCP policy basis. If, however, the intention was to verbatim correspond to the TRIPs framework in such a way as to not leave any area uncovered, one may wonder, why the selection of wording in Art. 207(1) was not identical. Or (as AG Villalón stated in advocating the opposite view to what the Court eventually ruled) why not simply 'intellectual property' instead of 'commercial aspects of intellectual

[15] Art. 22(3) DSU establishes: (a) The general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment; (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement; (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement.

[16] Art. 22(1) DSU explicitly states the temporary nature of this remedy as follows: "Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time."

property', given that even the substantive provisions eventually to be brought within the CCP's reach?[17] A wide scale of alternative explanations in this context have been put forward. These included the explanation that the linguistic differences in importation of the wording of TRIPs resulted in different terminology; or a result of Art. 207(1) aiming to stretch to greater area than the TRIPs currently covers in order specially to correspond the possible evolutions in its framework; or that the nuanced term that Art. 207(1) contained, to the extent that it was not identical to that of TRIPs, was a preparation of the autonomous EU concept.[18] Regardless of whichever of the aforesaid explanations truly reflects the underlying intention, the fact remains: the Court did not involve in a substantive analysis of provisions, not even to the extent of whether the tittle and the substantive content are consistent. Putting indelicately, this leads to the conclusion that what you named it matters more than what it actually contains. Ironically on the other hand, looking into the TRIPs` catalogue of subject matters, it is hard to assert that it contains distinct trade related characteristics as such. The latter is also largely agreed upon by legal scholars (Correa 2020, pp. 7; Taubman 2011, pp. 35; Tanghe 2016, 34). Therefore, the foregoing could be taken as to reveal a good deal of misalignment between the tittle and the actual subject matter contained therein.

Whilst the formal and contextual inconsistency we referred to might have possibly stemmed from the (political) endeavors for bringing the IP rights under the wings of the WTO framework, the following landscape remains somewhat paradoxical: The contextual realm regulated is broader than what the title referred to; in the meantime, some pivotal aspects that the title of the Agreement claims to cover were not necessarily covered. This is particularly problematic when the Court in interpreting the primary law of the Union (i.e. Art. 207, the wording 'commercial aspects' therein) referred to the said tittle which, in effect, did not fully reflect the subject matter regulated. On that note, two questions are found to trigger one another: Firstly, is it a methodological error of TRIPs to regulate substantive matters of intellectual property that are, at any rate, merely substantive, thus not exhibiting particular trade-relatedness? Secondly, if the aforesaid is the case, to what extent is it admissible for the EU law to inherit that erred (either formally or contextually) framework and place it right at the center of the competence division matter, merely because of verbal similarities in the tittle?

On the same axis but from a wider perspective, it is, in itself, fairly unusual -and possibly problematic- for the Court to employ an international agreement as the basis of its interpretation of the EU law that is believed to have been built on autonomous concepts (Wilińska-Zelek & Malaga 2017, pp. 33; Mylly 2014, pp. 248; Hestermeyer 2013, pp. 929). This hassle appears to emanate from the background story of how and why the intellectual property has initially been inserted in the WTO framework. There exists a large degree of consensus that the inclusion as such was almost entirely politically motivated (Van Damme 2015, pp. 80; Tanghe 2016, pp. 34,35; Taubman 2011, pp. 36). As Taubman articulated: TRIPS is best understood simply as an agreement that IP is trade-related as a political and economic fact (Taubman, 2011, pp. 36). More accurately, it was designed as

[17] AG Villalón conceded that the use of 'commercial aspects' instead of simply 'intellectual property' in itself is an evidence to the existence of such an area that is beyond the commercial aspects to which substantive provisions of TRIPs should belong. (Case C-414/11, AG's Opinion, para. 80)

[18] For the analysis of these views see: Tanghe (2016, pp.32)

a compromise between the countries in whose economy intellectual property readily played significant role and those which are deemed developing countries. The conflict of interests is rather apparent: The former, namely developed countries, sought a high-end IP protection standard, insofar as IP-intense products and services constitute their major export, hence key to their international trade interest. For the developing countries, on the other hand, multilateral standardization of intellectual property protection and the coercion of the latter through the multinational trade system would amount to higher costs in access to technology of different sorts of which they typically are the importers. In short, TRIPs appears to go along with the trade-related expectations of developed countries. The very emergence of the terminology of trade-related aspects of intellectual property therefore exuded, to large extent, from the trade politics. In the grand scheme of things, the Court of Justice in *Daiichi Sankyo* interpreted the Union law concept, namely the commercial aspects of intellectual property, on the basis partly of international politics to which it eventually accorded a critical result as regards the division of external powers. We tend to observe the foregoing to accommodate two distinct connotations: (i) such a justification might be tolerable to the extent that it mirrors the WTO realities in respect to the prevalence of certain political considerations; (ii) Quite crucially, on the other hand, the actualities as such would not, at any rate, engender -or function as- a legal interpretation method. Further, it is necessary to acknowledge that the latter appears to be even more eccentrical when it is resorted to in the context of EU acquis, the systematic of which perfectly enables the development of its autonomous concept.

The third pillar of the Court`s reasoning counts on the general and preambular aims the TRIPs Agreement whereby the liberation of international trade is believed to be hinged upon the strengthening and harmonization of intellectual property protection on a worldwide scale. This is visibly captured in the preamble of TRIPs Agreement as a '*Desir[e] to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights…*'[19] According to the Court, the aforesaid objective, in itself, sufficiently comprised a link to international trade (Case C-414/11, para. 58).

It is nevertheless greatly questionable whether such a reliance on these abstract goals, without questioning their theoretical and practical logic as well as their coherence with the contextual breadth of the Agreement, can lead to a worthwhile conclusion. Though valuable in mirroring the underlying teleological patterns, preambular recitals, by the definition, could hardly be conceived as the ultimate identifier of the substance of the legislative documents to which they are appendant. Nor could they singlehandedly render the substance of that legislation feasible to attain those preambular goals. Indeed, they usually happen to serve as a foreword, abstract, preliminary statement or perhaps as a statement of intent. In any event, it should not portray a primary source from which legal interpretations to be inferred.

Against this background, it is doubtful to what degree the preamble, not only of TRIPs but of any agreement, could reasonably be construed as a determinant in pinning down the actual area which that agreement is contextually liable to affect. It is all the more so, in the particulars of the TRIPs, in the view of the following facts: The Agreement saturates to a larger area than the tittle suggests; that is to say, the provisions of the Agreement are not

[19] Para. 1, Part I: General Provisions and Basic Principles of TRIPs Agreement

necessarily tailored to that preambular aim. There hardly appears any provisions that particularly helps promoting or facilitating international trade such as to break apart the traditional trade-barrier effect of IP rights. Correspondingly, it remains ambiguous how it should be assured, in the absence of a content analysis, that those goals are attainable by the Agreement. In other words, the contents of the Agreement have not been put to a feasibility test by the Court against the backdrop of those preambular aims but they were taken for granted.

The over-emphasizing of the preambular aims -if taken to be a universal method of interpretation- is likely to entail a general corollary risk of misalignment of the CCP competences beyond the TRIPs. In that, an artificial link to international could be established by formulating the preamble in a flexible or imprecise manner, much like the risk that surfaces when 'specific link' is deduced from the title of the Agreement as was discussed above. It should, moreover, be added that, if a feasibility link sought between the preamble and the content of the TRIPs, such a link could hardly be detected. In simple terms, the stricter standard-setting approach that the TRIPs follows shall normally amount to a stronger exclusivity on the end of the right holders, thus leading to less liberal international trade. To that end, one may conclude the preambular aim appendant to the TRIPs somewhat remains rhetorical. The question, in turn, remains stand-still: Can this rhetoric be attained by what the TRIPs substantively has to offer? While we have already insinuated what shall the answer likely be, this question, nevertheless, does not seem to have factored into the Court analysis.

The trilogy of reasoning promulgated by the Court was thus concentrated on the integral dynamics of the WTO system and the formal characteristics TRIPs Agreement exhibited. Further, having excluded the subject matter examination, the formal discussion was the sole basis of analysis the Court engaged in. In addition to the fact that the discussion was limited to the formal matters, each and every reasoning therein came with rather substantial flaws. Consequently, and rightly the Court`s reasoning is observed to be superficial and unconvincing (Tanghe 2016, pp. 30).

Conceivably, on the contrary, making a reference to the underlaid intentions when creating the commercial aspects notion and to the continuum in which negotiation of the Art. 207 TFEU took place and to the earlier case law of the Court where expansionist interpretation as to the scope of the CCP prevailed, that is to say a compound of a teleological and historical reasoning, could have been more accurately proposed. In the same vein, Van Damme suggests that a reasoning, that refers to the negotiation of the TFEU provision and to the progressive broadening of the CCP sphere which stemmed over the time from the case law and international legal framework could have been more relevant than remaining limited in formal guidelines (Van Damme 2015, pp. 79,80). She emphasizes, such would eventually reveal that the changes made to the scope of the exclusive competence over the CCP had the aim of bringing the TRIPs Agreement within that competence and that would adequately justify its ruling in respect to the formal question we have been discussing above (Van Damme 2015, pp. 79,80).

Moreover, the Court seems to have endeavored to apply the general preamble of the WTO system to the intellectual property sphere. In doing so, it was articulated that the TRIPs Agreement aims to reduce the distortion in international trade by ensuring the effective and adequate protection of intellectual property rights (Case C-414/11, para. 58). Nevertheless, such an assumption, that is to say the assumption of IP protection to reduce

the barriers in respect to international trade, is rather ill-portrayed. Once the fundamental premises of IP rights are revisited, it becomes apparent that they, quite intrinsically, fall contradictory to the spirit of free trade (Tanghe 2015, pp.151; Correa 2007, pp. 3). IP rights very naturally result in –even serve for- the opposite of the aim that was indicated by the Court.[20] Accordingly, as long as TRIPs Agreement does not create a unified (or unitary) intellectual property protection regime -which it does not-, intellectual property rights will continue serving naturally for market isolation in respect to global trade instead of removing the barriers.

This is all the more so once what the TRIPs does not cover is simultaneously surveyed alongside what it does. As is well known, the exclusivities conferred by intellectual property rights on their holders, by default, enable the rights holders to interfere with the distribution process of corporeal goods. Apparent from the historical perspective, this prerogative has been utilized by the right holders with a view to segregating the national markets of the countries (where their rights are protected) by opposing to import of goods, even though those were put on the market by the same right holder in other countries. Whilst this practice is plainly detrimental to cross-border trade, in the counterbalance was devised the exhaustion (first-sale) doctrine that prevents the right holder from controlling the subsequent trade in corporeal goods once they were consensually put on the market (Yusuf & von Hase 1992, pp. 117). Against the backdrop of this principle, further dealing in those goods are liberated to the same geographical extent to which exhaustion doctrine applies. Clearly, therefore, international exhaustion modality best accommodates the free flow of international trade whereas the national pattern appears the most restrictive. On that note, the applicable exhaustion modality appears to be the most "trade-related" aspect of intellectual property rights; yet, the TRIPs Agreement expressly[21] refrained from setting a standard in that respect, thus failing to address the most commercial aspect of intellectual property one may envisage (Mylly 2014, pp. 314).[22] It is therefore highly disputable whether the Agreement in its substantive provisions could potentially cater to the aim of reducing the distortions to international trade.

It is however important to highlight that the decision in *Daiichi Sankyo* should not be taken to have proposed that the substantive provisions, in particular the patentability requirements as was at the stake, in itself constituted a commercial aspect of intellectual property. Nevertheless, this substantive provision was brought to the forefront by a trade agreement which ultimately rendered commercial attributions to it. Such a prospect brings

[20] The same proposition was propounded by the Court in 1/94 in the following statement: "The power to prohibit the use of a trade mark, the manufacture of a product, the copying of a design or the reproduction of a book, a disc or a videocassette inevitably has effects on trade. Intellectual property rights are moreover specifically designed to produce such effects." (Case C-414/11, para. 57). Though it is true that the relevance of the pre-Lisbon jurisprudence was declined in the sequel of Daiichi Sankyo ruling, neither the inherent function of intellectual property rights nor the scope of the TRIPs agreement was altered in anyway. Therefore, the its conceivable that the quoted observation of the Court remains relevant.

[21] In that, Art. 6 of the Agreement reads: "Nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights."

[22] It is relevant to note that the modalities of exhaustion represent the most delicate matter in international trade and economic politics as the different geographical extents of application cater to different economic interests. To that end, it must be highlighted that, let alone setting up a unitary multinational exhaustion modality within the context the TRIPs, even restricting the application of national exhaustion appears pretty utopian. To the contrary view, however, see: Bonadio (2011, pp. 160)

about two inferences: Firstly, it is quite conceivable that, if the general framework was not a trade agreement -or a body of multiple trade agreements-, the substantive provisions on intellectual property would not have been deemed specifically linked to trade, thus falling outside the definition of commercial aspects. Secondly, given the determinative function of the formal and general characteristics, one may be led to the conclusion that any provision that is remotely linked to international trade -if linked at all- could be brought into the scope of the CCP by merely referring in its preamble to the aim of, say, facilitating the international trade, or by being placed under a set of trade agreements. Indeed, the question often raised by scholars is whether this holistic view the Court took in *Daiichi Sankyo* -that endorses and indexes the CCP coverage to the title of the agreement and to its preamble which spells out broadly the intentions embedded in agreement- would be a means to unrestrainedly broaden the exclusive EU competence sphere (Wilińska-Zelek & Malaga 2017, 35). The latter, indeed, *prima facie* appears to be a conceivable risk especially in view of the Court's omission to make a reference to the negotiations leading to Art. 207(1) as it now stands, other than the assumptive statement that 'the drafters could not have been unaware of the similarities of the titles'. As a result, it remains unclear whether the method of deducing a link from the title of the agreement is a stance peculiar to the TRIPs, or that is a new pathway to follow in the future with respect to other agreements. Nonetheless, before affirming this to be a general risk, one may need to take into account the background to the emergence of the 'commercial aspects' notion, which is -as we pointed out above- precisely what the Court seems to have neglected making an explicit reference to. That is to say, from a teleological view point, the said concept was initially intended to bring TRIPs into the reach of the CCP in reaction to former exclusion of the same off the CCP, hence one could quite naturally expect the interpretation thereof to be accordingly. Still, however, this question thus the aforesaid risk remains intact when it potentially comes to another intellectual property agreement outside the umbrella of WTO Agreements.

Against this background, the present author takes the view, on the basis of the semantic reach of the wording chosen, that the Lisbon revision was not only intended to correspond to 'trade-related aspects' but it also aimed at somewhat exceeding the breadth of the latter with a probable view to making it clear that it *a fortiori* covers the area that the TRIPs pertains to. Reasonably by the general perception and according to their semantic range, the two terms in question, although substantially intertwined, contextually differ at certain points. Indeed, 'commerce' tends to saturate to greater scale of activities than does 'trade'. The latter normally has its scope limited to the exchange of goods and services in return for a certain consideration, usually in the form of wholesale and retail which could be carried out both domestically (internal trade) or internationally (external trade: import, export, entrepot trade). Meanwhile the commerce however, having covered those activities within the meaning of trade, also includes those activities so called auxiliaries to trade such as banking, insurance, advertising, transporting etc.[23] At the last instance, trade forms a branch of commerce, hence falls contextually narrower than the latter. This perspective also appears to be corroborative of the intention of Art. 207(1) to correspond to the entire TRIPs Agreement.

[23] To that effect, see: Gandhi (2021)

On a side note, it is necessary to acknowledge the prospect that the substantive intellectual property matters covered in the international realm usually differentiate from one another only by slim nuances, whilst largely following the similar patterns. Therefore, just like the inclusion of TRIPs itself in the WTO framework was a compromise so as to get the countries with developed economies on board, reducing the 'commercial aspects' notion to the formal structure of the agreement at hand might also easily be construed as a compromise in order to (i) provide the effectiveness of the external powers on the basis of Art. 207 TFEU; (ii) to meet (or correspond to) the actualities of the WTO as regards the integral multi-agreement structure; (iii) to acknowledge practical realities and circumstances of multilateral trade agreement negotiations. This, however, comes at the risk of practical and political 'good' being preferred over legal certainty and doctrinal profundity. Finally, it should also be recalled that the European Union (the European Community at the time) was one of the major actors who nudged the intellectual property into the WTO framework.[24] One might therefore take the outcome of *Daiichi Sankyo* ever less surprising to the extent that it aligned finely with the economic-political correctness of world trade which was partially architected by the EU itself.

4. TO DEFINE OR NOT TO DEFINE?

Leaving aside the political correctness of the Art. 207(1) on the one hand and that of the Court`s ruling in *Daiichi Sankyo*, to the extent that it corroborated to this correctness, on the other hand, those who expected a definitional interpretation of the 'commercial aspects' are bound to end up fairly disappointed. As was enfolded by the discussion above, the Court`s message, for the most part, was a mandate on what anyone should think of the TRIPs. At the meantime it avoids conveying any clear messages on how to think of it, more particularly on how to arrive at that mandate from a legal analytic perspective.

In an attempt to identify what the Court`s ruling was, nonetheless, the following observations shall be made: First of all, the Court`s analysis subsisted exclusively in the formal aspects of the agreement at hand, without addressing its substance and the effect that such substance is objectively liable to create on international trade. Secondly, even this formal survey was strictly surrounded by the boundaries of the TRIPs; therefore, nearly no imperative flowed from the judgement shed light onto the competence issue beyond the peripheries of this very agreement. Finally, corollary to these two points, it offered no objective definition (in fact, any definition for that matter) that helps unclouding this concept of the EU law. Thus, it did not advance the debate too far from TRIPs-centrism towards an autonomous concept of commercial aspects. Put differently, instead of interpreting and defining the notion of commercial aspects, the ruling contented itself - from a mere formal perspective- to iterating that the TRIPs agreement should belong to that hazy concept.

This observation should nevertheless be coupled with a rather minor reservations for the quasi-definitive lines posted in that judgement. Albeit, according to the Court, the

[24] It is important to note that, throughout the negotiations preceding the inception of the WTO Agreements, the European Community was one of the economic actors that exhibited significant willingness for the insertion of an over-encompassing IP legislation into the WTO framework. For the European Communities' proposal on extended TRIPs, see: (GATT, 1990).

relevance of the pre-Lisbon case law was negated, it is observed that there exists a continuous loyalty to the 'specific link' criterion. Accordingly, the definitional context subsists in the following steps: (i) *a European Union act falls within the common commercial policy if it relates specifically to international trade*; (ii) that is when *it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade;* (iii) *of the rules adopted by the European Union in the field of intellectual property, only those with a specific link to international trade are capable of falling within the concept of 'commercial aspects of intellectual property'* (Case C-414/11, para. 51,52). A grammatical interpretation, therefore, suggests that the elements quoted in the point (ii) must be cumulatively met. In other words, any one of the intentions of promoting or facilitating or governing international trade engenders a 'specific link' only when those provisions are susceptible to create a direct and immediate effect. This specific link, in turn, sets out the limits of commercial aspects.

Definitional profundity of this paradigm could be rebutted on many fronts. First of all, even in the express recognition of the presence of an intent to govern, promote or facilitate the international trade[25], whether the impact the TRIPs liable to crate is direct and immediate remains wide open to discussion. At any rate, an attempt to deduce these specific links, and by extension, direct and immediate effect on international trade from the formal structure of the agreement instead of a substantive survey thereof is bound to remain superficial. Secondly, it must be observed, the sub-concepts that were put forward as definitional parameters are hardly less ambiguous than the concept of 'commercial aspects' which they claim to delineate. In that, the notion of specific link as well as its constituents (i.e. the intentions of promoting, facilitating or governing international trade and direct and immediate effect) are neither defined nor do they appear somewhat confinable through an objective criterion. Finally, and crucially, neither one of these sub-concepts is specific to the post-Lisbon state of affairs. Evidently, on the face of pre-Lisbon jurisprudence, the notion of 'specific links to international trade' and the subsequent qualifiers thereof had already been a part of *acquis communautaire* prior to the inception of Art. 207(1) TFEU.[26] That is to say, while all the inputs, namely those concepts and sub-concepts as well as the TRIPs Agreement itself, remained the same, the outcome however transpired differently. The same old formula exercised on the same parameters, therefore, came to a different result in the post-Lisbon landscape. This leaves the beholder of the *Daiichi Sankyo* judgement with one explanation: The news that this judgement bore did not merely stem from a revolutionary legislative re-construction but rather from an interpretative paradigm shift towards a political and (politically concordant) teleological one. At any rate, however, such a political and teleological out-turn scarcely amounts to a legal definition. Nevertheless, as we pointed out earlier, even such a line of reasoning was not put forward. At one extreme, therefore, one might be led to conclude that these quasi-definitional criteria are rather a cold-comfort which only serves to set up a (virtual) bridge between the TRIPs and the CCP; much like the international trade politics labeled the

[25] The author, however, feels the necessity to make a reservation for the intention of 'promoting' and 'facilitating'. While the referred intentions certainly exist in the TRIPs Agreement on a preambular level, as was discussed above, neither the feasibility of the Agreement to attain these nor the underlying theoretical postulate that 'the stricter IP protection, the more liberal trade' is fully convincing.

[26] For the whole set of jurisprudence developing the specific link criterion, see: Opinion 1/94, para. 57; implicitly Opinion 2/00, para. 40; Case C-281/01, para. 40,41; Case C-347/03, para. 75 and Case C-411/06, para. 71.

TRIPs as 'trade-related' so as to mantle it into the WTO context. By and large, all we are left with in the sequel of the Court`s ruling is a mere (and fairly exact) affirmation that the TRIPs now entirely falls into the ambit CCP and exclusive competence area of the Union.

Though the present author takes the view that a query on the definition of 'commercial aspects' has its 'autonomous' merits and that this concept is an end in itself insofar as it may trigger further discussions on the interplay between international trade and intellectual property rights, even to such an extent that touches upon the philosophical premises of intellectual property, the practical reverberations of its (lacking) definition should, nevertheless, not be overlooked. The Court`s utmost TRIPs-centrism and the lack of any substantive definition effectively curtailed any projection as to the fate of other international regulation on intellectual property. Therefore, in the sequel of *Daiichi Sankyo,* how (and if) the notion of commercial aspects would play out outside the TRIPs remained to be a continuous uncertainty. Imaginably, therefore, many questions were left unanswered.

While it is true that the argument of "being a part of a trade agreement" could potentially find a room for application beyond the TRIPs, this postulate was immediately confronted by the fact that the latter observation was made in specific respect to WTO system. Correspondingly, this raises the question whether this outcome would be the same if the agreement in question was one that is not as 'systematic' or broadscale as the WTO system is. Frankly, it could be argued that the global extent of the agreement is in direct proportion to its 'direct and immediate effect' on international trade and, to that end, some agreements -such as bilateral trade agreements- might possibly be regarded as less 'specifically linked' to international trade than the others. In that prospect, the competence allocation would seem nothing but incidental. The second potential implication appears equally grave: Whatever intellectual property provision the international economic politics manage to squeeze into a trade agreement, unquestionably, qualifies as commercial aspect of intellectual property. If such is the case, it goes without saying, this could categorically diminish any non-commercial aspect of intellectual property and, by extension, any involvement of the Member States on the axis of competence allocation. This simultaneously triggers the question of compatibility with Art. 207(6) TFEU which, in essence, prohibits an illicit harmonization of laws through the exercise of external competences.[27] While this concern was brought to the forefront in the Court`s Opinion 1/94, and had largely shaped its outcome, quite interestingly, the same neither factored in nor was discussed in the *Daiichi* Sankyo. The question of compatibility with Art. 207(6) is equally relevant for when (and if) the slightest foreign element, i.e. the involvement of a non-member country, to the agreement at hand is taken to trigger the CCP competence. The latter would equally create an illicit inroad to harmonization of laws insofar as, in such cases, there would be greater regulatory impact on the Internal Market than that created on the international level.

On the other hand, one could not help wonder if the same TRIPs was concluded not in the WTO context but, instead, within the proximities of another forum that is not

[27] In that, Art. 207(6) TFEU reads: "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 harmoni[z]ation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmoni[z]ation"

necessarily a 'trade system', would the very same agreement then appear to relate to non-commercial aspects of intellectual property? Moreover, with a reverse speculation, it is all the more likely that some inherently non-commercial aspects of intellectual property, such as the moral rights of authors, could just as well be categorically regarded to fall into commercial aspects if these were included in the TRIPs.

To sum up and put very simplistically, though the Court mandated what to think of the TRIPs, the question persist as regards what one has to think of the other intellectual property arrangements that (i) are not a part of the WTO framework or any trade agreement; (ii) do not carry a strikingly similar name to the wording of Art. 207(1) or (iii) do not refer, on a preambular level, to the aim reducing the distortions to international trade, regardless whether or not they are capable of doing so. Above all, it remains unanswered if one should expect, at all, an objective definition to be accorded to that notion, at any point.

5. BITS AND CRUMBS TO NOURISH THE DEFINITION

Having taken the ruling in *Daiichi Sankyo* as the (incommensurate) centerpiece of the competence allocation in the intellectual property realm in the post-Lisbon era, some effort could be put to derive bits and pieces from the Court`s subsequent jurisprudence in order to patch up some of the definitional shortcomings.

5.1. International Gravity: C-137/12: Commission v. Council (Conditional Access)

As shall be recalled, one of the Court`s opening lines in *Daiichi Sankyo* was confined to recapping the area of operation of the CCP. Accordingly, that policy relates to trade with non-member countries, not to trade in the Internal Market (Case C-414/11, para. 58). With that, however, the degree of foreign element (i.e. the involvement of non-member countries) required to trigger the CCP competences tends to have imperative reverberations. Whilst it could generally be reasoned that the lesser foreign element required the greater the risk of illicit harmonization,[28] on a near occasion to *Daiichi Sankyo* the question of correct legal basis was brought under scrutiny.

At the center of the dispute was the proper legal basis for conclusion of the Conditional Access Convention[29] on behalf of the Union. On the one camp of arguments rests, the Council and the Member States which contended that the proper legal basis must be Art. 114 TFEU to the effect that the Convention in question is, in a way, adjunct to the Directive 98/84[30] with which it presented extreme similarities. In that, the former was designed to extinguish the risk of non-member countries serving as a base for exporting illicit devices, or supplying services relating to those devices, to the European Union, which, in turn,

[28] In interpreting the term of "illicit", it must be remembered that the legal bases for harmonization of laws in the Internal Market (namely, Art. 114 TFEU) and that for concluding international agreements binging upon and liable to alter the law of the Member States (namely, Art. 207 TFEU) greatly vary. Therefore, while the proper legal basis for harmonization is Art. 114 of TFEU, such an effect could be created through the exercise of the CCP competences. However, in the latter case, if such an effect is created with a view to harmonize the laws in the Internal Market, this might amount to excess of EU power, hence an illicit harmonization.

[29] European Convention on the legal protection of services based on, or consisting of, conditional access (OJ 2011 L 336, p.2)

[30] Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access

would undermine the functioning of the Internal Market and the effectiveness of the protection established in that market by that Directive (Case C-137/12, para. 46). Therefore, the Convention, according to them, targeted the Internal Market rather than international trade. Having cited Art. 114 TFEU as the legal basis, the Council`s decision on the signing of the Convention had transpired accordingly.[31]

The Commission and the Parliament, on the other hand, maintained that the correct legal basis must be Art. 207(4) TFEU to the effect that the primary aim of the Convention was to ensure adequate protection of the conditional access services on the markets of those contracting parties which do not belong to the European Union (Case C-137/12, para. 37). Therefore, albeit some measures thereunder such as the ban on exporting illicit devices and services to the EU, caters to protection of the Internal Market and service providers established therein, the actual aim of the contracting parties could not be confined to improving the functioning of the Internal Market but, instead, it relates to promoting and facilitating trade between those parties (Case C-137/12, para. 39,40). The Commission also illustrated, in its view, a direct and immediate effect to international trade by suggesting that the Convention, by drying off electronic piracy, contributes, directly and immediately, to facilitating and promoting the supply of protected services between the European Union and other European countries (Case C-137/12, para. 43).

In parallel to the Commission`s position, the Court concluded that the Convention is intended to introduce similar protection to that of Directive 98/84 in European non-member countries -hence beyond the territory of the Union-, in order to promote the supply of such services to those States by EU service providers (Case C-137/12, para. 64). Importantly, the Court skillfully deduced an argument in favor of the CCP competence from the existing state of harmonization in the Internal Market. Accordingly, the approximation of the legislation of Member States in the area that the Convention covered had already been largely achieved by Directive 98/84; this sufficiently confirmed that the aforesaid objective and proved that the main target cannot possibly be the Internal Market. Its focus, thus, being on the non-member countries rather than the Internal Market, the Court maintained that it has a specific connection with international trade in those services, for which reason it can legitimately be linked to the CCP (Case C-137/12, para. 65). Moreover, it added that the ban on the export of illicit devices to the Union took in hand the European Union's global interests and falls, by its very nature, within the scope of the CCP (Case C-137/12, para. 69). In the light of the foregoing, the Court concluded that the proper legal basis shall be Art. 207(4) TFEU.

Albeit the ruling in *Conditional Access* did not particularly center around the commercial aspects of intellectual property, on the axis of the CCP several implications may nevertheless be deduced. Having applied what is doctrinally called "centre of gravity test", the Court observed the primary aim of the Convention to be related to international trade.[32] This follows that, should such aim be detected, the extent of foreign element (i.e.

[31] Council Decision 2011/853/EU of 29 November 2011 on the signing, on behalf of the Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access (OJ 2011 L 336, p. 1)

[32] To the same effect AG Kokott concludes in her Opinion that "The focus is thus less on establishing uniform rules in the European internal market than on attempting 'to export' the Union's internal acquis to third countries. In other words, the signing of the Convention does not appear to be a measure of 'internal harmonisation' within

the involvement of non-Member countries) is of little relevance.[33] By the same token, it is to be concluded that less encompassing foreign element than that the TRIPs accommodates would suffice to trigger the CCP competence. However, on the background of this prospect, there exists the fact that the Convention has its predating counterpart in the secondary Union law. This conveys massages both to the favor and against the ruling in *Daiichi Sankyo*. In that, while the foreign element present in the TRIPs Agreement is amply large, thus it *a fortiori* relates to international trade, the issue of excess of Union power cannot be excluded.

Area to which the Convention saturates, as was indicated by the Court, had already been regulated, in quite an identical manner, in the Union law. Correspondingly and naturally, the risk of indirect harmonization was swept clear at the outset. Moreover, in the presence of the similar internal EU legislation, it is presumable that the EU would have retained implicit exclusive power even if it was not for Art. 207 TFEU. On the flip side of the same coin, however, a comparison to the TRIPs would appear ill-adapted insofar as the latter extends to cover areas, such as patent law, that was not substantially regulated by the Union law back then. That means, while the Conditional Access Convention was not liable to affect the existing law in the Internal Market (at least to an appreciable extent), the same was not necessarily true of the TRIPs. It is, thus, to be concluded that the question of indirect harmonization continues to be relevant in the sequel of *Conditional Access* case.

5.2. Opinion 2/15: Singapore FTA

In the context of conclusion of European-Singapore Free Trade Agreement,[34] the concept of commercial aspects has been brought under the spotlight. Since the Chapter 11 of the Agreement was consisted of intellectual property provisions, the competence allocation was to be pinned down on the basis of Art. 207(1) TFEU. Though, in the last instance, the Court`s conclusion on the competence allocation followed a similar pattern to that reached in *Daiichi Sankyo*, some niceties need to be highlighted.

Of great importance, the analysis of AG Sharpston opining on the case accommodates well-founded observations. Having expressed her discontent with the Court`s reasoning in *Daiichi Sankyo* and admitting that the inclusion of provisions on intellectual property in a particular trade agreement might indicate a specific link to international trade, the AG maintains that the CCP might also cover intellectual property provisions or agreements negotiated and concluded in a non-trade context (Opinion 2/15, AG's Opinion, para. 431). While this line of argument might *prima facie* suggests an even broader reading of Art. 207(1) than that appeared in *Daichii Sankyo*,[35] the AG implies that the contrary is also true. Accordingly, if the mere inclusion of a matter in such an agreement were taken to suffice bringing it within the CCP, the Member States would be at serious risk of losing existing competences (Opinion 2/15, AG's Opinion, para. 433). Against that backdrop, what the AG suggest is a substantive analysis of the specific link to trade instead of deducing it from the formal structure of the agreement at issue. Moreover, with a (negative) reference to the

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the Union, but rather a contribution to 'external harmonisation' in relation to third countries." (Case C-137/12, AG's Opinion, para. 49).

[33] With the express proviso that such element exists.

[34] Free trade Agreement between the European Union and the Republic of Singapore (OJ L 294, 14.11.2019, p. 3–755)

[35] To the same effect see, Lenk (2017, pp. 365).

ruling in *Daiichi Sankyo,* she takes the view that such a link cannot be inferred from the type of remedy for which dispute settlement rules provide (Opinion 2/15, AG's Opinion, para. 434). This substantive link, instead, should be established *"where their exercise is essential to the commercial exploitation of the protected intellectual property in a cross-border market, such rights fall within the 'commercial aspects of intellectual property*." (Opinion 2/15, AG's Opinion, para. 436). On that note, while observing that there is virtually no reason not to reach the conclusion that provisions regarding the minimum level of protection (as well as other procedural provisions, enforcement measures and general principles) presents specific link to trade (Opinion 2/15, AG's Opinion, para. 431),[36] she sliced the provisions on moral rights out from this general conclusion. Through a substantive survey of the agreement and with and in the view of theoretical background of moral rights, she suggested that the latter cannot be concluded on the basis of Art. 207(1) alone insofar as these do not appear even ancillary to the general trade-related theme. The contrary, according to the AG, would amount to cancelling out the qualifier of "commercial aspects", thus rendering a holistic EU competence in the intellectual property field (Opinion 2/15, AG's Opinion, para. 437). Consequently, she proposed that the Chapter 11 of the Agreement must subject to joint competence insofar as they apply to non-commercial aspects (Opinion 2/15, AG's Opinion, para. 456).

The Court, on its part, exhibited a relative methodological refinement in comparison to *Daiichi Sankyo* ruling. In that, it engaged in a relatively particularistic approach such as to review individual provisions of the Agreement, without however affecting the holistic conclusion on the CCP competence. Thereupon, having subsumed all the intellectual property provisions under the aim of "facilitating the production and commercialization of innovative and creative products and services between the Parties and increasing the benefits from trade and investment", the Court established that the Agreement clearly caters to liberalization of trade between the EU and the Republic of Singapore rather than harmonization of the Member States` laws (Opinion 2/15, para. 125,126). As for the moral rights, according to the Court, the referential inclusion of the international conventions regulating the latter subject was not sufficient for determining the general character of the Agreement and the competence allocation for that purpose insofar as agreement itself did not speak off (or included as its component) moral rights (Opinion 2/15, para. 129). On that note, the Court reached the conclusion that Chapter 11 of the Agreement fully fell into the CCP competence realm.

Apparent from the Court`s analysis, the jurisprudence in Opinion 2/15 hardly contributed into an objective definitional apprehension of the concept of commercial aspects. Much like the *Daiichi Sankyo* judgement, it exhibited loyalty to specific link criterion and the sub-qualifiers thereof. It is, on the other hand, elating that, through an individual assessment of the provisions, the Court vouchsafed to establish the link between aforesaid aim (hence specific link to trade) and the contents of the Agreement. At this very point, one is immediately led to wondering why the same method was not followed in the *Daiichi Sankyo* ruling, as doing so could pleasantly milden the problematic intensity of that ruling. In consequence, on the other hand, provision relating to moral rights could not

[36] In that the AG adheres to the view that "minimum standards of protection for the economic interests embedded in intellectual property to promote investment, reduce trade barriers, facilitate international trade and guarantee some equality of competitive conditions.", thus concludes the relevance to the CCP.

escape the 'commercial' attribution. While the Court`s justification for such a result was based on the fact that the addressing of moral rights was only referential, therefore not an immanent component of the agreement, this leaves the following questions open: Would the outcome on the competence allocation appear differently if that matter was addressed in the Agreement directly or would that still be regarded to present a specific link to trade by reason of the fact that the Agreement at issue is a trade agreement? What should also be taken the notice of is that the referential inclusion of the international conventions is not liable to affect the law of the Member States since the latter are already parties to that convention; this might have comforted the Court in concluding for the CCP competence. Follow up question therefore presents itself whether the outcome transpire differently if the Agreement introduced a new provision regarding moral rights, hence rendering a harmonizing effect. At any rate however, this outcome strengthens the thesis that, as far as a trade agreement is at the stake, there exists an irrebuttable presumption of specific link to international trade, notwithstanding individual provision might be inherently non-commercial. By the same token, the clearest message in the Court`s ruling might be that the concept of 'commercial aspects' just as straightforwardly comes into play outside the WTO framework and the TRIPs Agreement. It is also noted that the judgement has set the threshold of foreign element that suffices to bring an agreement into the CCP sphere at the lowest. In that, the involvement of any non-Member country -which is typical to FTAs- is regarded to suffice rendering 'direct and immediate effect' to international trade, thus triggering the CCP competence.

5.3. Opinion 3/15: Marrakesh Treaty

The Marrakesh Treaty,[37] concluded within the ambit of the World Intellectual Property Organization (WIPO), sets out mandatory limitations and exceptions to copyright for the benefit those who are blind, visually impaired, and otherwise print disabled. Under Art. 4(1), 5(1) and 6 of the Treaty, contracting parties assume the obligation to (i) provide, in their national laws, for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public within the meaning of WIPO Copyright Treaty (WCT); (ii) enable the distribution or making available of that accessible format copy by an authorized entity to a beneficiary person or an authorized entity in another contracting party; (iii) permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the right holder. Against this background and upon the ambivalence persisted between the Commission and the Council backed up by the Member States, the Court was called on to identify the proper legal basis for the conclusion of the Treaty.

In the Commission`s view, the Treaty must be regarded to fall within the exclusive competence zone of the Union, primarily through the CCP or, alternatively, on the basis of implied exclusive competence. The first plea was constructed upon the Treaty provision which relates to cross-border exchange of accessible format copies with non-Member countries; having so argued, the Commission took the view that specific link to

[37] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities in Marrakesh, on June 27, 2013

international trade was present. The second plea, on the other hand, particularly relied on the *InfoSoc* Directive[38] which provides in its Art. 5(3)(b) that Member States may provide for exceptions and limitations for uses to the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability (InfoSoc Dir., Art. 5(3)). Thereupon the Commission purported that the proximity of the Treaty is, to a large extent, readily covered by the Union law, therefore, there exists implicit exclusive power within the Meaning of Art. 3(2) TFEU.

The Court, on its part, having reiterated the specific link criterion, set about finding such links in the teleological background and the substance of the Treaty (Opinion 3/15, para. 62). Looking simultaneously into the preamble and Art. 4, 5 and 6 of the Treaty, it observed that the underlying purpose caters to the interest of designated beneficiaries by facilitating, through various means, their access to published works; it is not to promote, facilitate or govern international trade in accessible format copies (Opinion 3/15, para. 82). To that end, the Court found, the Treaty cannot be held to have a specific link to international trade. To counter the Commission`s assertion of specific link on the basis of cross-border exchange of accessible format copies, the Court underlined that such exchange stood as an instrument of achieving the non-commercial objectives of the Treaty rather than being an independent aim thereof (Opinion 3/15, para. 90). Moreover, it maintained that these acts of exchange cannot be equated to international trade for commercial purposes. The latter was evidenced, in the context of the Treaty, as all exchanges of accessible format copies would transpire between authorized entities, without involvement of ordinary commercial operators and as there existed mechanisms to ensure that only beneficiary persons will obtain accessible format copies exchanged in pursuant to that Treaty (Opinion 3/15, para. 92-97). In the light of foregoing, the Court concluded that Art. 207(1) TFEU alone shall not be the appropriate legal basis for the conclusion of the Treaty.

What appears to be a positive development on the face of the Court`s ruling is its express admission to the necessity of a contextual analysis alongside the teleological interpretation in finding the specific link to international trade. This could, in turn, translate into a jurisprudential willingness to accord a substantive definition to the notion of commercial aspects of intellectual property; at very least it could render the content analysis as a criterion in detecting the specific link, which was clearly lacking in the *Daiichi Sankyo* ruling. This optimistic landscape, however, is bound to be overshadowed by two facts: In the present case there existed no trade agreement from which a specific link to trade could *a priori* deduced. On that note, the present author sees benefit in putting an emphasis on the (suggestive) question whether the Court 'opted for' engaging in a contextual analysis of the Treaty or, in the absence of a trade agreement surrounding those intellectual property provisions, it rather 'had no option but' to delve into the substance. Secondly, and by the same token, there appears no imperative in the Court`s jurisprudence that sets out the context analysis as a universal methodology such as to apply to intellectual property provisions contained in trade agreements. On that account, it is questionable whether the conclusion would be the same if the same substance was embodied in a trade agreement, be that one like the TRIPs or an FTA, and whether in the latter case the Court

[38] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22/06/2001 P. 0010 - 0019)

would engage in a substance analysis by going beyond a mere survey of the purpose of that trade agreement. The chances are, the answer would likely be negative insofar as the same question was, virtually, answered in negative in *Opinion 2/15* in respect to moral rights which are equally (if not more) non-commercial by nature.

Albeit the CCP competition was excluded, of extreme importance is the fact that the Court went on to arrive at exclusive EU competence on the basis of Art. 3(2) TFEU on the implied exclusive powers of the Union. Having regarded the Treaty`s relative counterpart in the Union law, namely Art. 5(3) of the *InfoSoc* Directive, the Court concluded that the Treaty falls in an area that is already covered, to a large extent, by the common EU rules (Opinion 3/15, para. 129). It could possibly be speculated that, in addition to the inherent non-commercial complexion of the Treaty, the -rather apparent- existence of an alternative ground for the EU exclusivity (i.e. implied exclusive competence) might be one of the reasons that encouraged the Court delve into a context analysis. Therefore, leaving aside the coming into light at least one non-commercial aspect of intellectual property on that occasion, the fact is not excluded that either by the CCP competence or through implicit one, the gravity of the Union monopoly in the intellectual property tends to increase.[39]

6. CONCLUSIONS

As anyone may reckon, the road to the inclusion of intellectual property in the CCP has been rough and knotty. While it would be fairly controversial to suggest that this adaptation is getting easier from a doctrinal perspective, the sight of the destination -that is an over-encompassing EU competence- is, however, seemingly becoming clearer.

As much as the outcome of *Daiichi Sankyo* appears politically and teleologically coherent in the view of the historical sequence of events, there are very few sturdy anchors that could set this outcome on a palatable legal doctrinal ground. Not only has the pure formal and result-oriented analysis the Court employed seems to have fallen short of providing a dependable legal reasoning, but it also curtailed the possibility of deducing an intelligible definition of "commercial aspects" both for the purposes of TRIPs itself and for that of European legal order. Whilst the ruling, by way of reiteration of the settled jurisprudence, tangentially put forward some quasi-definitive criteria, the manner the Court attempted to illustrate the presence of those criteria appears far from convincing. In that, as was demonstrated above, each line of reasoning brought up by the Court remains somewhat rebuttable. Though the significance of the Lisbon amendment in putting the commercial aspects of intellectual property straightforwardly into the CCP is not to be undermined, it is quite interesting to note that the notion of 'specific links to international trade' and the subsequent qualifiers thereof had already been a part of *acquis communautaire* before Art. 207(1) TFEU. Therefore, the same old formula exercised on the same parameters, came to a different result in the post-Lisbon landscape. It is therefore to be concluded that, as conclusive as the ruling in *Daiichi Sankyo* was in the particulars of the TRIPs, it did not deliver much of new as regards the notion of commercial aspects; but all the mixed feelings in definitional terms and on the fate of other agreements that consist of or happen to include intellectual property provisions.

[39] To the same effect, see: Acquah, (2017, pp. 550)

The further jurisprudence on this matter that emerged post-*Daiichi Sankyo* could be apprehended on two opposite fronts. On the one hand, it bears some answers to the questions that were previously left open. It is now clear that the notion of commercial aspects reserves a room for application beyond the TRIPs Agreement; this *almost literal correspondence* does not necessarily entrap that notion within the borderlines of the TRIPs. As was revealed by the Court`s *Opinion 2/15*, not only multinational arrangements on intellectual property but also those contained in the EU`s FTAs are capable of falling in the commercial aspects of intellectual property. By the same token it is concluded that less encompassing foreign element than that the TRIPs accommodates would suffice to create 'direct and immediate effect' and to trigger the CCP competence. Finally, it is observed that outside the proximities of the TRIPs -which has been the centerpiece of the intellectual property-CCP interface-, the Court exhibited a certain tendency to look into the substance of the intellectual property provisions. It, however, remains questionable whether this was a precursor to a methodological track change for the better or purely ornamental to the reasoning.

Besides these highlights, post-*Daiichi* jurisprudence is of very little help in terms of attaining an objective definition. Far from progressively gifting the European legal order an autonomous -and definable- notion of 'commercial aspects of intellectual property', the Court seems to continue putting the label of 'commercial' or -rarely- that of 'non-commercial' to the international agreements at hand. In doing so it continues utilizing the concepts of 'specific link to international trade' and 'direct and immediate effect' which are scarcely more discernable than the notion of 'commercial aspects' itself, especially when the regards paid to the imprecise manner in which the Court keenly deduces such links.

Having let it as it may be, and at the expense of overstepping the Court`s way of dealing with the issue (that is to get the justification aligned with the -known/planned- outcome, not vice-versa), in an attempt to define the commercial aspects, we can conclude the following: It appears that, in the presence of a formal link to an trade agreement (or an umbrella agreement that is related to international trade) virtually any intellectual property provision will sufficiently qualify as commercial aspects. The very presence of an external trade framework, in itself, shall therefore be taken to serve for the aim of promoting and facilitating the international trade; furthermore, preambular statements of the agreement are generously credited in finding the latter aims. This resembles a presumption on the end of the Court and that, seemingly, is irrebuttable by any substantive counter-argument. Moreover, should such formal links or preambular iteration of such aims lack, there is enough reason to conclude that the Court is likely to deduce such "commercial aspects" from the substance of the international agreement at issue. The Court sees a benefit in holding onto this flexible tool in congruence with the tendency of expanding the proximity of the CCP not necessarily only in the particular field of intellectual property but rather holistically, despite the AG`s call for defining the notion of "commercial aspects" as an autonomous concept within the European legal order (Case C-414/11, AG's Opinion, para. 80). This could be taken as another way of uttering that the commercial character and potential intrinsic in intellectual properties and the rights attributed to them suffices for commercial aspects. This whole paradigm renders a narrow category of 'non-commercial aspects' and this that encompasses the intellectual property matter that is specifically excluded from commercial exploitation. In the light of the Court`s Opinion 3/15, the

Marrakesh Treaty stands to be the sole representative of that narrow category. With that, nevertheless, it would have been no difficult task for the Court bring the Marrakesh Treaty into the scope of the CCP with the help of a little extra emphasis on any distant trade-related implications. In doing so, it could easily detect a specific link to international trade, this time in an exclusionary sense: that is the prohibition of the use of such material for commercial purposes. Moreover, it seems to be of very little doubt that the latter agreement, if concluded in the WTO context or any other trade agreement for that matter, would have already been categorically regarded to have specific links to trade.

All taken into account, a down-to-earth reading of the historical sequence seem to suggest that this notion was hardly intended as a confinable legal concept and, quite to the contrary, it was designed as a flexible (and somewhat pragmatical) tool that will be aligned with the circumstances of the occasion and the spirit of time, albeit at the cost of legal certainty and doctrinal coherence. From a relatively optimistic stand point, one might also be led to believe, the notion of commercial aspects is a still-ripening phenomena in the autonomous European legal order. Such a hypothesis tends to find support (even if not from the post-Daiichi jurisprudence itself) from the opinions delivered in the latter contexts by Advocate Generals. Particularly valuable is the confinable formula proposed by the AG Sharpston who maintained that "*where their exercise is essential to the commercial exploitation of the protected intellectual property in a cross-border market, such rights fall within the 'commercial aspects of intellectual property*". Since, on the other hand, this conceptualization saturates to a substantive analytic apprehension of provisions, it cannot justify (or explain in retrospect) the solidly holistic and formalistic approach taken by the Court in *Daiichi Sankyo,* which by no means delved into a substantive analysis as such. The Court`s linear resistance to adopting the better formulation, such as the one quoted above, likewise overshadows this optimism.

Whichever standpoint one might choose to take in glancing at the notion of commercial aspects, the development hitherto encourages to lower the standards of expectations for an autonomous legal concept. It appears that it is not the Court`s endeavor to make this concept more trenchant than how it now stands but it is rather for those who seek out a definitional precision, much like the present author, to settle for the less.

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